

# 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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## Education Department

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

#### Interpretation and Translation Services for Limited English Proficient (LEP) Individuals by Mail Order Pharmacies

I.D. No. EDU-11-14-00002-P

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

**Proposed Action:** Amendment of section 63.11 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 6810(1) and 6829(4); L. 2012, ch. 57, part V

**Subject:** Interpretation and translation services for Limited English Proficient (LEP) individuals by mail order pharmacies.

**Purpose:** To implement section 6829(4) of the Education Law, as added by Part V of chapter 57 of the Laws of 2012.

**Text of proposed rule:** 1. Paragraph (7) of subdivision (a) of section 63.11 of the Regulations of the Commissioner of Education is added, effective March 30, 2014, to read as follows:

(7) *Mail order pharmacy shall mean a pharmacy that dispenses most of its prescriptions through the United States postal service or other delivery system.*

2. Subdivision (b) of section 63.11 of the Regulations of the Commissioner of Education is amended, effective March 30, 2014, as follows:

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

(1) For purposes of counseling an individual about his or her prescription medications or when soliciting information necessary to maintain a patient medication profile, each covered pharmacy *and mail order pharmacy* shall provide free, competent oral interpretation services and transla-

tion services in such individual's preferred pharmacy primary language to each LEP individual requesting such services or when filling a prescription that indicates that the individual is limited English proficient at such covered pharmacy *or mail order pharmacy*, unless the LEP individual is offered and refuses such services.

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

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

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

3. Paragraph (1) of subdivision (c) of section 63.11 of the Regulations of the Commissioner of Education is amended, effective March 30, 2014, as follows:

(1) In accordance with Education Law section 6829(3), each covered pharmacy shall conspicuously post a notice to inform LEP individuals of their rights to free, competent oral interpretation services and translation services. Such notice shall include the following statement in English and in each of the pharmacy primary languages: "Point to your language. Language assistance will be provided at no cost to you." *With each initial transaction with patients seeking mail order services, mail order pharmacies shall provide printed materials in English and in each of the pharmacy primary languages, explaining the availability of competent oral interpretation services and translation services. In addition, mail order pharmacies that are nonresident establishments shall provide any required information pursuant to section 63.8(b)(6) of this Part in English and in each of the pharmacy primary languages.*

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

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

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

Subdivision (1) of section 6810 of the Education Law, as amended by section 2 of Part V of Chapter 57 of the Laws of 2012, provides that all prescription drug labels shall conform to rules and regulations as promulgated by the Commissioner pursuant to section 6829 of the Education Law.

Subdivision (4) of section 6829 of the Education Law, as added by section 3 of Part V of Chapter 57 of the Laws of 2012, requires the Commissioner, in consultation with the Commissioner of the Department of Health (DOH), to promulgate regulations, effective March 30, 2014, requiring all mail order pharmacies conducting business in New York State to provide free, competent oral interpretation services and translation services to persons filling a prescription through such mail order pharmacies who are identified as Limited English Proficient (LEP) individuals. Specifically, Education Law § 6829(4) requires the regulations to address the concerns of affected stakeholders and reflect the findings of a thorough analysis of issues including: (a) how persons shall be identified as LEP individuals, in light of the manner by which prescriptions are currently received by mail order pharmacies; (b) which languages shall be considered; (c) the manner and circumstances in which competent oral interpretation services and translation services shall be provided; (d) the information for which competent oral interpretation services and translation services shall be provided; (e) anticipated utilization, available resources, and cost considerations; and (f) standards for monitoring compliance with the regulations and ensuring the delivery of quality competent oral interpretation services and translation services.

## 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes, particularly section 3 of the Part V of Chapter 57 of the Laws of 2012 that amended Article 137 of the Education Law by adding a new section 6829, which, inter alia, requires mail order pharmacies sending prescriptions to individuals in New York State to provide interpretation and translation services to LEP individuals. The proposed amendment subjects mail order pharmacies to the same interpretation and translation requirements that have been required for covered pharmacies within New York State since 2013. Specifically, the proposed amendment requires that with each initial transaction with patients seeking mail order pharmacy services, in addition to English, mail order pharmacies provide printed materials in Chinese, Italian, Russian and Spanish, explaining the availability of competent oral interpretation services and translation services. Persons will be identified as LEP individuals when they request such oral interpretation services and translation services or when such mail order pharmacy fills a prescription that indicates that the individual is a LEP individual. The manner and circumstances in which competent oral interpretation services and translation services will be provided is by a staff member of the mail order pharmacy or third-party contractor and services will be provided on an immediate basis but need not be provided in-person or face-to-face. The information for which competent oral interpretation and translation services shall be provided will be prescription medication labels, warning labels and other written materials. With respect to anticipated utilization, available resources, and cost considerations, based upon experience with the existing requirements for translation services in the New York City metropolitan area, the proposed requirements should prove to be neither costly nor logistically difficult for mail order pharmacies. Additionally, regarding standards for monitoring compliance with the regulations and ensuring the delivery of quality competent oral interpretation services and translation services, as in all such matters, complaints of non-compliance will be investigated and since out-of-state pharmacies require registration with the Department, they are also subject to the Department's professional discipline processes.

## 3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to ensure that, similar to covered pharmacies, mail order pharmacies that conduct business in New York State provide LEP individuals with specified translation and interpretation services. The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Section 3 of Part V of Chapter 57 of the Laws of 2012.

As required by statute, the proposed rule is also needed to establish the requirements for the provision of interpretation and translation services by mail order pharmacies that send prescriptions to the LEP individuals within New York State.

## 4. COSTS:

(a) Costs to State government. The proposed rule implements statutory requirements and establishes standards as directed by statute, and will not impose any additional costs on State government beyond those imposed by the statutory requirements.

(b) Costs to local government. There are no additional costs to local governments.

(c) Cost to private regulated parties. The proposed rule does not impose any additional costs on regulated parties beyond those imposed by statute.

(d) Cost to the regulatory agency. The proposed rule does not impose any additional costs on the Department beyond those imposed by statute.

## 5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of section 6829(4) of the Education Law, as added by Section 3 of Part V of Chapter 57 of the Laws of 2012. It does not impose any program, service, duty, or responsibility upon local governments.

## 6. PAPERWORK:

The proposed rule imposes no new reporting requirements.

## 7. DUPLICATION:

The proposed amendment is necessary to implement Section 3 of Part V of Chapter 57 of the Laws of 2012. There are no other State or Federal requirements on the subject matter of this amendment. Therefore, the proposed amendment does not duplicate other existing State or Federal requirements.

## 8. ALTERNATIVES:

The 2012 New York State budget legislation included certain amendments to the Education Law which are commonly referred to as the SafeRx Law (L. 2012, c. 57, Part V). This law, which generally became effective March 30, 2013, includes provisions to assist LEP individuals who need interpretation and translation services when filling prescriptions at covered pharmacies. Effective May 30, 2013, the Board of Regents approved regulations affecting those covered pharmacies located within New York State. Following a series of open forums and consultations with stakeholders, the Regents accepted the recommendation that the entire State be considered a single "region." In accordance with the statutory requirements and the analysis of census data, this determination resulted in a requirement that interpretation and translation services be provided in four languages, in addition to English. Other regional determinations were rejected since most led to fewer languages being covered in almost all upstate localities. Therefore, covered New York State pharmacies must now provide competent oral interpretation services and translation services in Chinese, Italian, Russian and Spanish.

The 2012 legislation also required the Commissioner of Education, in consultation with the Commissioner of DOH, to promulgate regulations, effective March 30, 2014, to establish translation and interpretation requirements for mail order pharmacies. The proposed amendment is needed to conform the Regulations of the Commissioner of Education to Section 3 of Part V of Chapter 57 of the Laws of 2012.

Consideration was given to information gathered as part of the aforementioned open forums and consultations with stakeholders, as well as experience with the existing interpretation and translation services requirements for covered pharmacies, and ultimately it was decided, consistent with the above rationale for covered pharmacies, that mail order pharmacies shall be subject to the same interpretation and translation requirements that have been required for covered pharmacies within New York State since 2013. Within this context, there were no significant alternatives to the proposed amendment and none were considered.

## 9. FEDERAL STANDARDS:

Since, there are no applicable federal standards for the provision of interpretation and translation services to LEP individuals by mail order pharmacies, the proposed amendment does not exceed any minimum federal standards for the same or similar subject areas.

## 10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Section 3 of Part V of Chapter 57 of the Laws of 2012. Mail order pharmacies conducting business in New York State must comply with the interpretation and translation services requirements for LEP individuals on the effective date of the authorizing statute, March 30, 2014. It is anticipated that licensees will be able to comply with the proposed rule by the effective date so that no additional period of time will be necessary to enable regulated parties to comply.

## *Regulatory Flexibility Analysis*

The purpose of the proposed amendment is to implement the provisions of section 6829(4) of the Education Law, as added by Section 3 of Part V of Chapter 57 of the Laws of 2012 that, effective March 30, 2014, require all mail order pharmacies sending prescriptions to individuals in New York State to provide interpretation and translation services for Limited English Proficient ("LEP") individuals. The proposed amendment also subjects mail order pharmacies to the same interpretation and translation services requirements as are now required for covered pharmacies within the State. Specifically, pursuant to the proposed amendment, with each initial transaction with individuals seeking mail order pharmacy services, in addition to English, mail order pharmacies will provide printed materials, in Chinese, Italian, Russian and Spanish, explaining the availability of competent oral interpretation services and translation services. Persons will be identified as LEP individuals when they request such oral interpretation services and translation services or when such mail order pharmacy fills a prescription that indicates that the individual is a LEP individual. The manner and circumstances in which competent oral interpretation services and translation services will be provided is by a staff member of the mail order pharmacy or third-party contractor and services will be provided on an immediate basis but need not be provided in-person or face-to-face. The information for which competent oral interpretation services and translation services shall be provided will be prescription medication labels, warning labels and other written materials.

The proposed amendment applies the same translation and interpreta-

tion requirements to mail order pharmacies that were established for covered pharmacies in 2013 and does not impose any additional costs on regulated parties beyond those required under the statute. Additionally, based upon experience with the existing requirements for translation services in the New York City metropolitan area, the proposed amendment should prove to be neither costly nor logistically difficult for mail order pharmacies.

The proposed amendment will affect all mail order pharmacies registered by the State Education Department (Department). The Department estimates that there are 5,044 registered pharmacies in New York State and 535 non-resident pharmacies are also registered to ship prescriptions into New York State. The Department estimates that fewer than 50 of these registered pharmacies are considered to be mail order pharmacies under the statutory definition and, of these pharmacies, none are small businesses. The proposed rule establishes translation and interpretation requirements for mail order pharmacies. It will not impose any new reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will not adversely affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

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

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

The proposed amendment will apply to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Of the 5,044 pharmacies registered by the State Education Department ("Department") and the 535 non-resident registered pharmacies, the Department estimates that fewer than 50 of these registered pharmacies are considered to be mail order pharmacies under the statutory definition. Of these mail order pharmacies, one mail order pharmacy reports its permanent address of record is in a rural county.

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

The proposed amendment will apply to all mail order pharmacies conducting business in New York State. The proposed amendment implements the provisions of section 6829(4) of the Education Law, as added by Section 3 of Part V of Chapter 57 of the Laws of 2012 that, effective March 30, 2014, requires all mail order pharmacies sending prescriptions to individuals in New York State to provide interpretation and translation services for Limited English Proficient (LEP) individuals. It also subjects mail order pharmacies to the same interpretation and translation services requirements as are now required for covered pharmacies within the state. Specifically, with each initial transaction with individuals seeking mail order pharmacy services, in addition to English, mail order pharmacies will provide printed materials, in Chinese, Italian, Russian and Spanish, explaining the availability of competent oral interpretation services and translation services. Persons will be identified as LEP individuals when they request such oral interpretation services and translation services or when such mail order pharmacy fills a prescription that indicates that the individual is a LEP individual. The manner and circumstances in which competent oral interpretation services and translation services will be provided is by a staff member of the mail order pharmacy or third-party contractor and services will be provided on an immediate basis but need not be provided in-person or face-to-face. The information for which competent oral interpretation services and translation services shall be provided will be prescription medication labels, warning labels and other written materials.

The proposed amendment will not impose any additional professional services requirements on entities in rural areas.

##### **3. COSTS:**

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

##### **4. MINIMIZING ADVERSE IMPACT:**

In developing the proposed amendment, the Department obtained input from representatives of the professions of nursing, medicine, podiatry, midwifery and dentistry. In addition, it held public hearings in Buffalo, Albany, and New York City. More than 20 public advocacy groups and representatives of the retail pharmacy chains have commented on the proposals. Further discussions were then held with representatives of the advocacy groups and of the retail pharmacy chains. The concerns of those commenting on the proposals were taken into account in modifying the original proposal, and the proposal represented in the proposed regulations was acceptable to both the advocacy groups and the chain retail pharmacies. The proposed regulations make no exception for individuals who live in rural areas, as the legislation did not permit such an exception. Therefore, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt entities in rural areas from coverage by the proposed amendment.

#### **5. RURAL AREAS PARTICIPATION:**

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements in section 6829(4) of the Education Law, as added by Section 3 of Part V of Chapter 57 of the Laws of 2012, and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The State Education Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

#### **Job Impact Statement**

Section 6829(4) of the Education Law, as added by Section 3 of Part V of Chapter 57 of the Laws of 2012, establishes interpretation and translation requirements for all mail order pharmacies conducting business in New York State. The proposed amendment implements the provisions of section 6829(4) of the Education Law that, effective March 30, 2014, require all mail order pharmacies sending prescriptions to individuals in New York State to provide interpretation and translation services for Limited English Proficient (LEP) individuals. It also subjects mail order pharmacies to the same interpretation and translation services requirements as are now required for covered pharmacies within the state. Specifically, with each initial transaction with individuals seeking mail order pharmacy services, in addition to English, mail order pharmacies will provide printed materials in Chinese, Italian, Russian and Spanish, explaining the availability of competent oral interpretation services and translation services. Persons will be identified as LEP individuals when they request such oral interpretation services and translation services or when such mail order pharmacy fills a prescription that indicates that the individual is a LEP individual. The manner and circumstances in which competent oral interpretation services and translation services will be provided is by a staff member of the mail order pharmacy or third-party contractor and services will be provided on an immediate basis but need not be provided in-person or face-to-face. The information for which competent oral interpretation and translation services shall be provided will be prescription medication labels, warning labels and other written materials.

Because the proposed amendment implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing translation and interpretation requirements for mail order pharmacies sending prescriptions to individuals in New York State is attributable to the statutory requirement, not the proposed amendment, which simply establishes standards that conform to the requirements of the statute. In any event, the same translation and interpretation requirements were established for covered pharmacies in 2013, and the Department is not aware that those requirements significantly affected jobs or employment opportunities in those pharmacies.

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

## Department of Financial Services

### EMERGENCY RULE MAKING

#### Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

**I.D. No.** DFS-11-14-00001-E

**Filing No.** 159

**Filing Date:** 2014-02-27

**Effective Date:** 2014-02-27

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

**Action taken:** Addition of Part 418 and Supervisory Procedures MB 109 and MB 110 to Title 3 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** Chapter 472 of the Laws of 2008, which requires mortgage loan servicers to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks), went into effect on July 1, 2009. These regulations implement the registration requirement and inform servicers of the details of the registration process so as to permit applicants to prepare, submit and review applications for registrations on a timely basis.

Excluding persons servicing loans made under the Power New York Act from the mortgage loan servicer rules is necessary to facilitate the immediate implementation of such loan program so that the anticipated energy efficiency benefits can be realized without delay.

**Subject:** Registration and Financial Responsibility Requirements for Mortgage Loan Servicers.

**Purpose:** To require that persons or entities which service mortgage loans on residential real property on or after July 1, 2009 be registered with the Superintendent of Financial Services.

**Substance of emergency rule:** Section 418.1 summarizes the scope and application of Part 418. It notes that Sections 418.2 to 418.11 implement the requirement in Article 12-D of the Banking Law that certain mortgage loan servicers ("servicers") be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks), while Sections 418.12 and 418.13 set forth financial responsibility requirements that are applicable to both registered and exempt servicers. [Section 418.14 sets forth the transitional rules.]

Section 418.2 implements the provisions in Section 590(2)(b-1) of the Banking Law requiring registration of servicers and exempting mortgage bankers, mortgage brokers, and most banking and insurance companies, as well as their employees. Servicing loans made pursuant to the Power New York Act of 2011 is excluded. The Superintendent is authorized to approve other exemptions.

Section 418.3 contains a number of definitions of terms that are used in Part 418, including "Mortgage Loan", "Mortgage Loan Servicer", "Third Party Servicer" and "Exempted Person".

Section 418.4 describes the requirements for applying for registration as a servicer.

Section 418.5 describes the requirements for a servicer applying to open a branch office.

Section 418.6 covers the fees for application for registration as a servicer, including processing fees for applications and fingerprint processing fees.

Section 418.7 sets forth the findings that the Superintendent must make to register a servicer and the procedures to be followed upon approval of an application for registration. It also sets forth the grounds upon which the Superintendent may refuse to register an applicant and the procedure for giving notice of a denial.

Section 418.8 defines what constitutes a "change of control" of a servicer, sets forth the requirements for prior approval of a change of control, the application procedure for such approval and the standards for approval. The section also requires servicers to notify the Superintendent of changes in their directors or executive officers.

Section 418.9 sets forth the grounds for revocation of a servicer registration and authorizes the Superintendent, for good cause or where there is substantial risk of public harm, to suspend a registration for 30 days without a hearing. The section also provides for suspension of a servicer

registration without notice or hearing upon non-payment of the required assessment. The Superintendent can also suspend a registration when a servicer fails to file a required report, when its surety bond is cancelled, or when it is the subject of a bankruptcy filing. If the registrant cures the deficiencies its registration can be reinstated. The section further provides that in all other cases, suspension or revocation of a registration requires notice and a hearing.

The section also covers the right of a registrant to surrender its registration, as well as the effect of revocation, termination, suspension or surrender of a registration on the obligations of the registrant. It provides that registrations will remain in effect until surrendered, revoked, terminated or suspended.

Section 418.10 describes the power of the Superintendent to impose fines and penalties on registered servicers.

Section 418.11 sets forth the requirement that applicants demonstrate five years of servicing experience as well as suitable character and fitness.

Section 418.12 covers the financial responsibility and other requirements that apply to applicants for servicer registration, registered servicers and exempted persons (other than insured depository institutions to which Section 418.13 applies). The financial responsibility requirements include a required net worth (as defined in the section) of at least \$250,000 plus 1/4 % of total loans serviced or, for a Third Party Servicer, 1/4 of 1% of New York loans serviced; (2) a corporate surety bond of at least \$250,000 and (3) a Fidelity and E&O bond in an amount that is based on the volume of New York mortgage loans serviced, with a minimum of \$300,000.

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service an aggregate amount of loans not exceeding \$4,000,000.

Section 418.13 exempts from the otherwise applicable net worth and surety bond requirements, but not the Fidelity and E&O bond requirements, entities that are subject to the capital requirements applicable to insured depository institutions and that are considered at least adequately capitalized.

Section 418.14 provides a transitional period for registration of mortgage loan servicers. A servicer doing business in this state on June 30, 2009 which files an application for MLS registration by July 31, 2009 will be deemed in compliance with the registration requirement until notified that its application has been denied. A person who is required to register as a servicer solely because of the changes in the provisions of the rule regarding use of third party servicers which became effective on August 23, 2011 and who files an application for registration within 30 days thereafter will not be required to register until six months from the effective date of the amendment or until the application is denied, whichever is earlier.

Section 109.1 defines a number of terms that are used in the Supervisory Procedure.

Section 109.2 contains a general description of the process for registering as a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 109.3 lists the documents to be included in an application for servicer registration, including the required fees. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent of Financial Services (formerly the Superintendent of Banks) can require additional information or an in person conference, and that the applicant can submit additional pertinent information.

Section 109.4 describes the information and documents required to be submitted as part of an application for registration as a servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, and other documents, such as fingerprint cards and background reports.

Section 110.1 defines a number of terms that are used in the Supervisory Procedure.

Section 110.2 contains a general description of the process for applying for approval of a change of control of a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 110.3 lists the documents to be included in an application for approval of a change of control of a servicer, including the required fees. It sets forth the time within which the Superintendent of Financial Services (formerly the Superintendent of Banks) must approve or disapprove an application. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information. Last, the section lists the types of changes in a servicer's operations resulting from a change of control which should be notified to the Department of Financial Services (formerly the Banking Department).

Section 110.4 describes the information and documents required to be submitted as part of an application for approval of a change of control of servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating continuing compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, a description of the acquisition and other documents regarding the applicant, such as fingerprint cards and background reports.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 27, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, New York State Department of Financial Services, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@dfs.ny.gov

### Regulatory Impact Statement

#### 1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Subprime Lending Reform Law (Ch. 472, Laws of 2008, hereinafter, the "Subprime Law"), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers (MLS) are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2) (b-1) and 595-b.)

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

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

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

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

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

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

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

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

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

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

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations

of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for MLS registration applications and for MLS branch applications are established in accordance with Banking Law Section 18-a.2. Legislative Objectives.

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

The Subprime Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Superintendent.

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

The regulations implement the first component of the mortgage servicing statute – the registration of mortgage servicers. In doing so, the rule utilizes the authority provided to the Superintendent to set standards for the registration of such entities. For example, the rule requires that a potential loan servicer would have to provide, under Sections 418.11 to 418.13 of the proposed regulations, evidence of their character and fitness to engage in the servicing business and demonstrate to the Superintendent their financial responsibility. The rule also utilizes the authority provided by the Legislature to revoke, suspend or otherwise terminate a registration or to fine or penalize a registered mortgage loan servicer.

Consistent with this requirement, the rule authorizes the Superintendent to refuse to register an applicant if he/she shall find that the applicant lacks the requisite character and fitness, or any person who is a director, officer, partner, agent, employee, substantial stockholder of the applicant has been convicted of certain felonies. These are the same standards as are applicable to mortgage bankers and mortgage brokers in New York. (See Section 418.7.)

Further, in carrying out the Legislature's mandate to regulate the mortgage servicing business, Section 418.8 sets out certain application requirements for prior approval of a change in control of a registered mortgage loan servicer and notification requirements for changes in the entity's executive officers and directors. Collectively, these various provisions implement the intent of the Legislature to register and supervise mortgage loan servicers.

The Department has separately adopted emergency regulations dealing with business conduct and consumer protection requirements for MLSS. (3 NYCRR Part 419).

#### 3. Needs and Benefits.

The Subprime Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry. It affected a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Previously, the Department of Financial Services (formerly the Banking Department) regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

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

While minimum standards for the business conduct of servicers is the subject of another emergency regulation which has been promulgated by the Department. (3 NYCRR Part 419) Section 418.2 makes it clear that

persons exempted by from the registration requirement must notify the Department that they are servicing mortgage loans and must otherwise comply with the regulations.

As noted above, these regulations relate to the first component of the mortgage servicing statute – the registration of mortgage loan servicers. It is intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers.

Further, consumers in this state will also benefit under these regulations because in the event there is an allegation that a mortgage servicer is involved in wrongdoing and the Superintendent finds that there is good cause, or that there is a substantial risk of public harm, he or she can suspend such mortgage servicer for 30 days without a hearing. And in other cases, he or she can suspend or revoke such mortgage servicer's registration after notice and a hearing. Also, the requirement that servicers meet minimum financial standards and have performance and other bonds will act to ensure that consumers are protected.

As noted above, the MLS regulations are divided into two parts. The Department had separately adopted emergency regulations dealing with business conduct and consumer protection requirements for MLSs. (3 NYCRR Part 419)

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

Under Section 418.2, a person servicing loans made under the Power New York Act of 2011 will not thereby be considered to be engaging in the business of servicing mortgage loans. Consequently, a person would not be subject to the rules applicable to MLSs by reason of servicing such loans.

#### 4. Costs.

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The amount of the application fee for MLS registration and for an MLS branch application is \$3,000.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System are set by that body. MLSs will also incur administrative costs associated with preparing applications for registration.

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

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

#### 5. Local Government Mandates.

None.

#### 6. Paperwork.

An application process has been established for potential mortgage loan servicers to apply for registration electronically through the National Mortgage Licensing System and Registry (NMLSR) - a national system, which currently facilitates the application process for mortgage brokers, bankers and loan originators. Therefore, the application process is virtually paperless; however, a limited number of documents, including fingerprints where necessary, would have to be submitted to the Department in paper form.

The specific procedures that are to be followed in order to apply for registration as a mortgage loan servicer are detailed in Supervisory Procedure MB 109.

#### 7. Duplication.

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

An exemption was created under Section 418.13, from the otherwise applicable net worth and surety bond requirements, for entities that are subject to the capital requirements applicable to insured depository institutions and are considered adequately capitalized.

#### 8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimis amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

The procedure for suspending servicers that violate certain financial responsibility or customer protection requirements, which provides a 90-day period for corrective action, during which there can be an investigation and hearing on the existence of other violations, provides flexibility to the process of enforcing compliance with the statutory requirements.

#### 9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies. However, although not a registration process, in order for any mortgage loan servicer to service loans on behalf of certain federal instrumentalities such servicers have to demonstrate that they have specific amounts of net worth and have in place Fidelity and E&O bonds.

These regulations exceed those minimum standards, in that, a mortgage loan servicer will now have to demonstrate character and general fitness in order to be registered as a mortgage loan servicer. In light of the important role of a servicer – collecting consumers' money and acting as agents for mortgagees in foreclosure transactions – the Department believes that it is imperative that servicers be required to meet this heightened standard.

#### 10. Compliance Schedule.

The emergency regulations will become effective on September 17, 2012. Similar emergency regulations have been in effect since July 1, 2009.

The Department expects to approve or deny applications within 90 days of the Department's receipt (through NMLSR) of a completed application.

A transitional period is provided for mortgage loan servicers which were doing business in this state on June 30, 2009 and which filed an application for registration by July 31, 2009. Such servicers will be deemed in compliance with the registration requirement until notified by the Superintendent that their application has been denied.

Additionally, the version of Part 418 adopted on an emergency basis effective August 5, 2011 requires holders of mortgage servicing rights to register as mortgage loans servicers even where they have sub-contracted servicing responsibilities to a third-party servicer. Such servicers were given until October 15, 2011 to file an application for registration.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the Rule:

The emergency rule will not have any impact on local governments. It is estimated that there are approximately 120 mortgage loan servicers in the state which are not mortgage bankers, mortgage brokers or exempt organizations, and which are therefore required to register under the Subprime Lending Reform Law (Ch. 472, Laws of 2008) (the "Subprime Law") Of these, it is estimated that a very few of the remaining entities will be deemed to be small businesses.

#### 2. Compliance Requirements:

The provisions of the Subprime Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of Financial Services (formerly the Banking Department) of servicers who are not mortgage bankers, mortgage brokers or exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Subprime Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Subprime Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. The emergency MLS Registration Regulations here adopted implement that statutory requirement by providing a procedure whereby MLSs can apply to be registered and standards and procedures for the Department to approve or deny such applications. The emergency regulations also set forth financial responsibility standards applicable to applicants for MLS registration, registered MLSs and servicers which are exempted from the registration requirement.

Additionally, the regulations set forth standards and procedures for Department action on applications for approval of change of control of an MLS. Finally, the emergency regulations set forth standards and procedures for, suspension, revocation, expiration, termination and surrender of MLS registrations, as well as for the imposition of fines and penalties on MLSs.

#### 3. Professional Services:

None.

#### 4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of \$3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

5. Economic and Technological Feasibility:

The emergency rule-making should impose no adverse economic or technological burden on mortgage loan servicers who are small businesses. The NMLS is now available. This technology will benefit registrants by saving time and paperwork in submitting applications, and will assist the Department by enabling immediate tracking, monitoring and searching of registration information; thereby protecting consumers.

6. Minimizing Adverse Impacts:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLS, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

As noted above, most servicers are not small businesses. As regards servicers that are small businesses and not otherwise exempted, the regulations give the Superintendent of Financial Services (formerly the Superintendent of Banks) the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

7. Small Business and Local Government Participation:

Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

**Rural Area Flexibility Analysis**

Types and Estimated Numbers:

Approximately 70 mortgage loan servicers have been registered by the Department of Financial Services or have applied for registration. Very few of these entities operate in rural areas of New York State and of those, most are individuals that do a de minimis business. As discussed below, the Superintendent can modify the requirements of the regulation in such cases.

Compliance Requirements:

Mortgage loan servicers in rural areas which are not mortgage bankers, mortgage brokers or exempt organizations must be registered with the Superintendent to engage in the business of mortgage loan servicing. An application process will be established requiring a MLS to apply for registration electronically and to submit additional background information and fingerprints to the Mortgage Banking unit of the Department.

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations authorize the Superintendent of Financial Services (formerly the Superintendent of Banks) to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which service not more than \$4,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden which those requirements might otherwise impose on entities operating in rural areas.

Costs:

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The application fee for MLS registration will be \$3,000. The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry ("NMLSR") are set by that body. Applicants for mortgage loan servicer registration will also incur administrative costs associated with preparing applications for registration.

Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations.

Minimizing Adverse Impacts:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLSR, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. Additionally, in the case of servicers that operate in rural areas and are not otherwise

exempted, the Superintendent has the authority to reduce, waive or modify the financial responsibility requirements for individuals that do a de minimis amount of servicing.

Rural Area Participation:

Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

**Job Impact Statement**

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Department of Financial Services (formerly the Banking Department) and exempt from the new registration requirement. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

**NOTICE OF ADOPTION**

**Regulation of Subprime Home Loans**

**I.D. No.** DFS-42-13-00006-A

**Filing No.** 170

**Filing Date:** 2014-03-04

**Effective Date:** 2014-03-19

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

**Action taken:** Addition of Part 43 to Title 3 NYCRR.

**Statutory authority:** Financial Services Law, section 302; Banking Law, sections 6-m and 14

**Subject:** Regulation of Subprime Home Loans.

**Purpose:** To define the meaning of certain terms in Section 6-m of the Banking Law.

**Text of final rule:** PART 43

*SUBPRIME HOME LOANS – MEANING OF TERMS*

§ 43.1 Background.

Section 6-m of the Banking Law provides for the regulation of subprime home loans as defined in the statute.

Pursuant to the authority provided by Section 302(2) of the Financial Services Law and Section 14 of the Banking Law, the Superintendent of Financial Services is authorized to prescribe regulations interpreting the provisions of the Banking Law, including Section 6-m. This Part is issued pursuant to this authority, and it applies to all subprime home loans as defined in the Banking Law.

§ 43.2 Meaning of Certain Terms.

The following interpretations shall be used in determining whether a loan is a subprime home loan within the meaning of Section 6-m of the Banking Law:

a. The term "Week" referred to in the phrase the "week prior to the week in which the lender provides the 'good faith estimate' " used in Section 6-m(1)(c) shall in all cases mean the seven-day period from Friday through Thursday, the day on which the Federal Home Loan Mortgage Corporation publishes its Primary Mortgage Market Survey ("PMMS"). Therefore, the relevant PMMS for purposes of Section 6-m(1)(c) is the one published on the Thursday prior to receiving the good faith estimate. For example, if a lender provides a good faith estimate on any day including Friday, June 14 through Thursday, June 20, the relevant PMMS is the one published on Thursday, June 13. For a good faith estimate issued on Friday, June 21 through Thursday, June 27, the relevant PMMS is the one published on Thursday, June 20.

b. The term "Good Faith Estimate" referred to in the phrase " 'good faith estimate' required under 12 USC § 2601 et seq." used in Section 6-m(1)(c) shall in all cases mean the good faith estimate used to establish the terms of the mortgage loan. If a revised good faith estimate is required under section 1024.7(f) of Regulation X (12 CFR Part 1024), the term "Good Faith Estimate" shall mean such revised good faith estimate.

c. The term "Commitment" referred to in the phrase "the time the lender issues its commitment" used in Section 6-m(1)(b) shall in all cases where a commitment is not issued by the lender mean the "Good Faith Estimate".

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 43.1 and 43.2.

**Text of rule and any required statements and analyses may be obtained from:** Harry Goberdhan, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1669, email: Harry.Goberdhan@DFS.ny.gov

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

The Department amended the first sentence of 3 NYCRR, Part 43.2, as proposed to clarify the scope and purpose of the regulation.

Additionally, after receiving a comment from a trade association regarding which good faith estimate should be used to calculate the annual percentage rate, the Department amended the last sentence of 3 NYCRR, Part 43.2(b) as proposed to include a reference to Regulation X (12 CFR Part 1024) to clarify the term "Good Faith Estimate."

These changes made to the proposed rule does not necessitate a revision to the RIS, RFA, RAFA or JIS because they are minor clarifications of the text which do not affect the accuracy or completeness of the impact statements.

#### 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

Summary of Comments:

Two comments on the proposal were received:

1. A comment filed on behalf of the Mortgage Bankers Association, Central New York Mortgage Bankers Association, Empire State Mortgage Bankers Association, Mid-Hudson Valley Mortgage Bankers Association, Mortgage Bankers Association of New York, Mortgage Bankers Association of Northeastern New York, and Mortgage Bankers Association of the Genesee Region (the "Associations") applauded the Department for taking the necessary action to adopt 3 NYCRR, Part 43 as the new regulation would give consumers and mortgage lenders in New York a more precise rate calculation when purchasing or refinancing a home. Additionally, the Associations requested that the Department take note of the fact that they would support a statutory change to Section 6-m of the Banking Law to effectively permit mortgage lenders to "use the rate lock date to establish the APR calculation, instead of the date of the revised GFE [good faith estimate]."

2. A comment filed on behalf of the New York Bankers Association (NYBA) paralleled that received from the Associations stating the action taken by the Department would significantly reduce negative borrower impact in the state and ensure the continued availability of credit. The comment also recommended that 3 NYCRR, Part 43.2(b) as proposed be amended to include a reference to 12 CFR Part 1024 (Regulation X) that would effectively clarify which good faith estimate should be used to calculate the APR.

#### Change Made to Proposed Rule

In response to the comments by the NYBA, the last sentence of 3 NYCRR, Part 43.2(b) as proposed is amended to read as follows: "If a revised good faith estimate is required under section 1024.7(f) of Regulation X (12 CFR Part 1024), the term "Good Faith Estimate" shall mean such revised good faith estimate."

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Regulation of Shared Appreciation Mortgages

I.D. No. DFS-51-13-00002-RP

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

**Proposed Action:** Addition of Part 83 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 6-f

**Subject:** Regulation of shared appreciation mortgages.

**Purpose:** Permits shared appreciation mortgages in certain limited circumstances.

**Substance of revised rule:** § 83.1 describes the scope and application of Part 83. It notes that Section 6-f of the Banking Law authorizes the Superintendent to adopt rules and regulations relating to shared appreciation mortgages that would permit banks and other financial institutions to make residential mortgage loans that provide for the lender or its assignee (the "Holder") to receive a share in the appreciation of the market value of the residential property securing the loan.

§ 83.2 defines certain terms used in Part 83.

§ 83.3 sets forth the eligibility requirements for a shared appreciation mortgage modification.

§ 83.4 sets forth the calculation of the mortgagor's unpaid principal balance, as well as the calculation of the mortgagor's debt-to-income ratio.

§ 83.5 sets forth the circumstances that can lead to a sharing of the appreciation under a shared appreciation mortgage agreement.

§ 83.6 sets forth the calculation used to determine the Holder's share of the appreciation.

§ 83.7 sets forth the disclosures that must be provided to borrowers entering into shared appreciation mortgage modifications.

§ 83.8 sets forth a statement that must be conspicuously placed on every shared appreciation mortgage agreement.

§ 83.9 requires Holders that offered shared appreciation mortgage modifications to adopt policies and procedures for notifying eligible customers of the shared appreciation option.

§ 83.10 sets forth fees, charges, and interest rates that may be imposed or used in connection with shared appreciation mortgage agreements.

§ 83.11 sets forth prohibitions on certain conduct by the Holder in connection with shared appreciation mortgages.

**Revised rule compared with proposed rule:** Substantive revisions were made in sections 83.2, 83.3, 83.5, 83.6, 83.7 and 83.11.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Harry Goberdhan, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1669, email: Harry.Goberdhan@DFS.ny.gov

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

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

#### Revised Regulatory Impact Statement

1. Statutory Authority.

Revised Section 6-f of the Banking Law became effective on December 15, 2009 (Chapter 507 of the Laws of 2009). The revised Section 6-f authorizes the Superintendent to adopt rules permitting shared appreciation agreements where the lender or holder of a residential mortgage loan or cooperative apartment unit loan reduces the principal amount of a mortgage loan in order to assist a borrower at risk of foreclosure. Under such an agreement, the lender is entitled to share in any appreciation of the market value of the real property or co-op shares between the effective date of the reduction in the principal amount of the mortgage and the date when the property is sold or transferred, but not more than the lesser of (i) the amount of the reduction in principal, plus interest at the same rate as applies to the remaining principal amount, or (ii) 50% of the amount of appreciation. The law requires certain disclosures with respect to shared appreciation mortgages. New York does not currently allow shared appreciation mortgages (other than certain FHA-insured mortgages).

2. Legislative Objectives.

Revised Section 6-f of the Banking Law was intended to provide New York mortgage lenders and struggling borrowers with another tool to help the borrowers keep their homes. The shared appreciation agreements allow lenders to share with the homeowner the future appreciation of the home's value, providing lenders with an additional incentive to allow borrowers to stay in their homes. At the same time, the disclosure requirements and the limitations on the amount of appreciation that lenders can share serve to guard against abuse of vulnerable New Yorkers. The intended result is that more homeowners will keep their homes, which al-

lows homeowners to avoid the costly and protracted foreclosure process, allows lenders to recoup their investment, and provides local communities with stability.

### 3. Needs and Benefits.

Data by research provider CoreLogic indicates that 7.7% of New York homeowners owed more than their homes were worth as of the first quarter of 2013. Meanwhile, foreclosures have soared in recent years. Mortgage modifications have helped many homeowners keep their homes, but many modification applications are rejected by lenders and servicers because it is not in the lenders' or investors' best interests to grant the modifications. Shared appreciation agreements allow lenders to share with the homeowner the future appreciation of the home's value, thus providing a new incentive to such lenders to reduce the principal amount on the loan and thus permit the borrower to keep the home. Lenders thus have an additional non-foreclosure option that they can offer to struggling homeowners. The intended benefit is to homeowners, lenders, and local communities alike. Qualifying homeowners will avoid the costly and protracted foreclosure process, lenders will recoup more of their investment, and local communities will become more stable.

### 4. Costs.

This proposed regulation will not result in any fiscal implications to the State. Moreover, because shared appreciation agreements are not required but instead would become available as an option to lenders and borrowers if they mutually agree to enter into such agreements, the regulation does not impose any required costs on regulated entities or consumers.

To avoid losing their homes, homeowners who enter into shared appreciation agreements agree to give up a portion of their right to recover the appreciation in the value of their property upon sale.

### 5. Local Government Mandates.

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

### 6. Paperwork.

Because shared appreciation agreements are not required, the regulation does not impose any paperwork requirement on lenders or borrowers unless they mutually agree to enter into shared appreciation agreements. Shared appreciation agreements require borrowers to complete an application, and lenders to make certain disclosures to borrowers in writing explaining certain terms of the shared appreciation agreement and their effect on borrowers. Lenders are also required to disclose any fees, costs, and payments associated with the shared appreciation agreement, as well as a list of the names and contact information of five HUD-certified mortgage counselors in the borrowers' county.

### 7. Duplication.

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

### 8. Alternatives.

Although now authorized by changes in the Banking Law to adopt a regulation with respect to shared appreciation agreements, the Department could choose not to do so. The proposed regulation, however, will provide lenders and struggling borrowers with another tool to keep borrowers in their homes and combat the ongoing foreclosure crisis. If such a regulation is not adopted, homeowners will be deprived of an opportunity to remain in their homes, lenders will be denied an opportunity to recoup their investment, and communities will be denied the benefits that accompany greater stability in the housing market.

### 9. Federal Standards.

There are no applicable federal standards.

### 10. Compliance Schedule.

Revised Section 6-f became effective on December 15, 2009. It is proposed that the regulation be effective upon publication of the Notice of Adoption in the State Register.

## Revised Regulatory Flexibility Analysis

### 1. Effect of the Rule:

The revised proposed regulation will help qualifying borrowers to avoid foreclosure, which will provide stability to local communities and, therefore, local governments, including a more stable tax base. The regulation may help small businesses including community banks and mortgage bankers to maintain an income stream from delinquent loans that would otherwise fall into the costly foreclosure process.

### 2. Compliance Requirements:

The revised proposed regulation does not impose any requirements on small businesses. To the extent lenders are small businesses that choose to enter into shared appreciation agreements, they must do so within the restrictions set forth in the regulation, which include making certain disclosures and limiting the amount of the appreciation in which they can share.

### 3. Professional Services:

None.

### 4. Compliance Costs:

Costs associated with making required disclosures are negligible. If any small business finds the costs to be excessive, they can choose not to enter into shared appreciation agreements.

### 5. Economic and Technological Feasibility:

The rule-making should impose no adverse economic or technological burden on small businesses.

### 6. Minimizing Adverse Impacts:

The revised proposed regulation provides small businesses with an option to enter into shared appreciation agreements if they choose to do so. They have no obligation to enter into such agreements, and therefore the regulation should impose no adverse impacts.

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

The Department solicited input on the revised proposed regulation from industry representatives and consumer groups. The Department also maintains regular contact with large segments of the mortgage industry through its regulation of mortgage bankers, servicers, brokers, and loan originators. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to feedback from various industry and consumer groups, the Department has tailored this regulation to protect consumer interests while also serving the needs of mortgage lenders and servicers.

## Revised Rural Area Flexibility Analysis

**Types and Estimated Numbers.** Approximately 10% of all mortgage loans in New York State are made to borrowers located in rural areas. To the extent that these loans meet the shared appreciation qualifications in the proposed regulation, lenders and borrowers may mutually agree to enter into a shared appreciation agreement.

**Compliance Requirements.** Compliance requirements in rural areas do not differ from those in non-rural areas. Both are minimal, and require making certain disclosures and limiting the amount of appreciation in which lenders can share.

**Costs.** Costs in rural areas do not differ from those in non-rural areas. The proposed regulation provides lenders and borrowers with an option to enter into shared appreciation agreements if they choose to do so. There is have no obligation to enter into such agreements, and if any party finds the costs to be prohibitive, they can choose not to enter into shared appreciation agreements.

**Minimizing Adverse Impacts.** Adverse impacts in rural areas do not differ from those in non-rural areas. The revised proposed regulation provides lenders and borrowers with an option to enter into shared appreciation agreements if they choose to do so. There is have no obligation to enter into such agreements, and therefore the regulation should impose no adverse impacts.

**Rural Area Participation.** The Department maintains regular contact with large segments of the mortgage industry through its regulation of mortgage bankers, servicers, brokers, and loan originators, including those in rural areas. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs, which serve the interests of rural areas. In response to feedback from various industry and consumer groups, the Department has tailored this regulation to protect consumer interests while also serving the needs of mortgage lenders and servicers.

## Revised Job Impact Statement

The revised proposed regulation is not expected to have an adverse effect on jobs or employment activities. Rather, to the extent it helps struggling homeowners to keep their homes, it may give such homeowners the confidence and stability they need to keep their jobs or obtain new jobs.

## Assessment of Public Comment

The Department received five written comments on the proposed rule making. Shared Appreciation Agreement and Shared Appreciation Mortgage Modification Agreement, as contemplated by the proposed rule, for purposes of this assessment will be referred to as ("SAM Agreements").

### Organizations Commenting:

During the public comment period, written comments were received from: (i) a law professor; (ii) a trade association representing mortgage bankers; (iii) a trade association representing credit unions operating in New York; (iv) an entity that services mortgage loans; and (v) a not-for-profit organization engaged in promoting and protecting affordable and sustainable homeownership in New York City.

### Summary of Comments:

Overall, the comments strongly supported implementation of the proposed rule and commended the Department's efforts towards that goal. Additionally, the comments included certain specific recommendations and requests to amend the proposed rule in certain areas.

The professor noted that the impact on homeowners of a SAM Agreement would vary and that it was unlikely that the mandatory disclosures required by the proposed rule would be adequate. On the other hand, the mortgage banking trade association raised concerns that the disclosures currently required by the proposed rule would be overly burdensome.

The credit union association requested that the Department clarify that the intent of the proposed rule was to authorize state-chartered credit unions to offer these types of loan modifications.

The not-for-profit organization and the mortgage loan serving entity generally requested that the proposed rule be modified to: permit modifications for more homeowners by increasing the permissible debt-to-income ratio; permit a Mortgagor to enter into a SAM Agreement in circumstances where the Mortgagor was delinquent and in danger of foreclosure and not past due by a specified number of days; permit a Mortgagor to enter into a SAM Agreement when it is the best option for the Mortgagor; and otherwise making such loans more widely available.

#### Changes Made to Proposed Rule:

The Department has clarified two of the current disclosures regarding consultations with other lien holders before entering into a SAM Agreement, and that the subject Residential Property must be the sole asset securing the loan. The Department also added a disclosure that, where applicable, the Mortgagor might be eligible to enter into a mortgage modification or refinancing without having to share in the appreciation in the value of the subject Residential Property.

The Department has also:

- (i) Amended Section 83.11(i) to increase the maximum debt-to-income ratio and prohibit SAM Agreements when they will result in a Mortgagor's debt-to-income ratio being greater than 40%;
- (ii) Amended Section 83.3(a)(1)(i) to increase to 150 the number of days before an Appraisal Report becomes stale and unusable;
- (iii) Amended Section 83.3(a)(3) to require a Holder to assess the Mortgagor's eligibility for other modification and refinancing programs;
- (iv) Amended Section 83.3(a)(2) to decrease to 60 the number of days a Mortgagor must be delinquent before being considered eligible to enter into a SAM Agreement; and
- (v) Amended Section 83.6(a)(2) to permit a Mortgagor to receive credit for any Capital Improvement, net of applicable depreciation, that may have been made to the Residential Property.

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## Department of Health

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### EMERGENCY RULE MAKING

#### Presumptive Eligibility for Family Planning Benefit Program

**I.D. No.** HLT-51-13-00004-E

**Filing No.** 165

**Filing Date:** 2014-02-28

**Effective Date:** 2014-02-28

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

**Action taken:** Amendment of section 360-3.7 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 366(1)

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

**Specific reasons underlying the finding of necessity:** Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to SSL section 366(1) that require the Department, by regulation, to implement criteria for presumptive eligibility for the Family Planning Benefit Program, took effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis.

**Subject:** Presumptive Eligibility for Family Planning Benefit Program.

**Purpose:** To set criteria for the Presumptive Eligibility for Family Planning Benefit Program.

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by section 366(1) of the Social Services Law, section 360-3.7 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended, to be effective upon filing with the Secretary of State, to add a new subdivision (e), to read as follows:

Section 360-3.7 is amended to add a new subdivision (e) to read as follows:

(e) *Presumptive eligibility for coverage of family planning benefit program (FPBP) services.*

(1) *An individual will be presumed eligible to receive the MA care, services and supplies listed in paragraph (8) of this subdivision when a qualified provider determines, on the basis of preliminary information, that the individual's family income does not exceed 200 percent of the Federal poverty line applicable to a family of the same size.*

(2) *For purposes of this subdivision, the individual's family income will be determined according to section 360-4.6 of this Part relating to financial eligibility for MA. The resources of the individual's family will not be considered in determining the individual's presumptive eligibility for coverage of FPBP services.*

(3) *For purposes of this subdivision, an individual's family includes the individual, any legally responsible relatives and any legally dependent relatives with whom he or she resides. In determining eligibility for children under 21, parental income is disregarded when the child requests confidentiality, has good cause not to provide or is otherwise unable to obtain parental income information.*

(4) *As used in this subdivision, the term qualified provider means a provider who:*

(i) *is eligible to receive payment under the MA program;*

(ii) *provides family planning services, treatment and supplies; and*

(iii) *has been found by the department to be capable of making*

*presumptive eligibility determinations based on family income.*

(5) *An individual who has been determined presumptively eligible for coverage of FPBP services must submit a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the month following the month in which a qualified provider determined him or her to be presumptively eligible.*

(6) *A qualified provider that has determined an individual to be presumptively eligible for coverage of FPBP services must:*

(i) *on the day the qualified provider determines the individual to be presumptively eligible, inform the individual that a FPBP application must be submitted to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month in order to continue presumptive eligibility until the day his or her FPBP eligibility is determined;*

(ii) *assist the individual to complete the FPBP application and submit the application on his or her behalf; and*

(iii) *within five business days after the day the qualified provider determines the individual to be presumptively eligible, notify the social services district in which the individual resides, or the department or its agent, of its presumptive eligibility determination on forms the department develops or approves.*

(7) *The period of presumptive eligibility for coverage of FPBP services begins on the day a qualified provider determines the individual to be presumptively eligible. If the individual submits a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month, the period of presumptive eligibility continues through the day the individual's eligibility for FPBP is determined; if the individual fails to submit such an application, the period of presumptive eligibility continues through the last day of the following month.*

(8) *An individual found presumptively eligible pursuant to this subdivision is eligible for coverage of the following medically necessary FPBP services and appropriate transportation to obtain such services:*

(i) *hospital based and free standing clinics;*

(ii) *county health department clinics;*

(iii) *federally qualified health centers or rural health centers;*

(iv) *obstetricians and gynecologists;*

(v) *family practice physicians;*

(vi) *licensed midwives, nurse practitioners; and*

(vii) *family planning related services from pharmacies and laboratories.*

(9) *If a presumptively eligible individual is subsequently determined to be ineligible for FPBP, he or she may request a fair hearing pursuant to Part 358 of this Title to dispute the denial of FPBP, but the presumptive eligibility period will not be extended by such request.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-51-13-00004-P, Issue of December 18, 2013. The emergency rule will expire April 28, 2014.

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

#### Regulatory Impact Statement

Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law sec-

tion 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

**Legislative Objectives:**

Subdivision (1) of section 366 of the Social Services Law (SSL), as amended by Chapter 59 of the Laws of 2011, provides that pursuant to regulations promulgated by the Commissioner of Health, that the Department will establish criteria for presumptive eligibility for the Family Planning Benefit Program. The legislative objective, expressed through SSL section 366(1) is to expand access to family planning services by easing the application process.

**Needs and Benefits:**

New York included in Chapter 59 of the Laws of 2011, the option afforded by the Affordable Care Act, of providing individuals with a period of presumptive eligibility for family planning-only services. This regulation will provide the necessary criteria, as required by subdivision 1 of Section 366 of the Social Services Law, to implement the Presumptive Eligibility for the Family Planning Benefit Program.

**COSTS:**

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

This amendment will not increase costs to the regulated parties.

**Costs to State and Local Government:**

This amendment will not increase costs to the State or local governments.

**Costs to the Department of Health:**

Any costs associated with this amendment will be offset by administrative savings.

**Local Government Mandates:**

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

**Paperwork:**

Any provider choosing to act as a "qualified provider" will be required to notify the local social services district when a presumptive eligibility determination has been made.

**Duplication:**

There are no duplicative or conflicting rules identified.

**Alternatives:**

Establishing criteria for presumptive eligibility for the Family Planning Benefit Program is mandated by section 366(1) of the SSL. Processing through a statewide vendor was chosen over processing through local districts to centralize administration of eligibility determinations.

**Federal Standards:**

The federal Medicaid statute at section 2303(b) of the Affordable Care Act (ACA) added a new section (1920C) to the Social Security Act that gives States that adopt the new family planning group the option of also providing a period of presumptive eligibility based on preliminary information that an individual meets the eligibility criteria for family planning services in new section 1902(ii).

**Compliance Schedule:**

Social services districts should be able to comply with the proposed regulations when they become effective.

**Regulatory Flexibility Analysis**

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

**Cure Period:**

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

## EMERGENCY RULE MAKING

### Expand Medicaid Coverage of Enteral Formula

**I.D. No.** HLT-52-13-00001-E

**Filing No.** 167

**Filing Date:** 2014-03-04

**Effective Date:** 2014-03-04

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

**Action taken:** Amendment of section 505.5 of Title 18 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The 2011-2012 Executive Budget placed limitations on Medicaid coverage of enteral formula. In response, stakeholders expressed the concern that these benefits limits were too restrictive as applied to a small population of individuals substantially at risk and nutritionally compromised who require oral supplemental nutrition. Consequently, in Chapter 56 of the Laws of 2012, the Legislature amended section 365-a of the Social Services Law to authorize the Department to establish standards for Medicaid coverage of enteral formula for persons with a diagnosis of HIV infection, AIDS or HIV-related illness, or other diseases and conditions. The proposed regulations carry out this Legislative intent. The Department has determined that it is necessary to adopt the regulations on an emergency basis to protect the health of medically fragile persons with declining medical and nutritional status who need access to enteral formula.

**Subject:** Expand Medicaid Coverage of Enteral Formula.

**Purpose:** To expand Medicaid coverage of enteral formula for individuals with HIV infection, AIDS or HIV-related illness or other diseases.

**Text of emergency rule:** Paragraph (3) of subdivision (g) of Section 505.5 of Title 18 is amended to read as follows:

(3) Enteral nutritional formulas are limited to coverage for:

(i) tube-fed individuals who cannot chew or swallow food and must obtain nutrition through formula via tube;

(ii) individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means; [and for]

(iii) children under age 21 when caloric and dietary nutrients from food cannot be absorbed or metabolized[.]; and

(iv) persons with a diagnosis of HIV infection, AIDS, or HIV-related illness, or other disease or condition, who are oral-fed and who:

(a) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 18.5 as defined by the Centers for Disease Control, up to 1,000 calories per day; or

(b) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 22 as defined by the Centers for Disease Control and a documented, unintentional weight loss of 5 percent or more within the previous 6 month period, up to 1,000 calories per day; or

(c) require total nutritional support, have a permanent structural limitation that prevents the chewing of food, and the placement of a feeding tube is medically contraindicated.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-52-13-00001-P, Issue of December 24, 2013. The emergency rule will expire May 2, 2014.

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

**Regulatory Impact Statement**

**Statutory Authority:**

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program. In addition, SSL section 365-a(2)(g) authorizes the Commissioner of the Department to establish standards related to enteral formula

therapy and nutritional supplements for persons with a diagnosis of HIV infection, AIDS or HIV-related illness or other diseases and conditions.

**Legislative Objective:**

The legislative objective of this authority is to expand Medicaid coverage of enteral formula for individuals with HIV infection, AIDS or HIV-related illness or other diseases and conditions which can result in poor nutritional status.

**Needs and Benefits:**

Enteral nutritional formulas are ordered by practitioners and dispensed by pharmacy or durable medical equipment providers. Medicaid reimburses the cost of enteral formulas for administration via tube, or for oral nutrition when used for treatment of an inborn metabolic disorder, or to address growth and development issues in children. In 2012, the Legislature expanded Medicaid coverage of enteral formulas to persons with a diagnosis of HIV infection, AIDS or HIV-related illness (and potentially to persons with other diseases and conditions), subject to standards established by the Commissioner of the Department. The statutory change was intended to benefit underweight adults and adults who have rapid short term weight loss, who need oral enteral formula to supplement their diet.

The proposed rule would provide coverage of enteral formulas to persons with a diagnosis of HIV infection, AIDS, or HIV-related illness, or other disease or condition, who are oral-fed and who: (a) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 18.5 as defined by the Centers for Disease Control, up to 1,000 calories per day; or (b) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 22 as defined by the Centers for Disease Control and a documented, unintentional weight loss of 5 percent or more within the previous 6 month period, up to 1,000 calories per day; or (c) require total nutritional support, have a permanent structural limitation that prevents the chewing of food, and the placement of a feeding tube is medically contraindicated.

**Costs:**

**Costs to the State and Local Government:**

The expansion of coverage of enteral formula is estimated to result in an increase in Medicaid expenditures of \$3.5 million. Because the local social services districts' share of Medicaid costs is statutorily capped, it is expected that there will be no additional costs to local governments as a result of this proposed regulation.

**Costs to Private Regulated Parties:**

Regulated entities will not incur any costs as a result of this rule.

**Costs to the Regulatory Agency:**

DOH will incur an estimated cost of \$20,000 to implement necessary changes to the automated phone authorization system, which processes the majority of enteral related authorizations for providers. Utilization management measures will reallocate existing staff resources equivalent to one full time employee.

**Local Government Mandates:**

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

**Paperwork:**

This amendment will require practitioners and dispensers to obtain any necessary authorizations and complete the related required paperwork to the extent they provide enteral formula to individuals who qualify for coverage under the new benefit expansion.

**Duplication:**

This regulation does not duplicate any existing federal, state or local government regulation.

**Alternatives:**

The Department could expand the coverage of enteral formula to a more defined group based on age, diagnosis, or other factors. However, the proposed changes are felt to represent the most cost effective method of expanding coverage to at risk individuals not currently covered by the existing benefit limit.

**Federal Standards:**

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas and does not result in reimbursement by Medicaid at a higher level than established federal reimbursement for enterals.

**Compliance Schedule:**

It is anticipated that regulated persons would be able to comply with the rule immediately.

**Regulatory Flexibility Analysis**

**Effect on Small Business and Local Governments:**

This amendment affects 3123 pharmacies and 369 durable medical equipment providers enrolled in the Medicaid program that actively bill Medicaid for enterals. The amendment will expand the enteral benefit which will increase Medicaid utilization and billable claims for these businesses.

The expansion of coverage of enteral formula is estimated to result in an increase in Medicaid expenditures of \$3.5 million. Because the local social services districts' share of Medicaid costs is statutorily capped, it is expected that there will be no additional costs to local governments as a result of this proposed regulation.

**Compliance Requirements:**

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

**Professional Services:**

No new professional services are required as a result of this amendment.

**Compliance Costs:**

There are no direct costs of compliance with this amendment.

**Economic and Technological Feasibility:**

The enteral benefit limit is operationalized through beneficiary information and the practitioner's fiscal order for the enteral formula. Based on this information, a dispenser is able to provide enteral formula for tube-fed individuals who cannot chew or swallow food, individuals with rare inborn metabolic disorders, children when necessary to address growth and development concerns, adults who require supplemental nutrition up to 1,000 calories per day and are either underweight, or have a body mass index under 22 and have demonstrated an unintentional 5% weight loss within the previous 6 month period, and adults with a permanent structural limitation that prevents the chewing of food, for whom a feeding tube is medically contraindicated. Since the amendment will not change the way providers bill for services or affect the way the local districts contribute their local share of Medicaid expenses, there should be no concern about economic or technological difficulties associated with compliance of the proposed regulation.

**Minimizing Adverse Impact:**

No adverse impact is anticipated as the legislation amendment will expand the existing benefit limit.

**Small Business and Local Government Participation:**

The Department invited participation in developing coverage standards through email outreach, a webinar presentation and social media. Proposed coverage change options were presented. The stakeholder feedback received was given substantial weight when making the proposed regulation amendment. A second webinar will be scheduled to inform stakeholders of the specific changes that are being proposed. Upon adoption of the regulation, DOH will inform stakeholders of the changes in coverage and associated prior authorization modifications.

**Cure Period:**

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

**Rural Area Flexibility Analysis**

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

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

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

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
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Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

This rule will apply to 3123 pharmacies and 369 durable medical equipment providers in New York State. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

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

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

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

**Minimizing Adverse Impact:**  
The rule is not expected to have any adverse impact on public and private sector interests in rural areas.

**Opportunity for Rural Area Participation:**  
The Department meets on a regular basis with providers groups such as the New York Medical Equipment Providers (NYMEP), who represents some rural providers. Webinar and social media sessions are accessible to providers statewide, including rural providers.

**Job Impact Statement**

**Nature of Impact:**  
This rule will result in increased Medicaid billable claims for 3123 pharmacies and 369 durable medical equipment providers. The increase in revenue should not have an adverse impact on jobs and employment opportunities within these businesses.

**Categories and Numbers Affected:**  
This rule, which increases Medicaid revenue for providers, should not have any adverse effect on employment opportunities.

**Regions of Adverse Impact:**  
No region of New York State should realize adverse impact from this rule given the potential increase in Medicaid revenue for providers.

**Minimizing Adverse Impact:**  
No adverse impact is anticipated given that this rule expands the existing benefit limit.

**Self-Employment Opportunities:**  
The rule is expected to have minimal impact on self-employment opportunities since it expands the benefit limit and the majority of providers that will be affected by the rule are not small businesses or sole proprietors solely dispensing enteral to Medicaid beneficiaries.

with the State, including Statewide elected officials, State officers, employees, members of the Legislature, and Legislative employees.

Currently, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes must synthesize information from a number of different sources, including the statutory language and multiple 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. The regulations provide clear guidance to questions concerning who is covered by the gift statutes, what qualifies as a gift or as an exception, and what requirements apply to the covered individuals.

**Revised rule compared with proposed rule:** Substantive revisions were made in sections 933.2(q), 933.3(c) and 933.4(a)(7).

**Text of revised proposed 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

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

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

**Revised Regulatory Impact Statement**

1. Statutory authority: 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 certain individuals affiliated with the State, including Statewide elected officials, State officers, State employees, members of the Legislature, and Legislative employees. (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, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes 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 proposed rulemaking is necessary to regulate and clarify the requirements for State officers and employees and Members of the Legislature and employees covered by the gift prohibition set forth in Public Officers Law § 73(5). The regulations provide clear guidance to questions about who is covered by the gift prohibition, 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 draft revised 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 revised proposed 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 legislative employee or Member of the Legislature.

Part 933.3 specifies when a Gift can be solicited, received, or accepted by an individual covered by the regulations (referred to as 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 individual subject to the gift regulations; 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 circum-

## New York State Joint Commission on Public Ethics

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

**Gift Regulations**

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

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

**Proposed Action:** Addition of Part 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 offer, acceptance, and solicitation contained in the Public Officers Law.

**Substance of revised rule:** A summary of the rule follows because the full text of the rule is over 2,000 words:

Executive Law section 94(17)(a) directs the Joint Commission on Public Ethics (“JCOPE”) to promulgate rules concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Public Officers Law section 73(5) establishes the restrictions on soliciting, accepting, or receiving gifts (the Public Officers Law utilizes the definition of a gift, and exclusions from the definition, that are contained in Legislative Law Article 1-A, section 1-c(j)) that apply to certain individuals affiliated

stances, 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 revised draft 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 draft revised 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 draft revised regulations no longer require prior approval; rather, an individual must notify his State Agency prior to attending the event. Additionally, the draft revised 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 any item or service that is not a Gift because it has less than a 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 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 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**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the gift regulations may, indirectly, affect what items and services certain small businesses and local governments can offer or give to certain individuals employed by or otherwise affiliated with the state, this does not impose extensive record-keeping requirements or other adverse economic impacts on these entities.

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

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the gift regulations affect what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. Rural areas are not affected in any way.

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

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the gift regulations apply only to what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. This regulation does not apply nor relate to economic development or employment opportunities.

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

The Commission received public comments from four entities.

The first commenter suggested that the Part be revised so that the definition of "Gift" is followed immediately by a listing of all exceptions to that definition, rather than requiring a review of other subsections of the proposed rule to determine the permissibility of a Gift. This commenter also raised concerns about what knowledge the recipient must have about the offeror and the offeror's intent prior to accepting the Gift. The commenter suggested that, for consistency, the fifteen dollar threshold for the food and beverage exclusion also be used in the definition of "Nominal Value." The commenter also called for the inclusion of an exception to the definition of Gift for items or services given for customary or special occasions.

The Commission considered each of these comments and is of the view that the current structure of the regulations provides the most clarity. With respect to the comments concerning the intent of the donor, the Commission does not believe that the regulations require any individual to ascertain the state of mind of the person offering the Gift. The Commission is generally of the view that, with respect to dollar amount thresholds, there should be consistency within the regulations. Accordingly, the revised draft regulations amend the definition of Nominal Value to include the following language: "The Commission . . . generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value." Finally, the Commission rejected the suggestion of adding the requested exclusion to the regulations. In the Commission's estimation, this exclusion was overbroad. Moreover, the existing statutory exclusions, in the Commission's view, already covered a number of circumstances that the proposed exclusion sought to include.

The second entity commented on the aspect of the regulations concerning the Widely Attended Event exclusion. Specifically, the entity noted that the proposed regulations permit a State employee to take part in entertainment, recreational activity, or a reception at an acceptable event where such activities are part of the regular agenda of the event. The agency requested clarification of the phrase "part of the regular agenda of the event." In response to this comment, the Commission revised Part 933.4(a)(7) to clarify when food and beverage, as well as entertainment, recreational, and sporting activities are part of the Widely Attended Event exclusion.

The third entity commented that the Commission should affirm its jurisdiction over Members of the Legislature as well as Legislative employees. The commenter supported the proposed definition of Interested Source to include spouses and unemancipated children, but asked why the exclusion for food and beverages is valued at fifteen dollars or less while the definition of Nominal Value for other types of Gifts would be ten dollars. It also asked whether it may be advisable to set a cost threshold for approval of Widely Attended Events.

The Commission believes that the regulations are clear with respect to their application to Members of the Legislature and Legislative employees and are not, therefore, in need of further revision. With respect to the definition of Nominal Value, the Commission, as noted above, made a proposed revision to the definition. Finally, the Commission is of the view that given the language of the statutory exclusion for a Widely Attended Event, as well as the diverse array of events that could fall under this exclusion, a cost threshold for the applicability of the exclusion is not advisable.

The fourth entity questioned the fact that the regulations maintain the concept of a "Disqualified Source" utilized in Advisory Opinions issued by predecessor agencies (the draft regulations changed the nomenclature from "Disqualified Source" to "Interested Sources"), but eliminate the per

se bar against accepting Gifts from such sources. The entity opined that this aspect of the regulations would likely create uncertainty as to what is permissible. Finally, the entity stated that the proposed regulations require written pre-approval to attend a Widely Attended Event, but do not state the consequences for failing to do so.

The per se bar on Gifts from Disqualified Sources originated in an Advisory Opinion issued by a predecessor agency. The Commission is of the view that the elimination of this 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. With respect to the comment concerning failure to obtain pre-approval in order to avail oneself of the Widely Attended Event exception, the Commission, as noted above, has proposed revisions to the regulations that eliminate this requirement and, instead, merely require notification.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Gift Regulations for Lobbyists and Their Clients

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

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

**Proposed Action:** Addition of Part 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’’).

**Substance of revised rule:** A summary of the rule follows because the full text of the rule is over 2,000 words:

Executive Law section 94(17)(a) directs the Joint Commission on Public Ethics (‘‘JCOPE’’) to promulgate rules concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Public Officers Law section 73(5) establishes the restrictions on soliciting, accepting, or receiving gifts (the Public Officers Law utilizes the definition of a gift, and exclusions from the definition, that are contained in Legislative Law Article 1-A, section 1-c(j)) that apply to certain individuals affiliated with the State, including Statewide elected officials, State officers, employees, members of the Legislature, and Legislative employees.

Currently, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes must synthesize information from a number of different sources, including the statutory language and multiple 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. The regulations provide clear guidance to questions concerning who is covered by the gift statutes, what qualifies as a gift or as an exception, and what requirements apply to the covered individuals.

**Revised rule compared with proposed rule:** Substantive revisions were made in sections 934.2(m), 934.3(c), (f) and 934.4(a)(4).

**Text of revised proposed 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

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

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

#### Revised Regulatory Impact Statement

1. **Statutory authority:** 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 certain individuals affiliated with the State, including Statewide elected officials, State officers, State employees, members of the Legislature, and Legislative employees. (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, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes 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, accep-

tion, or receipt of a Gift is appropriate, these rules provide a comprehensive set of requirements for Covered Persons.

3. **Needs and benefits:** The proposed rulemaking is necessary to regulate and clarify the requirements for State officers and employees and Members of the Legislature and employees covered by the gift prohibition set forth in Public Officers Law § 73(5). The regulations provide clear guidance to questions about who is covered by the gift prohibition, 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 draft revised 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 revised proposed 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 legislative employee or Member of the Legislature.

Part 933.3 specifies when a Gift can be solicited, received, or accepted by an individual covered by the regulations (referred to as 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 individual subject to the gift regulations; 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 revised draft 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 draft revised 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 draft revised regulations no longer require prior approval; rather, an individual must notify his State Agency prior to attending the event. Additionally, the draft revised 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 any item or service that is not a Gift because it has less than a 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 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 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**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the gift regulations may, indirectly, affect what items and services certain small businesses and local governments can offer or give to certain individuals employed by or otherwise affiliated with the state, this does not impose extensive record-keeping requirements or other adverse economic impacts on these entities.

**Revised Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the gift regulations affect what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. Rural areas are not affected in any way.

**Revised Job Impact Statement**

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the gift regulations apply only to what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. This regulation does not apply nor relate to economic development or employment opportunities.

**Assessment of Public Comment**

The Commission received public comments from four entities.

The first commenter suggested that the Part be revised so that the definition of "Gift" is followed immediately by a listing of all exceptions to that definition, rather than requiring a review of other subsections of the proposed rule to determine the permissibility of a Gift. This commenter also raised concerns about what knowledge the recipient must have about the offeror and the offeror's intent prior to accepting the Gift. The commenter suggested that, for consistency, the fifteen dollar threshold for the food and beverage exclusion also be used in the definition of "Nominal Value." The commenter also called for the inclusion of an exception to the definition of Gift for items or services given for customary or special occasions.

The Commission considered each of these comments and is of the view that the current structure of the regulations provides the most clarity. With respect to the comments concerning the intent of the donor, the Commission does not believe that the regulations require any individual to

ascertain the state of mind of the person offering the Gift. The Commission is generally of the view that, with respect to dollar amount thresholds, there should be consistency within the regulations. Accordingly, the revised draft regulations amend the definition of Nominal Value to include the following language: "The Commission . . . generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value." Finally, the Commission rejected the suggestion of adding the requested exclusion to the regulations. In the Commission's estimation, this exclusion was overbroad. Moreover, the existing statutory exclusions, in the Commission's view, already covered a number of circumstances that the proposed exclusion sought to include.

The second entity commented on the aspect of the regulations concerning the Widely Attended Event exclusion. Specifically, the entity noted that the proposed regulations permit a State employee to take part in entertainment, recreational activity, or a reception at an acceptable event where such activities are part of the regular agenda of the event. The agency requested clarification of the phrase "part of the regular agenda of the event." In response to this comment, the Commission revised Part 938.4(a)(7) to clarify when food and beverage, as well as entertainment, recreational, and sporting activities are part of the Widely Attended Event exclusion.

The third entity commented that the Commission should affirm its jurisdiction over Members of the Legislature as well as Legislative employees. The commenter supported the proposed definition of Interested Source to include spouses and unemancipated children, but asked why the exclusion for food and beverages is valued at fifteen dollars or less while the definition of Nominal Value for other types of Gifts would be ten dollars. It also asked whether it may be advisable to set a cost threshold for approval of Widely Attended Events.

The Commission believes that the regulations are clear with respect to their application to Members of the Legislature and Legislative employees and are not, therefore, in need of further revision. With respect to the definition of Nominal Value, the Commission, as noted above, made a proposed revision to the definition. Finally, the Commission is of the view that given the language of the statutory exclusion for a Widely Attended Event, as well as the diverse array of events that could fall under this exclusion, a cost threshold for the applicability of the exclusion is not advisable.

The fourth entity questioned the fact that the regulations maintain the concept of a "Disqualified Source" utilized in Advisory Opinions issued by predecessor agencies (the draft regulations changed the nomenclature from "Disqualified Source" to "Interested Sources"), but eliminate the per se bar against accepting Gifts from such sources. The entity opined that this aspect of the regulations would likely create uncertainty as to what is permissible. Finally, the entity stated that the proposed regulations require written pre-approval to attend a Widely Attended Event, but do not state the consequences for failing to do so.

The per se bar on Gifts from Disqualified Sources originated in an Advisory Opinion issued by a predecessor agency. The Commission is of the view that the elimination of this 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. With respect to the comment concerning failure to obtain pre-approval in order to avail oneself of the Widely Attended Event exception, the Commission, as noted above, has proposed revisions to the regulations that eliminate this requirement and, instead, merely require notification.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

**Prevention of Influenza Transmission**

**I.D. No.** OMH-08-14-00014-E

**Filing No.** 162

**Filing Date:** 2014-02-28

**Effective Date:** 2014-02-28

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

**Action taken:** Addition of Part 509 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07, 7.09 and 31.04

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

**Specific reasons underlying the finding of necessity:** The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services in OMH-operated psychiatric centers and freestanding psychiatric hospitals licensed under Article 31 of the Mental Hygiene Law.

Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State have been worse than those experienced a decade ago. In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks. Recently, the New York State Department of Health adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent.

It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention. Therefore, OMH is adopting on an emergency basis this rule to require that, during the influenza season, all OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals shall ensure that all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Facilities shall supply such masks to personnel, free of charge.

For the health and safety of patients in OMH-operated psychiatric hospitals and Article 31 licensed freestanding psychiatric facilities, this rule is being adopted on an emergency basis until such time as it has been formally adopted through the SAPA rule promulgation process.

**Subject:** Prevention of Influenza Transmission.

**Purpose:** Require unvaccinated personnel to wear surgical masks in certain OMH-licensed or operated psychiatric centers during flu season.

**Text of emergency rule:** A new Part 509 is added to Title 14 NCYRR as follows:

#### PART 509

##### PREVENTION OF INFLUENZA TRANSMISSION

###### § 509.1 Background and Intent.

(a) Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State have been worse than those experienced a decade ago.

(b) In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

(c) Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

(d) Recently, the New York State Department of Health (DOH) adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health

agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

(e) It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention.

###### § 509.2 Legal Base.

(a) Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

(b) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

###### § 509.3 Definitions. For the purposes of this Part:

(a) Facility shall mean:

(1) a psychiatric center established pursuant to Section 7.17 of the Mental Hygiene Law; including all programs or services operated by, or under the auspices of, such psychiatric center;

(2) a hospital operated pursuant to Part 582 of this Title.

(b) Influenza season shall mean the period of time during which influenza is prevalent as determined by the Commissioner of Health.

(c) Personnel shall mean all persons employed or affiliated with a facility, as defined in this Section, whether paid or unpaid, including but not limited to employees, members of the medical, nursing, and other treatment staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with influenza, they could potentially expose patients to the disease.

###### Section 509.4 Documentation Requirements.

(a) All facilities shall determine and document which persons qualify as "personnel" under this Part.

(b) All facilities shall document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. Documentation of vaccination must include the name and address of the individual who ordered or administered the vaccine and the date of vaccination.

(c) During the influenza season, all facilities shall ensure that all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Facilities shall supply such masks to personnel, free of charge.

(d) Upon the request of the Office, a facility must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season.

(e) All facilities shall develop and implement a policy and procedure to ensure compliance with the provisions of this Part. The policy and procedure shall include, but is not limited to, the identification of those areas where unvaccinated personnel must wear a mask pursuant to subdivision (c) of this Section.

(f) For those facilities that are required to comply with 10 NYCRR Section 2.59, compliance with such Section shall be deemed compliance with this Part.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. OMH-08-14-00014-P, Issue of February 26, 2014. The emergency rule will expire April 28, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

###### Regulatory Impact Statement

1. Statutory authority: Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and charges OMH with the responsibility for ensuring that persons with mental illness receive high quality care and treatment. The proposed rule creates a new 14 NYCRR Part 509 to establish provisions designed to reduce the transmission of the influenza virus in inpatient psychiatric facilities operated or licensed by OMH. This rule furthers the legislative policy of providing high quality services to individuals with mental illness in a safe and secure environment.

3. Needs and benefits: Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State were worse than experienced in a decade, and serve as a reminder that influenza could have this devastating effect in any year. In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

The new 14 NYCRR Part 509 establishes provisions whereby all OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and Article 31 "free standing" psychiatric hospitals shall ensure that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Such masks shall be provided free of charge to personnel. Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

Recently, the New York State Department of Health adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention. On December 2, 2013, the Office of Mental Health issued an influenza health alert for all OMH-operated psychiatric centers and "free standing" licensed Article 31 psychiatric hospitals.

4. (a) Costs to local government: These regulatory amendments will not result in any additional costs to local government.

(b) Costs to State and regulated parties: Although it is impossible to quantify the exact cost of providing surgical or procedure masks for those personnel who have not been vaccinated, it is anticipated that this cost will not be significant. The Department of Health estimates that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. This is a modest investment to protect the health and safety of patients and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism, including personnel working less effectively or being unable to work. Therefore, the minimal cost of surgical or procedure masks is expected to be offset by the savings reflected in a reduction of influenza in personnel and the loss of productivity and available staff.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts, except to the extent that the local governmental unit is a provider of services.

6. Paperwork: This rule will result in a minor increase in the paperwork requirements of all facilities covered by the regulation as they will have to determine and document which persons qualify as personnel under the new Part 509. Facilities must document the influenza vaccination status of

all personnel for the current influenza season in a secure file separate from an individual's personnel history folder. Upon request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements. In instances where an inpatient program is required to comply with the Department of Health regulations found in 10 NYCRR Section 2.59, compliance with that section shall be deemed compliance with this Part.

8. Alternatives: One alternative to requiring a surgical or procedure mask for unvaccinated personnel would be to require all personnel to be vaccinated for influenza. While OMH strongly encourages all personnel be vaccinated, requiring unvaccinated staff to wear a surgical or procedure mask is the most effective and least burdensome way to immediately reduce the potential for transmission of influenza at this time. The only other alternative that was considered was inaction, but because of the seriousness of the influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs, that alternative was necessarily rejected.

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

10. Compliance schedule: These regulatory amendments will be effective immediately upon adoption.

#### **Regulatory Flexibility Analysis**

The provisions of the new 14 NYCRR Part 509 apply to OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" psychiatric hospitals licensed under Article 31 of the Mental Hygiene Law. All of these hospitals employ more than 100 people; therefore, none of them qualify as a small business. The proposed rule creating a new 14 NYCRR Part 509 establishes provisions designed to reduce the transmission of the influenza virus by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. As there will be no adverse economic impact on small business or local governments, a Regulatory Flexibility Analysis for Small Business and Local Governments has not been submitted with this notice.

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

1. Description of the types and estimation of the number of rural areas in which the rule will apply: In New York State, 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The rule establishes provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Reporting, recordkeeping and other compliance requirements and professional services: All facilities covered by the regulation will have to determine and document which persons qualify as personnel under the new Part 509. In addition, facilities must document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. At the request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current flu season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part. No additional professional services are required as a result of this regulation.

3. Compliance costs: There will be modest costs to providers, regard-

less of their geographic location, as a result of this regulation. The exact costs, while impossible to quantify, are not expected to be significant. The Department of Health has estimated that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. These costs are expected to be offset by the savings reflected in the reduction of influenza in personnel and the loss of productivity and available staff.

4. Minimizing adverse impact: The regulations could have required all personnel be vaccinated for influenza; however, OMH believes it to be less burdensome to require the use of surgical or procedure masks for personnel who have not been vaccinated. The requirement to wear a surgical mask does not impose any physical limitations on the individual wearing the mask, as it would if the regulation required the use of a respirator, which would provide a higher level of protection. In addition, the requirement that personnel who have not been vaccinated wear a mask is only in effect during influenza season as determined by the Commissioner of Health.

5. Participation of public and private interests in rural areas: OMH has released a health advisory notifying OMH-operated psychiatric centers and free standing Article 31 psychiatric hospitals that the agency is promulgating a regulation establishing provisions designed to reduce the transmission of the influenza virus. The health advisory was shared with union representatives. In accordance with statutory requirements, the rule was presented to the Behavioral Health Services Advisory Council for review and recommendation at their meeting on December 13, 2013. The Council voted to approve the proposal.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted with this rule making. The new 14 NYCRR Part 509 is being created to establish provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and “free standing” Article 31 psychiatric hospitals. It is apparent from the nature and purpose of the rule that it will not have an impact on jobs and employment opportunities.

### **NOTICE OF ADOPTION**

#### **Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health**

**I.D. No.** OMH-01-14-00013-A

**Filing No.** 166

**Filing Date:** 2014-03-04

**Effective Date:** 2014-03-19

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

**Action taken:** Amendment of Part 577 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02

**Subject:** Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health.

**Purpose:** Remove the 2014 trend factor for article 31 private psychiatric hospitals effective January 1, 2014.

**Text or summary was published** in the January 8, 2014 issue of the Register, I.D. No. OMH-01-14-00013-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 5th year after the year in which this rule is being adopted.

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

The agency received no public comment.

## **Department of Motor Vehicles**

### **NOTICE OF ADOPTION**

#### **Appeals Board Procedures**

**I.D. No.** MTV-01-14-00002-A

**Filing No.** 168

**Filing Date:** 2014-03-04

**Effective Date:** 2014-03-19

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

**Action taken:** Amendment of Part 155 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 261, 469 and 471-a(5)

**Subject:** Appeals Board procedures.

**Purpose:** To conform Part 155 to the appeals Board’s current policies and procedures.

**Text or summary was published** in the January 8, 2014 issue of the Register, I.D. No. MTV-01-14-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

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

The agency received no public comment.

### **NOTICE OF ADOPTION**

#### **License Plates for Person with Disabilities**

**I.D. No.** MTV-01-14-00005-A

**Filing No.** 169

**Filing Date:** 2014-03-04

**Effective Date:** 2014-03-19

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

**Action taken:** Amendment of Part 24 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 404-a

**Subject:** License plates for person with disabilities.

**Purpose:** To conform Part 24 to statutory provisions regarding license plates for persons with disabilities.

**Text or summary was published** in the January 8, 2014 issue of the Register, I.D. No. MTV-01-14-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

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

The agency received no public comment.

## **Office for People with Developmental Disabilities**

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

#### **Pathway to Employment Service**

**I.D. No.** PDD-11-14-00012-P

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

**Proposed Action:** Amendment of Subparts 635-10, 635-99 and section 686.99 of Title 14 NYCRR.

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

**Subject:** Pathway to Employment Service.

**Purpose:** To establish Pathway to Employment as a new HCBS waiver service.

**Text of proposed rule:** A new subdivision 635-10.4(h) is added as follows:

(h) Pathway to employment is a person-centered, comprehensive career/vocational employment planning and support service that provides assistance for individuals to obtain, maintain or advance in competitive employment or self-employment. This service combines an individualized career/vocational planning process that identifies the individual's support needs, with the provision of services that will strengthen the skills needed to obtain, maintain or advance in competitive employment. It engages individuals in identifying a career/vocational direction, provides instruction and training in pre-employment skills, and develops a path for achieving competitive, integrated employment at or above the New York State minimum wage.

(1) The pathway to employment service consists of specific allowable activities that are listed in subparagraphs (i) and (ii) of this paragraph.

(i) The following allowable activities only involve direct service provision to the individual. Direct service provision consists of activities involving interaction with the individual.

(a) job readiness training, including individualized and appropriate work related behaviors;

(b) instruction and teaching of tasks necessary to obtain employment;

(c) individualized and ongoing job coaching;

(d) travel training;

(e) stress management, social skill development and interpersonal skill building;

(f) vocational observation and assessment;

(g) situational observation and assessment;

(h) job-related discovery;

(i) experiential learning in career exploration and vocational discovery;

(j) experiential learning to achieve a specific career/vocational outcome;

(k) assessment for use of assistive technology to increase independence in the workplace;

(l) community experiences through volunteer opportunities, paid or unpaid internships, mentorships, apprenticeships, job clubs, work site visits, job placement, or other job exploration modalities (Note: individuals participating in paid internships must be paid at least the minimum wage);

(m) education and counseling around benefits management and employment;

(n) career/vocational planning;

(o) customized job development; and

(p) planning for self-employment, including identifying skills that could be used to start a business, and identifying business training and technical assistance that could be utilized in achieving self-employment goals.

(ii) The following allowable activities only involve indirect service provision to the individual. Indirect service provision consists of activities that take place on behalf of the individual and that do not involve interaction with the individual.

(a) observation and assessment of an individual's interactions and routines at home, in the community and within other services or programs that could translate into employable skills;

(b) development of community experiences through volunteer opportunities, paid or unpaid internships, mentorships, apprenticeships, job clubs, work site visits, job placement, or other job exploration modalities;

(c) preparing a pathway to employment service delivery plan;

(d) preparing a pathway to employment career/vocational plan.

(2) To receive the pathway to employment service, the following criteria must be met:

(i) The individual must express an interest in competitive employment or self employment. Competitive employment or self employment must be identified as a goal in the individual's individualized service plan (ISP);

(ii) The individual must be enrolled in the Home and Community Based Services (HCBS) Waiver; and

(iii) Delivery of the service must be in the best interests of the individual.

(3) The number of individuals receiving pathway to employment ser-

vices simultaneously from a service provider staff shall be limited to no more than 3 individuals.

(4) Pathway to employment service delivery plan. The service provider shall develop an individual-specific pathway to employment service delivery plan that guides the delivery of the service. Such service delivery plan shall:

(i) list the individual's objectives and the relevant allowable activities that are necessary to achieve the individual's career/vocational and employment goals and to prepare the individual to receive supported employment services provided under this subpart or under another State or federal program, and

(ii) outline the responsibilities of the individual and the service provider necessary to facilitate the successful delivery of the service and the achievement of the individual's career/vocational and employment goals.

Note: See section 635-99.1 of this part for requirements pertaining to review and revision of habilitation plans (including the pathway to employment service delivery plan) that are attached to or included in the ISP.

(5) Pathway to employment career/vocational plan. The service provider shall develop a pathway to employment career/vocational plan for each individual receiving the service.

(i) The career/vocational plan shall:

(a) identify and focus on the individual's career/vocational and employment goals, employment needs, talents, and natural supports; and

(b) serve as the individual's detailed career/vocational plan for guiding his or her employment supports.

(ii) Unless OPWDD authorizes an extension in accordance with paragraph 635-10.5(ad)(5) of this subpart that specifies a later timeframe for the completion of the plan, the pathway to employment provider shall develop the career/vocational plan no later than 12 months after the date the individual started receiving the service, or the date as of which the individual received 278 hours of the service, whichever occurs first. The pathway to employment provider shall give the career/vocational plan to the individual upon completion of the service.

Note: See subdivision 635-10.5(ad) of this subpart for requirements related to reimbursement of pathway to employment services.

• A new subdivision 635-10.5(ad) is added as follows and the remaining subdivisions are renumbered accordingly:

(ad) Pathway to employment. The following shall apply to the pathway to employment service.

(1) Reimbursement shall be contingent on prior OPWDD approval. OPWDD approval will be based on the following criteria:

(i) The individual must express an interest in competitive employment or self employment. Competitive employment or self employment must be identified as a goal in the individual's individualized service plan (ISP);

(ii) The individual must be enrolled in the Home and Community Based Services (HCBS) Waiver; and

(iii) Delivery of the service must be in the best interests of the individual.

(2) Unit of service. The unit of service for pathway to employment services shall be one hour equaling 60 minutes, and shall be reimbursed in 15-minute increments. When there is a break in the service delivery during a single day, the service provider may combine, for billing purposes, the duration of continuous periods/sessions of indirect service provision and/or the duration of continuous periods/sessions of direct service provision.

(3) Fee setting. Hourly fees are based on the following:

(i) The Region in which the individual lives - Region 1, Region 2 or Region 3.

(a) Region 1 (NYC) is New York City and includes the counties of New York, Bronx, Kings, Queens and Richmond;

(b) Region 2 (NYC suburban) includes the counties of Putnam, Rockland, Nassau, Suffolk, and Westchester;

(c) Region 3 (upstate New York) includes all other counties of New York State.

(ii) The number of individuals being served simultaneously - Individual (1) or Group (serving 2 or 3 individuals). Group size shall be limited to no more than 3 individuals.

(4) Fee schedule. The hourly fees for the pathway to employment service are as follows:

Pathway to Employment-- Fee is hourly per person		
Region	Individual Fee	Group Fee
Region 1	\$43.04	\$37.68
Region 2	\$41.92	\$35.64
Region 3	\$33.40	\$28.40

(5) *Timeframe for completion of service. The pathway to employment service is time limited to a maximum of 12 months and 278 hours of service for each individual, unless OPWDD authorizes an extension.*

(i) *If the service provider considers that an individual needs more than 12 months and/or additional hours to complete the service, the service provider may submit a written request to OPWDD, in the form and format specified by OPWDD, for an extension(s) of a period of time and/or number of hours.*

(ii) *OPWDD's decision on the extension request will be based on the following:*

(a) *whether the individual engaged (or will engage) in an internship or volunteer opportunity and has the potential to be hired within 6 months of the scheduled completion of the pathway to employment service;*

(b) *whether there is (or will be) a break in the provision of the pathway to employment service due to an individual's extended medical absence or personal hardship;*

(c) *whether unforeseen circumstances prevent (or will prevent) the service provider from maintaining continuous delivery of the pathway to employment service;*

(d) *the best interests of the individual; and/or*

(e) *the timeliness of the service provider's request for an extension.*

(iii) *In the event that an extension(s) is authorized by OPWDD, the extension(s) shall not exceed 12 months and 278 hours of service.*

(iv) *The service provider shall maintain documentation of OPWDD's authorization of the extension.*

(6) *Lifetime limit on hours of service delivery. There shall be a lifetime limit of a maximum of 556 hours of service delivery per each individual receiving the service.*

(7) *Billable service time. Billable service time is:*

(i) *time when staff are providing pathway to employment allowable activities listed in paragraph 635-10.4(h)(1) of this subpart in accordance with the individual's pathway to employment service delivery plan; and*

(ii) *time when staff are developing the pathway to employment service delivery plan.*

(8) *Restrictions on billable service time.*

(i) *Time spent receiving another Medicaid service shall not be counted toward pathway to employment billable service time in instances when the Medicaid service is received simultaneously with one or more pathway to employment allowable activities that involve direct service provision to the individual (see paragraph 635-10.4(h)(1) of this subpart). An exception is the provision of Medicaid Service Coordination (MSC), which may be provided simultaneously with allowable activities that involve direct service provision to the individual.*

(ii) *Pathway to employment billable service time for allowable activities that involve indirect service provision to the individual shall be limited to 60 hours of billable service time (see subparagraph 635-10.4(h)(1)(ii) of this subpart).*

(9) *Documentation. Reimbursement is contingent on compliance with the documentation requirements as follows:*

(i) *The service provider shall maintain documentation that the individual receiving pathway to employment services has received the services in accordance with the individual's ISP and pathway to employment service delivery plan (see paragraph 635-10.4(h)(3) of this subpart).*

(ii) *For each continuous indirect service provision period/session, the service provider shall document the service start time and the service stop time, the ratio of individuals to staff at the time of the indirect service provision and the provision of all allowable activities that were delivered in accordance with the individual's pathway to employment service delivery plan.*

(iii) *For each continuous direct service provision period/session, the service provider shall document the service start time and the service stop time, the ratio of individuals to staff at the time of the direct service provision and the provision of at least one allowable activity that was delivered in accordance with the individual's pathway to employment service delivery plan.*

(iv) *The service provider shall maintain any additional documentation necessary to demonstrate compliance with federal requirements related to pathway to employment.*

(10) *Use of Funds. The pathway to employment service provider must ensure that Medicaid revenue billed and received for the provision of the pathway to employment service is not used to pay salaries or stipends to individuals receiving the service.*

*Note: See subdivision 635-10.4(h) of this subpart for pathway to employment allowable activities and other requirements not related to reimbursement.*

- Subdivision 635-99.1(bk) is amended as follows:

... It is the responsibility of the person's chosen service coordinator to ensure that the ISP is reviewed at least semi-annually and includes consideration of the information obtained from other-than-OPWDD providers (if any), who are providing services (i.e., as appropriate, the individualized written rehabilitation plan (IWRP) or the individualized education plan (IEP)). The service coordinator should also ensure that a review of the ISP occurs when the person and/or his or her advocate request it; or when the capabilities, capacities or preferences of the person have changed and warrant a review; or when it is determined by the service coordinator that the prevailing plan (or portions thereof) is/are ineffective. If habilitation services are provided (i.e., residential habilitation, day habilitation, community habilitation, supported employment, pre-vocational services, *pathway to employment*), the relevant habilitation plan(s) must be developed, and on a semiannual basis thereafter, reviewed and revised as necessary by the habilitation service provider. [The service coordinator shall attach the relevant habilitation plan(s) to the ISP. With the following documents as attachments to the ISP, the ISP is complete] *The ISP shall include or contain as attachments the following: ...*

- Subdivision 686.99(ab) is amended as follows:

... It is the responsibility of the person's chosen service coordinator to ensure that the individualized service plan is reviewed at least semi-annually and includes consideration of the information obtained from other-than-OPWDD providers (if any), who are providing services (i.e., as appropriate, the individualized written rehabilitation plan (IWRP) or the individualized education plan (IEP)). The service coordinator should also ensure that a review of the ISP occurs when the person and/or his or her advocate request it; or when the capabilities, capacities or preferences of the person have changed and warrant a review; or when it is determined by the service coordinator that the prevailing plan (or portions thereof) is/are ineffective. If habilitation services are provided (i.e., residential habilitation, day habilitation, community habilitation, supported employment, prevocational services, *pathway to employment*), the relevant habilitation plan(s) must be developed, and on a semiannual basis thereafter, reviewed and revised as necessary by the habilitation service provider. [The service coordinator shall attach the relevant habilitation plan(s) to the ISP. With the following documents as attachments to the ISP, the ISP is complete] *The ISP shall include or contain as attachments the following: ...*

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, Office for People With Developmental Disabilities (OPWDD), 44 Holland Avenue, 3rd floor, Albany, NY 12229, (518) 474-1830, email: RAU.Unit@opwdd.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.

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

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

a. OPWDD has the statutory responsibility to provide and encourage the provision of appropriate programs, supports and services in the areas of care, treatment, habilitation, rehabilitation, and other education and training of persons with developmental disabilities, as stated in the New York State (NYS) Mental Hygiene Law Section 13.07.

b. OPWDD has the authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the NYS Mental Hygiene Law Section 13.09(b).

c. OPWDD has the statutory authority to adopt regulations concerning the operation of programs and the provision of services, as stated in the NYS Mental Hygiene Law Section 16.00.

2. **Legislative objectives:** The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 16.00 of the Mental Hygiene Law. The proposed amendments establish standards for the provision and funding of the Pathway to Employment service under the Home and Community-Based Services (HCBS) waiver and make minor technical changes in existing regulations.

3. **Needs and benefits:** Among the long-term goals that make up OPWDD's vision for individuals receiving services in its system is the goal that individuals fully participate in their communities. One of the ways in which OPWDD hopes to achieve this goal is by assisting individuals with obtaining competitive employment. In so doing, OPWDD offers a variety of services in integrated settings that allow individuals to work toward competitive employment. Further, OPWDD is establishing a new pre-employment service known as Pathway to Employment. OPWDD committed to establish this service in its transformation agreement with the Centers for Medicare and Medicaid Services (CMS).

Pathway to Employment is a person-centered, comprehensive employ-

ment planning and support service that engages individuals in identifying a career direction, provides instruction and training in pre-employment skills, and develops a plan for achieving competitive, integrated employment at or above minimum wage. The proposed regulations outline requirements pertaining to the provision and funding of this new service. The regulations promote proper delivery and effective implementation of the service, as well as facilitate compliance with OPWDD requirements concerning the service. Additionally, the regulations are necessary for OPWDD to meet its commitment to CMS and to be eligible for federal funding that is critical for appropriate and effective service provision to individuals receiving services in its system.

The proposed regulations focus on preparing individuals for employment in their respective communities. As such, some of the allowable activities for direct and indirect service provision include: community experiences through volunteer opportunities, paid or unpaid internships, mentorships, apprenticeships, job clubs, work site visits, job placement, or other job exploration modalities; instruction and teaching of tasks necessary to obtain employment; travel training; and stress management, social skill development, and interpersonal skill building. OPWDD considers that the Pathway to Employment service and corresponding regulations will bring it one step closer to achieving its vision and long-term goals for individuals receiving services in its system, while simultaneously implementing Governor Andrew M. Cuomo's New York State Olmstead Plan for community integration of individuals with developmental disabilities.

The proposed regulations require the development of a Pathway to Employment Career/Vocational Plan within 12 months of the start of the service or within 278 hours of service delivery (unless an extension is authorized by OPWDD), and include a lifetime limit on hours of service delivery. OPWDD expects that these timeframe requirements will direct individuals towards individualized, needs-based services in a timely manner. The timeframe requirements will motivate providers and individuals in determining whether or not an individual is ready for competitive employment. If the timeframe requirements do not motivate individuals in transitioning from pre-employment services to competitive employment as the requirements are intended to do, then the requirements will prompt individuals to select a more appropriate service option (e.g. prevocational services, community habilitation, self directed services or day habilitation).

Finally, the proposed amendments make minor technical changes to existing regulations to add conforming requirements concerning the new Pathway to Employment service and to address an unrelated change in OPWDD's system, which is the implementation of the electronic format of the Individualized Service Plan (ISP) or eISP. These changes are necessary to provide clarification and consistency concerning the compliance activities required of providers.

#### 4. Costs:

##### a. Costs to the Agency and to the State and its local governments:

OPWDD considers that the proposed amendments will be cost neutral for the State in the short term. The Pathway to Employment service is a new HCBS waiver service, and would normally result in additional costs to NYS in its role paying for Medicaid. However, OPWDD expects that individuals receiving the Pathway to Employment service will have a commensurate decrease in the receipt of other services in the OPWDD system (e.g. prevocational services and day habilitation services). OPWDD expects that the savings associated with the reduction in these other services will be approximately equal to the cost of providing the new Pathway to Employment service. OPWDD expects to see a reduction in Medicaid expenditures in the long term, since the Pathway to Employment service is designed to serve as a bridge between prevocational services/day habilitation services and competitive employment/self employment. When individuals transition to competitive employment (or self employment) after completing the Pathway to Employment service, they will likely receive supported employment services, which are less costly than day habilitation and prevocational services.

Even if the new Pathway to Employment service leads to an increase in Medicaid expenditures in a particular county, these amendments will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped. Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

If OPWDD provides Pathway to Employment services directly, it will incur costs to deliver the service and comply with the proposed amendments. The Medicaid program will reimburse OPWDD for Pathway to Employment at the fees stated in the proposed amendments. OPWDD spending on delivering the Pathway to Employment service is expected to be at the level of these fees, so that the cost of delivering the service will be approximately equal to the fees. Since Pathway to Employment is a new service, there is no actual cost data that OPWDD could use to determine the fees. In the absence of actual cost data, OPWDD used cost data for supported employment programs.

b. Costs to private regulated parties: There are no initial capital costs. Providers will incur costs to deliver the service and comply with the proposed amendments. The Medicaid program will reimburse providers for Pathway to Employment at the fees stated in the proposed amendments. OPWDD expects that providers will spend at the fee levels to deliver the Pathway to Employment service, so that the cost of delivering the service will be approximately equal to the fees. Since Pathway to Employment is a new service, there is no actual cost data that OPWDD could use to determine the fees. In the absence of actual cost data, OPWDD used cost data for supported employment programs.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: Providers of Pathway to Employment services will have to develop a Pathway to Employment service delivery plan and a Pathway to Employment career/vocational plan. Providers will also have to obtain prior OPWDD approval to receive reimbursement for each person served, and approval for extensions beyond the initial 12 months and 278 hours of service. Finally, providers will have to document provision of the service. The service plan and service documentation paperwork requirements are consistent with paperwork required for other HCBS waiver services (i.e., there must be a plan for each type of service and the provision of services must be documented) and are needed to ensure the services are consistent with the individual's needs and wants, and to ensure that federal and State Medicaid funds are properly spent. The requirements for prior approval of the service and extensions are necessary to ensure that the pathway to employment service is provided to individuals appropriate for the service.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to these services.

8. Alternatives: The Pathway to Employment service is subject to a 12 month and 278 hour time limit (which can be extended under certain circumstances). OPWDD considered imposing a time limit longer than 12 months. However, OPWDD determined that a 12 month and 278 hour time period is generally a reasonable period of time for individuals with an interest in competitive or self-employment to develop a plan for employment and obtain a job, and decided to limit the provision of this service to 12 months and 278 hours. OPWDD considers that individuals who are interested in competitive or self employment will have a strong motivation to achieve this goal, which will likely expedite the provision of pre-employment services. However, in an effort to facilitate individual specific service provision and to accommodate individuals who for certain reasons are unable to formulate employment outcomes upon completion of the 12 month and 278 hour timeframe requirement, the proposed amendments allow for an extension of the timeframe when authorized by OPWDD. There is, however, a lifetime limit of 24 months or 556 hours of service delivery because once a career path has been identified and a career/vocational plan has been created for an individual there will not be a need for additional Pathway to Employment services beyond 24 months or 556 hours.

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

10. Compliance schedule: OPWDD is planning to adopt the proposed amendments effective June 1, 2014. Providers who opt to offer the Pathway to Employment service will need to familiarize themselves with the service delivery, documentation, and billing requirements in advance of the initial start up of the service, and individuals interested in receiving the service will need to work with their service coordinator to add the service to their ISPs. OPWDD plans to provide all necessary information, training, and guidance to providers regarding the new requirements with enough lead time that providers can begin to provide the new service when the regulations go into effect. In addition, if providers are not ready to provide the service when the regulations become effective, providers can opt to begin the provision of the new service at a later date.

OPWDD has already informed providers about the Pathway to Employment service in numerous meetings/conferences, mailings to the field, and in materials posted on its website, so that providers will have sufficient lead time to prepare for this new service if interested in offering it upon promulgation of the regulations. OPWDD has also notified all providers of the proposed amendments approximately three months in advance of their effective date so that they may contact OPWDD for technical assistance before these regulations go into effect. Individuals who may be interested in receiving the service and family members have also been informed about the new service directly by OPWDD and through its network of providers (including agencies providing Medicaid Service Coordination) so that individuals can pursue the necessary changes in their ISP in time to begin to receive services when the regulations become effective.

#### *Regulatory Flexibility Analysis*

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded services are

provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. OPWDD is unable to estimate the portion of these agencies that may be considered to be small businesses. OPWDD anticipates that some of these agencies will opt to provide the new Pathway to Employment established in the proposed regulation; however, OPWDD is unable to estimate the number of agencies that will opt to provide the new service and that will be subject to the proposed regulations.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments establish standards for the provision and funding of the Pathway to Employment service under the Home and Community-Based Services (HCBS) waiver and make minor technical changes in existing regulations.

2. Compliance requirements: The proposed amendments will impose compliance requirements on agencies that opt to provide the Pathway to Employment service. Providers of the Pathway to Employment service will be responsible to provide some of the allowable activities specified in the amendments for individuals receiving the service and will have to document provision of such allowable activities. Providers of the Pathway to Employment service will have to develop a Pathway to Employment service delivery plan and a Pathway to Employment career/vocational plan for each individual receiving the service, in addition to other documentation requirements in the regulation (e.g. requirements related to requests for extensions of the timeframe for completion of the service).

OPWDD considers that the compliance requirements are necessary to ensure the proper use of federal and state public funds and that they are not burdensome as they are consistent with requirements for other HCBS waiver services with which providers are very familiar.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There will be costs related to the compliance requirements specified above for providers that opt to provide the Pathway to Employment service. The Medicaid program will reimburse providers for Pathway to Employment at the fees stated in the proposed amendments. Provider spending on delivering the Pathway to Employment service is expected to be at the level of these fees, so that the cost of delivering the service will approximately equal the fees. OPWDD does not expect costs to vary for providers that are small businesses or for local governments of different types and sizes.

5. Economic and technological feasibility: The proposed amendments do not impose the use of any new technological processes on regulated parties.

6. Minimizing adverse impact: The purpose of these proposed amendments is to establish the Pathway to Employment service and to specify the requirements pertaining to the provision and funding of this service. There will be costs to small business providers for the provision of the Pathway to Employment service; however OPWDD does not expect that such costs will result in an adverse impact to providers. Providers will be reimbursed at the fees stated in the proposed amendments and OPWDD expects that the cost of providing the service will approximately equal the fees providers are paid for the service.

OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act (SAPA). However, since the documentation, quality standards and other compliance provisions in the amendments are needed to ensure the proper use of federal and state public funds, OPWDD did not establish different compliance, reporting requirements or timetables on small business providers or local governments or exempt small business providers or local governments from these requirements and timetables.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including those members of the New York State Association of Community and Residential Agencies (NYSACRA) who have fewer than 100 employees, at numerous meetings and conferences. OPWDD has conveyed its employment goals, including its objective to promulgate these amendments, to providers, at four meetings/conferences in April 2013, six meetings/conferences in May 2013, four meetings/conferences in June 2013, and five meetings/conferences in September 2013. Further, OPWDD has notified providers of its commitment to establish the Pathway to Employment service in materials posted on its website and in mailings to the field, one of which was a mailing of an OPWDD document titled, "OPWDD Employment Transformation: Questions and Answers," sent out on June 10, 2013. OPWDD also informed all providers, including small business providers, of the proposed amendments approximately three months in advance of their scheduled effective date.

8. (IF APPLICABLE): For rules that either establish or modify a viola-

tion or penalties associated with a violation: The proposed amendments do not establish or modify a violation or penalties associated with a violation.

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

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The proposed amendments have been reviewed by OPWDD in light of their impact on rural areas. The proposed amendments establish standards for the provision and funding of the Pathway to Employment service under the Home and Community-Based Services (HCBS) waiver and make minor technical changes in existing regulations.

2. Compliance requirements: The proposed amendments will impose compliance requirements on agencies that opt to provide the Pathway to Employment service. Providers of the Pathway to Employment service will be responsible to provide some of the allowable activities specified in the amendments for individuals receiving the service and will have to document the provision of such allowable activities. Providers of the Pathway to Employment service will have to develop a Pathway to Employment service delivery plan and a Pathway to Employment career/vocational plan for each individual receiving the service, in addition to other documentation requirements in the regulation (e.g. requirements related to requests for extensions of the timeframe for completion of the service).

OPWDD expects that the compliance requirements are necessary to ensure the proper use of federal and state public funds and that they are not burdensome as they are consistent with requirements for other HCBS waiver services with which providers are very familiar.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: Providers will not have to incur any initial capital costs to comply with the proposed rule. There will be compliance costs for providers that opt to provide the Pathway to Employment service. OPWDD expects that providers' spending on the Pathway to Employment service will be at the level of the fees contained in the proposed amendments. The amendments divide the State into Region 1, Region 2 and Region 3, and the fees vary by region. With the exception of Putnam County, all counties with populations of less than 200,000 or townships with a population of 150 persons or less per square mile are located in Region 3. Putnam County is in Region 2. Therefore, the costs of providing the service will vary based on the region in which the provider is located.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to establish the Pathway to Employment service and to specify the requirements pertaining to the provision and funding of this service. OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act (SAPA). However, since the documentation, quality standards and other compliance provisions in the amendments are needed to ensure the proper use of federal and state public funds, OPWDD did not establish different compliance, reporting requirements or timetables on small business providers or local governments or exempt small business providers or local governments from these requirements and timetables.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers, including providers in rural areas such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, at numerous meetings and conferences. OPWDD has conveyed its employment goals, including its objective to promulgate these amendments, to providers, at four meetings/conferences in April 2013, six meetings/conferences in May 2013, four meetings/conferences in June 2013, and five meetings/conferences in September 2013. Further, OPWDD has notified providers of its commitment to establish the Pathway to Employment service in materials posted on its website and in mailings to the field, one of which was a mailing of an OPWDD document titled, "OPWDD Employment Transformation: Questions and Answers," sent out on June 10, 2013. OPWDD also informed all providers, including providers in rural areas, of the proposed amendments approximately three months in advance of their scheduled effective date.

#### **Job Impact Statement**

OPWDD is not submitting a Job Impact Statement for this emergency/proposed rulemaking because this rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The proposed amendments establish Pathway to Employment as a new Home and Community-Based Services (HCBS) Waiver service option for individuals receiving services in the OPWDD system. Specifically, the amendments provide requirements for the provision and funding of the Pathway to Employment service under the HCBS Waiver and make other minor technical changes to existing regulations. Providers will incur costs, including staff costs, to deliver the Pathway to Employment service, and providers will be reimbursed for delivering the service at the fees contained in the proposed amendments. OPWDD expects that individuals receiving the Pathway to Employment service will receive fewer other services in the OPWDD system (e.g. prevocational services and day habilitation services) so that the overall level of services delivered system-wide will remain level. Therefore, the overall staffing level in the OPWDD service system should remain level and these amendments should not have a substantial adverse impact on jobs or employment opportunities.

These amendments should increase employment for persons with developmental disabilities, and should have a positive effect of jobs and employment opportunities for this population.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### Approval of Petition of North Town Roosevelt, LLC for Clarification of the Commission's October 28, 2011 Order

**I.D. No.** PSC-18-13-00009-A

**Filing Date:** 2014-02-26

**Effective Date:** 2014-02-26

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

**Action taken:** On 2/20/14, the PSC adopted an order approving North Town Roosevelt, LLC's petition for clarification of conditions of submetering approval at North Town Roosevelt.

**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:** Approval of petition of North Town Roosevelt, LLC for clarification of the Commission's October 28, 2011 order.

**Purpose:** To approve the petition of North Town Roosevelt, LLC for clarification of the Commission's October 28, 2011 order.

**Substance of final rule:** The Commission, on February 20, 2014, adopted an order approving North Town Roosevelt, LLC's petition for clarification of the Commission's October 28, 2011 Order Reinstating Submetering Approval, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(08-E-0838SA7)

### NOTICE OF ADOPTION

#### Approving a Waiver of 16 NYCRR Sections 894.1 Through 894.4

**I.D. No.** PSC-39-13-00015-A

**Filing Date:** 2014-02-26

**Effective Date:** 2014-02-26

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

**Action taken:** On 2/20/14, the PSC adopted an order approving the petition of the Town of Clare to waive 16 NYCRR, sections 894.1 through 894.4 pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Approving a waiver of 16 NYCRR sections 894.1 through 894.4.

**Purpose:** To approve a waiver of 16 NYCRR sections 894.1 through 894.4.

**Substance of final rule:** The Commission, on February 20, 2014, adopted an order approving a petition of Town of Clare, St. Lawrence County to waive the requirements of sections 894.1, 894.2, 894.3 and 894.4 to expedite the franchising process, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(13-V-0377SA1)

### NOTICE OF ADOPTION

#### Approving a Waiver of 16 NYCRR Sections 894.1 Through 894.4

**I.D. No.** PSC-47-13-00010-A

**Filing Date:** 2014-02-26

**Effective Date:** 2014-02-26

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

**Action taken:** On 2/20/14, the PSC adopted an order approving the petition of the Town of Bellmont to waive 16 NYCRR, sections 894.1 through 894.4 pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Approving a waiver of 16 NYCRR sections 894.1 through 894.4.

**Purpose:** To approve a waiver of 16 NYCRR sections 894.1 through 894.4.

**Substance of final rule:** The Commission, on February 20, 2014, adopted an order approving a petition of Town of Bellmont, Franklin County to waive the requirements of sections 894.1, 894.2, 894.3 and 894.4 to expedite the franchising process, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(13-V-0491SA1)

### NOTICE OF ADOPTION

#### Approval of Petition of 548 4th, LLC to Submeter Electricity at 548 4th Avenue, Brooklyn, NY

**I.D. No.** PSC-48-13-00002-A

**Filing Date:** 2014-02-26

**Effective Date:** 2014-02-26

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

**Action taken:** On 2/20/14, the PSC adopted an order approving the petition of 548 4th, LLC to submeter electricity at 548 4th Avenue, Brooklyn, NY, located in the territory of Consolidated Edison Company of New York, Inc.

**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:** Approval of petition of 548 4th, LLC to submeter electricity at 548 4th Avenue, Brooklyn, NY.

**Purpose:** To approve the petition of 548 4th, LLC to submeter electricity at 548 4th Avenue, Brooklyn, NY.

**Substance of final rule:** The Commission, on February 20, 2014, adopted an order approving the petition of 548 4th, LLC to submeter electricity at 548 4th Avenue, Brooklyn, NY, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(13-E-0501SA1)

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

**Provision for the Recovery and Allocation of Costs of Transmission Projects That Reduce Congestion on Certain Interfaces**

**I.D. No.** PSC-11-14-00003-P

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

**Proposed Action:** The Commission is considering whether to approve, reject or modify (in whole or in part), a Staff proposal to provide for the recovery and allocation of the costs of transmission projects that reduce congestion on certain transmission interfaces.

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

**Subject:** Provision for the recovery and allocation of costs of transmission projects that reduce congestion on certain interfaces.

**Purpose:** To consider the recovery and allocation of costs of transmission projects that reduce congestion on certain interfaces.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering whether to adopt, modify, or reject, in whole or in part, proposals by the Staff of the Department of Public Service (Staff) related to the recovery of the costs of transmission projects that mitigate the congestion identified in Case No. 12-T-0502. These proposals include: (1) establishing mechanisms for incumbent and non-incumbent transmission owners to recover their costs; (2) a method for allocating those costs to the ratepayers who are the beneficiaries of those projects; and, (3) parameters for risksharing among ratepayers and project developers. The Commission previously sought comments on these proposals in a notice published in the State Register on July 10, 2013, but is now considering acting on these proposals separately from the Staff proposal to establish a Public Policy Requirement, as defined by the Federal Energy Regulatory Commission. The Commission will consider any comments that were filed in response to the July 10, 2013 notice before acting on any of the three proposals enumerated above, and parties do not need to re-file such comments.

**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, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

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

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

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

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

(12-T-0502SP4)

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

**Petition for Submetering of Electricity**

**I.D. No.** PSC-11-14-00004-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Plaza Athenee Hotel Company Limited to submeter electricity at 35 East 64th Street, New York, NY.

**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 Plaza Athenee Hotel Company Limited to submeter electricity at 35 East 64th Street, New York, 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 Plaza Athenee Hotel Company Limited to submeter electricity at 35 East 64th Street, 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](mailto:Deborah.Swatling@dps.ny.gov)

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

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

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

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

(14-E-0052SP1)

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

**Reliability Support Services Agreement for Electric Service Reliability**

**I.D. No.** PSC-11-14-00005-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 whether to adopt, modify, or reject, in whole or in part, the joint petition for rehearing, which was filed on February 18, 2014, in response to the Commission's Order issued on January 16, 2014.

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

**Subject:** Reliability Support Services Agreement for electric service reliability.

**Purpose:** Consideration of a Reliability Support Services Agreement for electric service reliability.

**Substance of proposed rule:** The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, the joint petition for rehearing, which was filed by Sierra Club and Earthjustice, on behalf of the Ratepayer and Community Intervenors, on February 18, 2014, and may address any related matters. The joint petition for rehearing was filed in response to the Commission's Order issued on January 16, 2014, accepting an agreement whereby New York State Electric & Gas Corporation would procure Reliability Support Services (RSS) from Cayuga Operating Company, LLC's generating facility located in Lansing, New York, and recover the costs associated with the RSS agreement.

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

Albany, New York 12223-1350, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov)

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(12-E-0400SP3)

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

**Approval of Expense Targets**

**I.D. No.** PSC-11-14-00006-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, modify or reject, in whole or in part, Central Hudson's proposed targets for tree trimming expenditures, stray voltage testing and mitigation costs, and net plant for the year ending June 30, 2015.

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

**Subject:** Approval of expense targets.

**Purpose:** To approve proposed expense targets.

**Substance of proposed rule:** The Commission is considering whether to approve, modify, or reject in whole or in part, Central Hudson Gas and Electric Corporation's (Central Hudson or the Company) proposed targets for tree trimming expenditures, stray voltage testing and mitigation costs, and net plant for the year ending June 30, 2015. The Company proposes that the tree trimming and stray voltage testing and mitigation targets established in the Joint Proposal, and adopted by the Commission for the first year of the rate freeze should continue into the second year of the rate freeze. Central Hudson proposes, for the year ending June 30, 2015, to establish net plant targets of \$965.8 million for electric and \$282.1 million for gas, with associated annual depreciation expenses of \$36.5 million and \$10.6 million, respectively. Central Hudson proposes to spend \$7.7 million on leak-prone pipe replacement during 2015 and to limit the total common software expenditures, including legacy system replacements, to \$5 million.

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

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

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

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

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

(12-M-0192SP5)

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

**Waiver of 16 NYCRR Sections 894.1 Through 894.4(b)(2)**

**I.D. No.** PSC-11-14-00007-P

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

**Proposed Action:** The Public Service Commission is considering to approve, modify, or reject a petition from the Town of North Hudson, Essex County, to waive 16 NYCRR sections 894.1 through 894.4 pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Waiver of 16 NYCRR sections 894.1 through 894.4(b)(2).

**Purpose:** To allow the Town of North Hudson, to waive certain preliminary franchising procedures to expedite the franchising process.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify, or reject the Petition of the Town of North Hudson, Essex County, to waive the requirements of 16 NYCRR Sections 894.1 through 894.4 to expedite the franchising process.

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

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

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

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

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

(14-V-0015SP1)

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

**Petition for Submetering of Electricity**

**I.D. No.** PSC-11-14-00008-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Harmony Prima Lofts LLC to submeter electricity at 1373 Broadway, Albany, 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 Harmony Prima Lofts LLC to submeter electricity at 1373 Broadway, Albany, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Harmony Prima Lofts LLC to submeter electricity at 1373 Broadway, Albany, New York., located in the territory of Niagara Power Mohawk Corporation d/b/a National Grid.

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

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

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

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

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

(14-E-0053SP1)

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

**Issuance of Securities**

**I.D. No.** PSC-11-14-00009-P

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

**Proposed Action:** The Commission is considering whether to approve deny, or modify a petition filed by New York American Water Company, Inc. (f/k/a Long Island Water Corporation) to issue up to approximately \$69 million of long-term debt.

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

**Subject:** Issuance of Securities.

**Purpose:** To allow or disallow New York American Water Company to issue long-term debt.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by New York American Water Company, Inc. (f/k/a Long Island Water Corporation) seeking authorization to issue up to approximately \$69 million of long term debt to refinance existing long-term debt and finance new construction projects. 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, 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-0036SP1)

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

**Water Rates and Charges**

**I.D. No.** PSC-11-14-00010-P

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

**Proposed Action:** The Public Service Commission is considering a petition by the Village of Bronxville, requesting approval to have costs for infrastructure maintenance and access to be included in the rates charged to all customer classes within the Village of Bronxville.

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

**Subject:** Water rates and charges.

**Purpose:** To have costs for infrastructure maintenance and access to be included in the rates charged to all customer classes.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a petition by the Village of Bronxville, requesting approval per the Laws of New York, Chapter 433, requiring the Commission to issue an order to United Water New Rochelle, Inc. to have costs for infrastructure maintenance and access to be included in the rates charged to all customer classes and apportioned among all customers located within the Village of Bronxville. Although this rate change will have a revenue neutral impact on the utility's annual revenues, it will result in an increase to all customers within the municipality of the Village of Bronxville.

**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-W-0073SP1)

**State University of New York**

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

**Alterations in Restricted Parking Enforcement, Street Name Additions and Changes in Title of Enforcement Personnel**

**I.D. No.** SUN-11-14-00011-P

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

**Proposed Action:** Amendment of Part 584 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Alterations in restricted parking enforcement, street name additions and changes in title of enforcement personnel.

**Purpose:** To more clearly identify restricted parking areas and new street names.

**Substance of proposed rule (Full text is posted at the following State website: [www.stonybrook.edu](http://www.stonybrook.edu)):** The proposed changes to 8 NYCRR 584 reflect alterations in restricted parking enforcement, new street identification and changes in the title identification of enforcement personnel in the surrounding geographical areas of the campuses of the State University of New York at Stony Brook.

The changes will also further identification of restricted parking areas for notification of towing potential and clarification of enforcement responsibility.

**Text of proposed rule and any required statements and analyses may be obtained from:** Eileen Kerrigan Ippolito, SUNY Stony Brook, Office of General Counsel, 328 Administration Building, Stony Brook, NY 11794-1212, (631) 632-6110, email: Eileen.Ippolito@stonybrook.edu

**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: Education Law § 360(1)
2. Legislative Objectives: To provide for safety and convenience of students, faculty, employees and visitors to and on the property, roads, streets and highways under the supervision and control of the State University of New York through the regulation and enforcement of vehicular and pedestrian traffic, parking and signage.
3. Needs and Benefits: Changes in traffic and parking patterns and control designations on the State University campuses are designed to enable the campus community, visitors and emergency vehicles to traverse the campuses more safely and more efficiently.
4. Costs: None.
5. Local Government mandates: None.
6. Paperwork: None.
7. Duplication: None.
8. Alternatives: None.
9. Federal Standards: There are no related Federal standards.
10. Compliance schedule: The campus will notify those affected as soon as the rule is effective. Compliance should be immediate.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, record keeping or other compliance requirements on small businesses and local governments. The proposal addresses traffic and parking enforcement issues and street name additions on the campuses of the State University of New York at Stony Brook.

**Rural Area Flexibility Analysis**

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in any rural area. The proposal addresses restricted parking enforcement, new street names and changes in the title of enforcement personnel on the campuses of the State University of New York at Stony Brook.

***Job Impact Statement***

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses alterations in restricted parking enforcement, new street identification and changes in the title identification of enforcement personnel on the campuses of the State University of New York at Stony Brook.