RULE MAKING ACTIVITIES

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

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

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

Department of Economic Development

EMERGENCY RULE MAKING

START-UP NY Program

I.D. No. EDV-18-14-00003-E
Filing No. 320
Filing Date: 2014-04-21
Effective Date: 2014-04-21

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

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

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

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

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

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

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

Subject: START-UP NY Program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 19, 2014.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

START-UP NY program, standards for evaluating applications, and any other provisions the Commissioner deems necessary and appropriate.

LEGISLATIVE OBJECTIVES:

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

NEEDS AND BENEFITS:

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

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

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

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

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

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

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

COSTS:

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

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

III. Costs to the State government: None.

IV. Costs to local governments: None.

LOCAL GOVERNMENT MANDATES:

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

PAPERWORK:

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

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

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

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

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

Because it is evident from the nature of the proposed rule that it will have a net-positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small business and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

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

Job Impact Statement

The regulation establishes procedures and standards for the administration of the START-UP NY program. START-UP NY creates tax-free areas designed to attract innovative start-ups and high-tech industries to New York so as to stimulate economic activity and create jobs. The regulation will not have a substantial adverse impact on jobs and employment opportunities; rather, the program is focused on creating jobs. Because it is evident from the nature of the rulemaking that it will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Distinguished Educators

I.D. No. EDU-18-14-00005-P

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

Proposed Action: Amendment of sections 100.16 and 100.17 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305(1), (2), (20), 211-b(1)-(5) and 211-c(1)-(8)

Subject: Distinguished educators.

Purpose: To modify criteria for appointment, roles, responsibilities, protocols and procedures for distinguished educators to ensure that they are better able to carry-out their statutory responsibilities and functions to assist low performing schools.

Text of proposed rule: Subdivisions (c), (d), and (f) of section 100.17 of the Regulations of the Commissioner of Education are amended, effective July 30, 2014, as follows:

(c) Appointment. (1) . . .

(2) From the applications submitted pursuant to paragraph (1) of this subdivision, the Board of Regents delegates to the commissioner the authority pursuant to Education Law § 211-c(1) to designate a pool of eligible individuals to serve as distinguished educators. Individuals [in the pool] shall serve [a maximum of] *in the pool for* three years, provided that an individual's service in the pool may be renewed [for an additional year] *annually* upon submission of evidence of ongoing professional development.

(3) From the pool of distinguished educators designated pursuant to paragraph (2) of this subdivision, the commissioner shall appoint distinguished educators who have expressed their willingness to assist low performing districts in improving their academic performance, pursuant to the following:

(i) The commissioner may appoint [a distinguished educator as a consultant] one or more *distinguished educators as consultants* to a school district [or] *and/or* assign [him or her] *such distinguished educator(s)* to school(s) within such district:

(a) when such district has one or more schools designated as a priority school or focus school pursuant to section 100.18(g) of this Part and/or identified as persistently lowest achieving and placed under registration review pursuant to section 100.2(p)(9) and (10) of this Part, and [are at risk of closure for failure to make satisfactory progress under Federal and State accountability standards] *failed to achieve adequate yearly progress for four or more years*; and/or

(b) as a member of a joint intervention team pursuant to Education Law section 211-b(2)(b) and as provided in section 100.18(g)(2)(v) and (l)(2) of this Part.

(ii) The distinguished educator shall be appointed for *a* one-year *term* and, upon satisfactory annual evaluation pursuant to subdivision (g) of this section, may be reappointed for *one* or more additional *one*-year *terms*.

(iii) . . .
(iv) . . .
(v) . . .

(d) Roles and responsibilities.

(1) . . .

(2) School districts.

(i) The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator. *Such cooperation shall include, but not be limited, to:*

(a) providing the distinguished educator with a space to work and a district email address to be used for official correspondence;

(b) placing on the district website, reports of the distinguished educator and contact information for the distinguished educator;

(c) providing the distinguished educator with an opportunity to present a report to the board of education at least quarterly on the implementation of the improvement efforts of the district and/or any schools to which a distinguished educator is assigned; and

(d) promptly scheduling meetings with district personnel as requested by the distinguished educator.

(ii) . . .
(iii) . . .
(iv) . . .
(v) . . .
(vi) . . .

(f) Reporting requirements. Within [45] *forty-five (45)* days of appointment to the school district, a distinguished educator *and the district* shall *work collaboratively to* develop an action plan outlining [his/her] *the* goals and objectives for the district *and the distinguished educator* for the ensuing school year [and shall also submit such action plan to the commissioner or his or her designee for approval]. *The plan shall include, but not be limited to, an outline of the goals and objectives the district is responsible for achieving and the technical assistance the distinguished educator will provide in order to support the district in achieving its goals and objectives. The distinguished educator shall submit such action plan to the commissioner or his or her designee for approval.* Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the commissioner or his or her designee in a form prescribed by the commissioner.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, 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: Ken Slentz, Deputy Commissioner, State Education Department, Office of P-12 Education, State Education Building, 2M, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: NYSEDP12@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 empowers the Regents and the Commissioner to adopt rules to carry out State education laws and the functions and duties conferred on the Department by Law.

Education Law section 305(1) and (2) provide Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides Commissioner shall have such further powers and duties as charged by the Regents.

Education Law section 211-b provides for the inclusion of distinguished educators in joint school intervention teams that are appointed by the Commissioner to assist school districts in developing, reviewing and recommending plans for reorganizing or reconfiguring of schools in restructuring status or schools under registration review (SURR) status that have failed to demonstrate progress as specified in their corrective action plan or comprehensive education plan.

Education Law section 211-c directs the Regents to establish a distinguished educator program providing for the appointment of distinguished educators to assist low performing districts in improving their academic performance.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to ensure that distinguished educators are better able to carry-out their statutory responsibilities and functions to assist low performing schools.

NEEDS AND BENEFITS:

The proposed amendment relates to criteria for appointment, roles, responsibilities, protocols and procedures for distinguished educators to assist low performing school districts and schools pursuant to Education Law sections 211-b and 211-c. The proposed rule will ensure the appointment, consistent with statutory requirements, of qualified individuals, who have demonstrated consistent growth in academic performance or educational expertise including superior performance in the classroom, to serve as distinguished educators to assist low performing schools.

At the February 2011 Board of Regents meeting, the Board added section 100.17 of the Commissioner's Regulations to implement the provisions of Education Law sections 211-b and 211-c pertaining to the establishment of a Distinguished Educator Program to assist low performing school districts and schools in improving their academic performance.

The proposed amendment of section 100.17 is intended to address matters reflected in the State Education Department's experiences and "lessons learned" in implementing the Distinguished Educator program. Among those experiences and lessons are the following:

- Persons selected for the pool of distinguished educators should be able to remain in the pool and eligible for assignment as a distinguished educator for a period of more than three years so long as these persons

demonstrate that they are participating in appropriate professional development.

• The Commissioner should have the flexibility to reappoint a distinguished educator to multiple one-year renewal terms and should be able to appoint more than one distinguished educator to serve a district, if needed.

• Districts would benefit from a more explicit delineation of the ways in which districts are expected to fully cooperate with a distinguished educator so as to make the work of the distinguished educator more productive and helpful to the district.

• The action plan that results from the assignment of a distinguished educator should be jointly developed by the district and the distinguished educator.

COSTS:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any costs beyond those inherent in the statutes.

(a) Costs to State government: None.

(b) Costs to local government: Consistent with Education Law sections 211-b(2)(b) and 211-c(7), existing regulations provide that the reasonable and necessary expenses, including consulting fees, incurred in the performance of a distinguished educator's duties shall be paid by the school district or charter school that operates the school to which the distinguished educator is appointed.

The vast majority of districts will not incur additional costs as a result of the proposed amendment because they do not meet the criteria for appointment of a distinguished educator and, therefore, will not be assigned a distinguished educator. Even in the event a distinguished educator is assigned, this regulation imposes additional cost only if the distinguished educator is assigned beyond the initial two year period or is assigned to a school before the point at which the school is at risk of having its registration revoked. Moreover, the costs for districts assigned a distinguished educator will vary based on factors such as the extent of the district's need, the terms of the contract between the distinguished educator and the district, and the distinguished educator's level of involvement.

The proposed amendment will range in cost from approximately $34,000 to $250,000 annually in the event that the Commissioner continues the assignment of a distinguished educator beyond the initial two year period or appoints a distinguished educator to a school before the point at which the school is at risk of having its registration revoked. The lower range is based on a distinguished educator providing 300 hours of service per year to a district or school in the region of the State with the lowest costs and requiring that the distinguished educator receive no reimbursement for meals, lodging, or travel. The upper range assumes the distinguished educator will provide 1,200 hours of service per year to a district or school in the region with the highest costs and that the distinguished educator will receive reimbursement for meals and lodging for approximately 160 days of services plus approximately 7,800 miles of use of a personal vehicle per year. In the event that the Commissioner appoints a distinguished educator in either of the above circumstances included in the regulatory amendment, the cost will most likely be approximately midway between these two examples.

(c) Costs to private regulated parties: None. Participation as a distinguished educator is voluntary. As discussed above, under costs to local government, the reasonable and necessary expenses of appointed distinguished educators shall be a charge on the school district or charter school that operates the school to which the distinguished educator is appointed.

(d) Costs to regulating agency for implementation and continued administration of this rule: None. The proposed amendment does not impose any additional costs to the State Education Department beyond those inherent in Education Law sections 211-b and 211-c.

LOCAL GOVERNMENT MANDATES:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, beyond those inherent in the statutes.

Pursuant to the statute, the school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator. The proposed amendment specifies that such cooperation shall include, but not be limited, to:

(a) providing the distinguished educator with a space to work and a district email address to be used for official correspondence;

(b) placing on the district website, reports of the distinguished educator and contact information for the distinguished educator;

(c) providing the distinguished educator with an opportunity to present a report to the board of education at least quarterly on the implementation of the improvement efforts of the district and/or any schools to which a distinguished educator is assigned; and

(d) promptly scheduling meetings with district personnel as requested by the distinguished educator.

PAPERWORK:

The existing regulation requires that, within forty-five (45) days of appointment to the school district, a distinguished educator develop an action plan outlining the goals and objectives for the district and the distinguished educator for the ensuing school year. The proposed amendment requires that the district work collaboratively with the distinguished educator in developing such plan, which shall include, but not be limited to, an outline of the goals and objectives the district is responsible for achieving and the technical assistance the distinguished educator will provide in order to support the district in achieving its goals and objectives. The distinguished educator shall submit such action plan to the commissioner or his or her designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the commissioner or his or her designee in a form prescribed by the commissioner.

DUPLICATION:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and does not duplicate, overlap or conflict with State or federal legal requirements.

ALTERNATIVES:

The following significant alternative was proposed, but ultimately rejected: to compensate distinguished educators at the highest wage in the salary distribution based on available wage data collected by the New York State and/or Federal departments of labor.

This alternative was rejected because a specific set of skills are required to move struggling schools and districts from failure to proficiency. Therefore, the objective is not necessarily to procure the highest paid personnel, but rather the most skilled. As a result, the highest level of compensation is not necessary to procure effective distinguished educators.

FEDERAL STANDARDS:

There are no applicable federal standards for distinguished educators appointed pursuant to Education Law sections 211-b and 211-c.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c. The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to each public school district and charter school in the State to which a Distinguished Educator may be appointed pursuant to Education Law sections 211-b and 211-c. To date, the Commissioner has appointed one Distinguished Educator, for the Buffalo City School District.

COMPLIANCE REQUIREMENTS:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any compliance requirements on school districts beyond those inherent in the statutes.

Pursuant to the statute, the school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator. The proposed amendment specifies that such cooperation shall include, but not be limited, to:

(a) providing the distinguished educator with a space to work and a district email address to be used for official correspondence;

(b) placing on the district website, reports of the distinguished educator and contact information for the distinguished educator;

(c) providing the distinguished educator with an opportunity to present a report to the board of education at least quarterly on the implementation of the improvement efforts of the district and/or any schools to which a distinguished educator is assigned; and

(d) promptly scheduling meetings with district personnel as requested by the distinguished educator.

The existing regulation requires that within forty-five (45) days of appointment to the school district, a distinguished educator and the district shall work collaboratively to develop an action plan outlining the goals and objectives for the district and the distinguished educator for the ensuing school year. The proposed amendment requires that the district work collaboratively with the distinguished educator in developing such plan, which shall include, but not be limited to, an outline of the goals and objectives the district is responsible for achieving and the technical assistance the distinguished educator will provide in order to support the district in achieving its goals and objectives. The distinguished educator shall submit such action plan to the commissioner or his or her designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the commissioner or his or her designee in a form prescribed by the commissioner.

PROFESSIONAL SERVICES:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c. The proposed amendment imposes no additional professional services requirements on school districts beyond those inherent in the statutes.

COMPLIANCE COSTS:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any costs beyond those inherent in the statutes.

Consistent with Education Law sections 211-b(2)(b) and 211-c(7), existing regulations provide that the reasonable and necessary expenses, including consulting fees, incurred in the performance of a distinguished educator's duties shall be paid by the school district or charter school that operates the school to which the distinguished educator is appointed.

The vast majority of districts will not incur additional costs as a result of the proposed amendment because they do not meet the criteria for appointment of a distinguished educator and, therefore, will not be assigned a distinguished educator. Even in the event a distinguished educator is assigned, this regulation imposes additional cost only if the distinguished educator is assigned beyond the initial two year period or is assigned to a school before the point at which the school is at risk of having its registration revoked. Moreover, the costs for districts assigned a distinguished educator will vary based on factors such as the extent of the district's need, the terms of the contract between the distinguished educator and the district, and the distinguished educator's level of involvement.

The proposed amendment will range in cost from approximately $34,000 to $250,000 annually in the event that the Commissioner continues the assignment of a distinguished educator beyond the initial two year period or appoints a distinguished educator to a school before the point at which the school is at risk of having its registration revoked. The lower range is based on a distinguished educator providing 300 hours of service per year to a district or school in the region of the State with the lowest costs and requiring that the distinguished educator receive no reimbursement for meals, lodging, or travel. The upper range assumes the distinguished educator will provide 1,200 hours of service per year to a district or school in the region with the highest costs and that the distinguished educator will receive reimbursement for meals and lodging for approximately 160 days of services plus approximately 7,800 miles of use of a personal vehicle per year. In the event that the Commissioner appoints a distinguished educator in either of the above circumstances included in the regulatory amendment, the cost will most likely be approximately midway between these two examples.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on school districts. Economic feasibility is discussed in the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment modifies criteria for appointment, roles, responsibilities, protocols and procedures for distinguished educators to ensure that distinguished educators are better able carry-out their statutory responsibilities and functions to assist low performing schools pursuant to Education Law sections 211-b and 211-c. The proposed amendment does not impose any compliance requirements or costs beyond those inherent in the statute.

The proposed amendment is necessary to provide well-defined guidelines to ensure that the work of the distinguished educator is productive and helpful to the school district. In order to achieve this goal:

- school districts should be provided with a more explicit delineation of the ways in which they are expected to fully cooperate with a distinguished educator;
- the action plan that results from the assignment of a distinguished educator should be jointly developed by the district and the distinguished educator;
- persons selected for the pool of distinguished educators should be able to remain in the pool and eligible for assignment as a distinguished educator for a period of more than three years so long as these persons demonstrate that they are participating in appropriate professional development; and
- the Commissioner should have the flexibility to reappoint a distinguished educator to multiple one year renewal terms and should be able to appoint more than one distinguished educator to serve a district, if needed.

The implementation of these provisions of the proposed amendment will maximize the effectiveness of the program. School districts will benefit from a more explicit delineation of the ways in which districts are expected to fully cooperate with a distinguished educator so as to make the work of the distinguished educator more productive and helpful to the district.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. Copies have also been provided for review and comment to the chief school officers of the five big city school districts and to charter schools. Copies were also provided for review and comment to the chief school officers in districts with Focus and Priority Schools.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to each public school district and charter school in the State for which a Distinguished Educator may be appointed pursuant to Education Law sections 211-b and 211-c, including those located in 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. Currently, the Commissioner has not appointed any Distinguished Educators to school districts or charter schools located in rural areas.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any compliance requirements on school districts beyond those inherent in the statutes.

Pursuant to the statute, the school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator. The proposed amendment specifies that such cooperation shall include, but not be limited, to:

(a) providing the distinguished educator with a space to work and a district email address to be used for official correspondence;

(b) placing on the district website, reports of the distinguished educator and contact information for the distinguished educator;

(c) providing the distinguished educator with an opportunity to present a report to the board of education at least quarterly on the implementation of the improvement efforts of the district and/or any schools to which a distinguished educator is assigned; and

(d) promptly scheduling meetings with district personnel as requested by the distinguished educator.

The existing regulation requires that within forty-five (45) days of appointment to the school district, a distinguished educator and the district shall work collaboratively to develop an action plan outlining the goals and objectives for the district and the distinguished educator for the ensuing school year. The proposed amendment requires that the district work collaboratively with the distinguished educator in developing such plan, which shall include, but not be limited to, an outline of the goals and objectives the district is responsible for achieving and the technical assistance the distinguished educator will provide in order to support the district in achieving its goals and objectives. The distinguished educator shall submit such action plan to the commissioner or his or her designee for approval. Upon approval, the distinguished educator shall provide a copy of the action plan to the school district. The distinguished educator shall also submit quarterly reports to the commissioner or his or her designee in a form prescribed by the commissioner.

The proposed amendment imposes no additional professional services requirements on school districts in rural areas beyond those inherent in the statutes.

COSTS:

The proposed amendment establishes requirements relating to the appointment, roles, responsibilities, protocols and procedures of distinguished educators to assist low performing schools pursuant to Education Law sections 211-b and 211-c, and will not impose any costs beyond those inherent in the statutes.

Consistent with Education Law sections 211-b(2)(b) and 211-c(7),

existing regulations provide that the reasonable and necessary expenses, including consulting fees, incurred in the performance of a distinguished educator's duties shall be paid by the school district or charter school that operates the school to which the distinguished educator is appointed.

The vast majority of districts will not incur additional costs as a result of the proposed amendment because they do not meet the criteria for appointment of a distinguished educator and, therefore, will not be assigned a distinguished educator. Even in the event a distinguished educator is assigned, this regulation imposes additional cost only if the distinguished educator is assigned beyond the initial two year period or is assigned to a school before the point at which the school is at risk of having its registration revoked. Moreover, the costs for districts assigned a distinguished educator will vary based on factors such as the extent of the district's need, the terms of the contract between the distinguished educator and the district, and the distinguished educator's level of involvement.

The proposed amendment will range in cost from approximately $34,000 to $250,000 annually in the event that the Commissioner continues the assignment of a distinguished educator beyond the initial two year period or appoints a distinguished educator to a school before the point at which the school is at risk of having its registration revoked. The lower range is based on a distinguished educator providing 300 hours of service per year to a district or school in the region of the State with the lowest costs and requiring that the distinguished educator receive no reimbursement for meals, lodging, or travel. The upper range assumes the distinguished educator will provide 1,200 hours of service per year to a district or school in the region with the highest costs and that the distinguished educator will receive reimbursement for meals and lodging for approximately 160 days of services plus approximately 7,800 miles of use of a personal vehicle per year. In the event that the Commissioner appoints a distinguished educator in either of the above circumstances included in the regulatory amendment, the cost will most likely be approximately midway between these two examples.

MINIMIZING ADVERSE IMPACT:

The proposed amendment modifies criteria for appointment, roles, responsibilities, protocols and procedures for distinguished educators to ensure that distinguished educators are better able carry-out their statutory responsibilities and functions to assist low performing schools pursuant to Education Law sections 211-b and 211-c. The proposed amendment does not impose any compliance requirements or costs beyond those inherent in the statute. The proposed amendment is necessary to ensure the work of the distinguished educator is more productive and helpful to the school district. In order to achieve this goal:

- school districts should be provided a more explicit delineation of the ways in which they are expected to fully cooperate with a distinguished educator;
- the action plan that results from the assignment of a distinguished educator should be jointly developed by the district and the distinguished educator;
- persons selected for the pool of distinguished educators should be able to remain in the pool and eligible for assignment as a distinguished educator for a period of more than three years so long as these persons demonstrate that they are participating in appropriate professional development; and
- the Commissioner should have the flexibility to reappoint a distinguished educator to multiple one year renewal terms and should be able to appoint more than one distinguished educator to serve a district, if needed.

The implementation of these provisions of the proposed amendment will maximize the effectiveness of the program. School districts will benefit from a more explicit delineation of the ways in which districts are expected to fully cooperate with a distinguished educator so as to make the work of the distinguished educator more productive and helpful to the district.

Furthermore, since the proposed rule will establish State-wide standards for the appointment of distinguished educators to assist low performing schools, consistent with Education Law sections 211-b and 211-c, it was not possible to establish different requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment modifies criteria for appointment, roles, responsibilities, protocols and procedures of Distinguished Educators appointed to a school district or charter school pursuant to Education Law sections 211-b or 211-c. The proposed amendment will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Parental Consent for the Initial Provision of Special Education Services/Programs to a Student with a Disability for July/August

I.D. No. EDU-18-14-00006-P

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

Proposed Action: Amendment of section 200.5(b)(1) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 4402(2) and 4403(3); and L. 2014, ch. 56, part A, section 16-a

Subject: Parental consent for the initial provision of special education services/programs to a student with a disability for July/August.

Purpose: To conform the Commissioner's Regulations to section 16-a of part A of chapter 56 of the Laws of 2014.

Text of proposed rule: Paragraph (1) of subdivision (b) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective July 30, 2014 as follows:

(1) The school district must make reasonable efforts to obtain written informed consent of the parent, as such term is defined in section 200.1(l) of this Part, and must have a detailed record of its attempts, and the results of those attempts. Written consent of the parent is required:

(i) . . .

(ii) prior to the initial provision of special education to a student who has not previously been identified as having a disability. Consent for initial evaluation may not be construed as consent for initial provision of special education services; *and*

[(iii) prior to initial provision of special education services in a 12-month special service and/or program;]

[(iv)] *(iii)*. . .

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, 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: James P. DeLorenzo, Assistant Commissioner P-12, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Regents and Commissioner of Education to adopt rules and regulations to carry out State education laws and functions and duties conferred on the Education Department by Law.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties as are charged by the Regents.

Education Law section 4402 establishes school district duties for the education of students with disabilities.

Education Law section 4403 establishes Department and school district responsibilities concerning education programs and services to students with disabilities. Section 4403(3) authorizes the Department to adopt rules and regulations as the Commissioner deems in their best interests.

Section 16-a of Part A of Chapter 56 of the Laws of 2014 amended Education Law section 4402(2)(a) to eliminate the requirement for parental consent prior to the initial provision of special education services and programs during the months of July and August.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to conform the Commissioner's

Regulations to Chapter 56 of the New York State Laws of 2014, which became effective March 31, 2014.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the New York State Laws of 2014. Section 16-a of Part A of Chapter 56 amended Education Law section 4402(2)(a) to eliminate the requirement for parental consent prior to the initial provision of special education services and programs during the months of July and August.

4. COSTS:

a. Costs to State government: None.

b. Costs to local governments: None.

c. Costs to regulated parties: None.

d. Costs to the State Education Department of implementation and continuing compliance: None.

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional costs beyond those imposed by the statute. Consistent with the statute, the proposed amendment may reduce costs to school districts that are associated with obtaining parental consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by the statute. Consistent with the statute, the proposed amendment may reduce costs to school districts and will provide some relief from procedural compliance requirements by minimizing the instances when consent from parents must be obtained.

Section 200.5(b)(1), as amended, repeals the requirement for the written consent of the parent prior to the initial provision of special education services in a 12-month special service and/or program.

6. PAPERWORK:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional paperwork requirements. The proposed amendment eliminates the requirement for school districts to obtain parental consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August and, therefore, also eliminates the need for districts to give parents prior written notice at the same time that it requests consent for such services. This will result in a reduction of paperwork for districts.

7. DUPLICATION:

The proposed amendment will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014. There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment because the amendment merely conforms the Commissioner's Regulations to section 16-a of Part A of Chapter 56 of the Laws of 2014, which became effective on March 31, 2014.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to conform the Commissioner's Regulations to section 16-a of Part A of Chapter 56 of the Laws of 2014, which eliminated the requirement for parental consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, special act school districts and approved private schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment merely conforms the Commissioner's Regulations to section 16-a of Part A of Chapter 56 of the Laws of 2014, which became effective March 31, 2014. It does not impose any additional compliance requirements beyond those imposed by the statute. Consistent with the statute, the proposed amendment would provide some relief from procedural compliance requirements by eliminating the requirement that schools obtain written consent of the parent prior to the initial provision of special education services to a student with a disability in a 12-month special service and/or program.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

4. COMPLIANCE COSTS:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional costs on local governments. Consistent with the statute, the proposed amendment may reduce costs to school districts that are associated with obtaining parent consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional costs or compliance requirements on the State, local governments, private regulated parties or the State Education Department. Consistent with the statute, the proposed amendment may reduce costs and will provide some relief from procedural compliance requirements to school districts by minimizing the instances when consent from parents must be obtained.

Section 200.5(b)(1)(iii), as amended, repeals the requirement for the written consent of the parent prior to the initial provision of special education services in a 12-month special service and/or program.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents and the chief officers of the Big 5 city school districts with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies have also been provided to charter schools, State operated schools, Special Act school districts, approved private schools and other State agencies that operate education programs.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements in Education Law section 4402(2)(a), as amended by section 16-a of Part A of Chapter 56 of the Laws of 2014, and therefore the substantive provisions of the proposed rule cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will apply to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, special act school districts and approved private schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

The proposed amendment merely conforms the Commissioner's Regulations to section 16-a of Part A of Chapter 56 of the New York State (NYS) Laws of 2014, which became effective March 31, 2014. It does not impose any additional reporting, record keeping or other compliance requirements, or professional service requirements, on entities in rural areas beyond those imposed by the statute. Consistent with the statute, the proposed amendment would provide some relief from procedural compliance requirements by eliminating the requirement that schools obtain written consent of the parent prior to the initial provision of special education services to a student with a disability in a 12-month special service and/or program.

3. COSTS:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional costs on entities in rural areas. Consistent with the statute, the proposed amendment may reduce costs to school districts that are associated with obtaining parental consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment merely conforms the Commissioner's Regulations to Chapter 56 of the Laws of 2014. It does not impose any additional costs or compliance requirements on entities in rural areas. Consistent with the statute, the proposed amendment may reduce costs and provide some relief from procedural compliance requirements to school districts by minimizing the instances when consent from parents must be obtained.

Section 200.5(b)(1), as amended, repeals the requirement that schools obtain written consent of the parent prior to the initial provision of special education services in a 12-month special service and/or program.

The statute applies to school districts throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the amendment's provisions.

5. RURAL AREA PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements in Education Law section 4402(2)(a), as amended by section 16-a of Part A of Chapter 56 of the Laws of 2014, and therefore the substantive provisions of the proposed rule cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to section 16-a of Part A of Chapter 56 of the Laws of 2014, which eliminated the requirement for parental consent prior to the initial provision of special education services and programs to a student with a disability during the months of July and August.

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

Department of Financial Services

EMERGENCY RULE MAKING

Excess Line Placements Governing Standards

I.D. No. DFS-29-13-00002-E

Filing No. 319

Filing Date: 2014-04-21

Effective Date: 2014-04-21

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

Action taken: Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 3103, 5907, 5909, 5911, 9102 and arts. 21 and 59; L. 1997, ch. 225; L. 2002, ch. 587; and L. 2011, ch. 61

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

Specific reasons underlying the finding of necessity: This regulation governs the placement of excess line insurance. Article 21 of the Insurance Law and Regulation 41 enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from unauthorized insurers (known as "excess line insurers") if the unauthorized insurers are "eligible," and an excess line broker places the insurance.

On July 21, 2010, President Obama signed into law the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA"), which prohibits any state, other than the insured's home state, from requiring a premium tax payment for nonadmitted insurance. The NRRA also subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured's home state, and provides that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amended the Insurance Law to implement the provisions of the NRRA.

The sections of Part I of Chapter 61 that amend the Insurance Law to bring New York into conformance with the NRRA took effect on July 21, 2011, which is when the NRRA took effect. The regulation was previously promulgated on an emergency basis on July 22, 2011, October 19, 2011, January 16, 2012, April 16, 2012, July 13, 2012, October 10, 2012, January 7, 2013, April 5, 2013, July 3, 2013, August 30, 2013, October 28, 2013, December 26, 2013, and February21, 2014. The regulation was also proposed in June 2013, and was published in the State Register on July 17, 2013.

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

Subject: Excess Line Placements Governing Standards.

Purpose: To implement chapter 61 of the Laws of 2011, conforming to the Federal Nonadmitted and Reinsurance Reform Act of 2010.

Substance of emergency rule: On July 21, 2010, President Obama signed into law the federal Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which contains the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA"). The NRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess (or "surplus") line insurance. The NRRA also subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state, and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured.

In addition, the NRRA provides that an excess line broker seeking to procure or place excess line insurance for an exempt commercial purchaser ("ECP") need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure the insurance from or place the insurance with an excess line insurer.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRA.

Insurance Regulation 41 (11 NYCRR Part 27) consists of 24 sections and one appendix addressing the regulation of excess line insurance placements.

The Department of Financial Services ("Department") amended Section 27.0 to discuss the NRRA and Chapter 61 of the Laws of 2011.

The Department amended Section 27.1 to delete language in the definition of "eligible" and to add three new defined terms: "exempt commercial purchaser," "insured's home state," and "United States."

Section 27.2 is not amended.

The Department amended Section 27.3 to provide an exception for an ECP consistent with Insurance Law Section 2118(b)(3)(F) and to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.4 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.5 to: (1) clarify that the requirements set forth in this section apply when the insured's home state is New York; (2) with regard to an ECP, require an excess line broker or the producing broker to affirm in part A or part C of the affidavit that the ECP was specifically advised in writing, prior to placement, that the insurance may or may not be available from the authorized market that may provide greater protection with more regulatory oversight; (3) require an excess line broker to identify the insured's home state in part A of the affidavit; and (4) clarify that the premium tax is to be allocated in accordance with

Section 27.9 of Insurance Regulation 41 for insurance contracts that have an effective date prior to July 21, 2011.

The Department amended Section 27.6 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.7(b) to revise the address to which reports required by Section 27.7 should be submitted.

The Department amended Section 27.8 to: (1) require a licensed excess line broker to electronically file an annual premium tax statement, unless the Superintendent of Financial Services (the "Superintendent") grants the broker an exemption pursuant to Section 27.23 of Insurance Regulation 41; (2) acknowledge that payment of the premium tax may be made electronically; and (3) change a reference to "Superintendent of Insurance" to "Superintendent of Financial Services."

The Department amended Section 27.9 to clarify how an excess line broker must calculate the taxable portion of the premium for: (1) insurance contracts that have an effective date prior to July 21, 2011; and (2) insurance contracts that have an effective date on or after July 21, 2011 and that cover property or risks located both inside and outside the United States.

The Department amended Sections 27.10, 27.11, and 27.12 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.13 to clarify that the requirements set forth in this section apply when the insured's home state is New York and to require an excess line broker to obtain, review, and retain certain trust fund information if the excess line insurer seeks an exemption from Insurance Law Section 1213. The Department also amended Section 27.13 to require an excess line insurer to file electronically with the Superintendent a current listing that sets forth certain individual policy details.

The Department amended Section 27.14 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund, and to permit an actuary who is a fellow of the Casualty Actuarial Society (FCAS) or a fellow in the Society of Actuaries (FSA) to make certain audits and certifications (in addition to a certified public accountant), with regard to the trust fund.

Section 27.15 is not amended.

The Department amended Section 27.16 to state that an excess line insurer will be subject to Insurance Law Section 1213 unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105 and Insurance Regulation 41 and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41, in addition to other current requirements.

The Department amended Sections 27.17, 27.18, 27.19, 27.20, and 27.21 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

Section 27.22 is not amended.

The Department repealed current Section 27.23 and added a new Section 27.23 titled, "Exemptions from electronic filing and submission requirements."

Section 27.24 is not amended.

The Department amended the excess line premium tax allocation schedule set forth in appendix four to apply to insurance contracts that have an effective date prior to July 21, 2011.

The Department added a new appendix five, which sets forth an excess line premium tax allocation schedule to apply to insurance contracts that have an effective date on or after July 21, 2011 and that cover property and risks located both inside and outside the United States.

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. DFS-29-13-00002-P, Issue of July 17, 2013. The emergency rule will expire June 19, 2014.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of the Fourteenth Amendment to Insurance Regulation 41 (11 NYCRR Part 27) derives from Sections 202 and 302 of the Financial Services Law, Sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 9102, and Article 21 of the Insurance Law, Chapter 225 of the Laws of 1997, Chapter 587 of the Laws of 2002, and Chapter 61 of the Laws of 2011.

The federal Nonadmitted and Reinsurance Reform Act of 2010 (the "NRRA") significantly changes the paradigm for excess line insurance placements in the United States. Chapter 61 of the Laws of 2011 amends the Insurance Law and the Tax Law to conform to the NRRA. The NRRA and Chapter 61 have been impacting excess line placements since their effective date of July 21, 2011.

Section 301 of the Insurance Law and Sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law. Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Section 1213 provides the manner by which substituted service on an unauthorized insurer may be made in any proceeding against it on an insurance contract issued in New York. Substituted service may be made on the Superintendent in the manner prescribed in Section 1213.

Article 21 sets forth the duties and obligations of insurance brokers and excess line brokers. Section 2101 sets forth relevant definitions. Section 2104 governs the licensing of insurance brokers. Section 2105 sets forth licensing requirements for excess line brokers. Section 2110 provides grounds for the Superintendent to discipline licensees by revoking or suspending licenses or, pursuant to Section 2127, imposing a monetary penalty in lieu of revocation or suspension. Section 2116 permits payment of commissions to brokers and prohibits compensation to unlicensed persons. Section 2117 prohibits the aiding of an unauthorized insurer, with exceptions. Section 2118 sets forth the duties of excess line brokers, with regard to the placement of insurance with eligible foreign and alien excess line insurers, including the responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer. Section 2121 provides that brokers have an agency relationship with insurers for the collection of premiums. Section 2122 imposes limitations on advertising by producers. Section 2130 establishes the Excess Line Association of New York ("ELANY").

Section 9102 establishes rules regarding the allocation of direct premiums taxable in New York, where insurance covers risks located both in and out of New York.

2. Legislative objectives: Generally, unauthorized insurers may not do an insurance business in New York. In permitting a limited exception for licensed excess line brokers to procure insurance policies in New York from excess line insurers, the Legislature established statutory requirements to protect persons seeking insurance in New York. The NRRA significantly changes the paradigm for excess (or "surplus") line insurance placements in the United States. The NRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess line insurance. Further, the NRRA subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured. In addition, the NRRA establishes uniform eligibility standards for excess line insurers. A state may not impose additional eligibility conditions.

Under the new NRRA paradigm, an excess line broker now must ascertain an insured's home state before placing any property/casualty excess line business. Thus, if the insured's home state is not New York, even though the insured goes to the broker's office in New York, the excess line broker must be licensed in the insured's home state in order for the broker to procure the excess line coverage for that insured. Conversely, a person who is approached by an insured outside of New York must be licensed as an excess line broker in New York in order to procure excess line coverage for an insured whose home state is New York.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRA. The NRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

3. Needs and benefits: Insurance Regulation 41 governs the placement of excess line insurance. The purpose of the excess line law is to enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from eligible excess line insurers. This regulation implements the provisions and purposes of Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRA. The NRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

Section 27.14 of Insurance Regulation 41 currently prohibits an excess line broker from placing coverage with an excess line insurer unless the insurer has established and maintained a trust fund. However, the new NRRA eligibility requirements do not include a trust fund with respect to foreign insurers (alien insurers, however, do have to maintain a trust fund

that satisfies the International Insurers Department ("IID") of the National Association of Insurance Commissioners ("NAIC")). As such, New York is no longer requiring a trust fund of foreign insurers for eligibility.

Currently, Insurance Law Section 1213(e) exempts excess line insurers writing excess line insurance in New York from the requirements of Section 1213, such as the requirement that an insurer deposit with the clerk of the court cash or securities or a bond with good and sufficient sureties, in an amount to be fixed by the court sufficient to secure payments of any final judgment that may be rendered by the court, with the clerk of the court before filing any pleading in any proceeding against it, so long as the excess line insurance contract designates the Superintendent for service of process and, in material part, the policy is effectuated in accordance with Section 2105, the section that applies to excess line brokers. In a memorandum to the governor, dated March 30, 1949, recommending favorable executive action on the bill, the Superintendent of Insurance wrote that it was "our understanding that this subsection was inserted as the result of representations made by the representatives of Lloyds of London because the contracts of insurance customarily [written] by the underwriters and placed through licensees of this Department, contain a provision whereby the underwriters consent to be sued in the courts of this state and they maintain a trust fund in New York of a very sizable amount, which is available for the payment of any judgment which may be secured in an action involving one of their contracts of insurance."

When the Superintendent of Insurance first promulgated Insurance Regulation 41, effective October 1, 1962, pursuant to his broad power to make regulations, he codified in the regulation the longstanding practice regarding the trust fund, and established minimum provisions and requirements, thus providing a reasonable alternative for unauthorized insurers that regularly engage in the sale of insurance through the excess line market. While the specific provisions have been amended a number of times over the years, every iteration of Insurance Regulation 41 has called for a trust fund as a means of providing alternative security that the insurer would have resources to pay judgments against the insurer.

Although the NRRA apparently precludes New York from requiring a foreign insurer to maintain a trust fund to be eligible in New York, or a trust fund for an alien insurer that deviates from the IID requirements, New York policyholders need to be protected when claims arise. As a result, the Department is amending Section 27.16 of Insurance Regulation 41 to provide that an excess line insurer will be subject to Insurance Law Section 1213's requirements unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105, the Superintendent is designated as agent for service of process, and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41 (in addition to other requirements currently set forth in Section 27.16). Further, the Department is amending Section 27.14 of Insurance Regulation 41 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund. Insurance Law Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

The Department amended Section 27.8(a) of Insurance Regulation 41 to require excess line brokers to file annual premium tax statements electronically, and amended Section 27.13 to require excess line brokers to file electronically a listing that sets forth certain individual policy details. In addition, the Department added a new Section 27.13 to Insurance Regulation 41 to allow excess line brokers to apply for a "hardship" exception to the electronic filing or submission requirement.

4. Costs: The rule is not expected to impose costs on excess line brokers, and it merely conforms the requirements regarding placement of coverage with excess line insurers to the requirements in Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRA. Although the amended regulation will require excess line brokers to file annual premium tax statements and a listing that sets forth certain individual policy details electronically, most brokers already do business electronically. In fact ELANY already requires documents to be filed electronically. Moreover, the regulation also provides a method whereby excess line brokers may apply for an exemption from the electronic filing or submission requirement.

With regard to the trust fund amendment, on the one hand, excess line insurers may incur costs if they choose to establish and maintain a trust fund in order to be exempt from Insurance Law Section 1213. On the other hand, it should be significantly less expensive to establish and maintain a trust fund rather than comply with Insurance Law Section 1213. This is a business decision that each insurer will need to make. The trust fund, if established and maintained, will be for the purpose of protecting all United States policyholders.

Costs to the Department of Financial Services also should be minimal, as existing personnel are available to review any modified filings necessitated by the regulations. In fact, filing forms electronically may produce a cost savings for the Department of Financial Services. These rules impose no compliance costs on any state or local governments.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: The regulation imposes no new reporting requirements on regulated parties.

7. Duplication: The regulation will not duplicate any existing state or federal rule, but rather implement and conform to the federal requirements.

8. Alternatives: The Department discussed the changes related to trust funds and Insurance Law Section 1213 with counsel at the NAIC and with ELANY.

9. Federal standards: This regulation will implement the provisions and purposes of Chapter 61 of the Laws of 2011, which amends the Insurance Law to conform to the NRRA.

10. Compliance schedule: Pursuant to Chapter 61 of the Laws of 2011, this regulation will impact excess line insurance placements effective on and after July 21, 2011.

Regulatory Flexibility Analysis

This rule is directed at excess line brokers and excess line insurers.

Excess line brokers are considered to be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule is not expected to have an adverse impact on these small businesses because it merely conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010.

The rule will require excess line brokers to file annual premium tax statements electronically, and to file electronically a listing that sets forth certain individual policy details. However, the excess line broker may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Further, the Department of Financial Services has monitored Annual Statements of excess line insurers subject to this rule, and believes that none of them fall within the definition of "small business," because there are none that are both independently owned and have fewer than one hundred employees.

The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

The Department of Financial Services ("Department") finds that this rule does not impose any additional burden on persons located in rural areas, and the Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Job Impact Statement

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities. The rule conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010. The rule also makes an excess line insurer subject to Insurance Law section 1213, unless it chooses to establish and maintain a trust fund in New York for the benefit of New York policyholders.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

Public Retirement Systems

I.D. No. DFS-18-14-00001-E
Filing No. 317
Filing Date: 2014-04-16
Effective Date: 2014-04-16

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

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

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

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

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

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

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012, May 7, 2012, August 3, 2012, October 31, 2012, January 28, 2013, April 26, 2013, July 24, 2013, October 21, 2013, and January 17, 2014. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

Subject: Public Retirement Systems.

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

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

§ 136-2.2 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

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

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

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

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

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

(g) The Comptroller shall:

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 14, 2014.

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

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for

further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

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

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

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

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

2. Compliance requirements: None.

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

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

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

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

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis

I.D. No. DFS-18-14-00002-E
Filing No. 318
Filing Date: 2014-04-16
Effective Date: 2014-04-16

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

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

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

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

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

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

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

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

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

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

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

Text of emergency rule: *11 NYCRR 440*

(INSURANCE REGULATION 201)

PROVIDER REQUIREMENTS FOR INSURANCE REIMBURSEMENT OF APPLIED BEHAVIOR ANALYSIS

Section 440.0 Purpose.

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

Section 440.1 Definitions.

For purposes of this Part:

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

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

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

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

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

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

(3) certification as a teaching assistant; or

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

(c) Assistant behavior analyst means:

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

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

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

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

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

(3) a licensed provider.

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

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

(g) Behavior analyst certification board means:

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

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

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

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

Section 440.2 Supervision of assistant behavior analysts.

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

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

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

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

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

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

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

(i) performing behavior assessments;

(ii) developing and evaluating individualized ABA services;

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

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

(v) using behavior change procedures and systems supports;

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

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

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

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

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

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

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

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

(5) supervising assistant behavior analysts, including:

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

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

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

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

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

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

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

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

Section 440.3 Qualifications for assistant behavior analysts.

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

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

(1) basic principles of behavior analysis;

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

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

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

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

Section 440.4 Duties of assistant behavior analysts.

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

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

(b) participate in required team meetings; and

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 14, 2014.

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

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

Some private ABA providers may incur additional costs to fulfill the educational and training requirements of the rule in order to become

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

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

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

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

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

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

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

To address the concerns of interested parties, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts must be board certified but are not required to be New York licensed providers. As a result, the rule should significantly expand the pool of providers eligible to provide and supervise ABA while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers. Also, the rule permits health insurance reimbursement to out-of-state providers who are board certified.

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

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

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

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

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

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

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

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

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

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

Job Impact Statement

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

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

Department of Health

NOTICE OF ADOPTION

Medicaid Managed Care Programs

I.D. No. HLT-53-13-00001-A
Filing No. 324
Filing Date: 2014-04-22
Effective Date: 2014-05-07

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

Action taken: Repeal of Subparts 360-10 and 360-11, sections 300.12 and 360-6.7; and addition of new Subpart 360-10 to Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a, 364-j and 369-ee

Subject: Medicaid Managed Care Programs.

Purpose: To repeal old and outdated regulations and to consolidate all managed care regulations to make them consistent with statute.

Substance of final rule: The proposed rule repeals various sections of Title 18 NYCRR that contain managed care regulations and replaces them with a new Subpart 360-10 that consolidates these managed care regulations in one place and makes the regulations consistent with Section 364-j of the Social Services Law (SSL). Section 364-j of the SSL contains the Medicaid managed care program standards. The new Subpart 360-10 will also apply to the Family Health Plus (FHP) program authorized in Section 369-ee of the Social Services Law. FHP-eligible individuals must enroll in a managed care organization (MCO) to receive services and FHP MCOs must comply with most of the programmatic requirements of Section 364-j of the SSL.

The new Subpart 360-10 identifies the Medicaid populations required to enroll and those that are exempt or excluded from enrollment, defines good cause reasons for changing/disenrolling from an MCO, or changing primary care providers (PCPs), adds enrollee fair hearing rights, adds marketing/outreach and enrollment guidelines, and identifies unacceptable practices and the actions to be taken by the State when an MCO commits an unacceptable practice.

The proposed rule repeals the existing Subparts 360-10 and 360-11 and Sections 300.12 and 360-6.7 of Title 18 NYCRR. Section 300.12 applied to the Monroe County Medicap program, a managed care demonstration project that was undertaken in the mid-1980s and that no longer exists. Section 360-6.7 addresses processes and timeframes for disenrollment from the various types of MCOs and these provisions are included in the new Subpart 360-10. Subpart 360-11 implemented provisions relating to special care plans formerly contained in SSL Section 364-j; these provisions were added by Chapter 165 of the Laws of 1991 and later removed by Chapter 649 of the Laws of 1996.

360-10.1 Introduction

This section provides an introduction to the managed care program. Section 364-j of Social Services Law provides the framework for the Statewide Medicaid managed care program. Certain Medicaid recipients are required to receive services from Medicaid managed care organizations. Section 369-ee added the Family Health Plus (FHP) program to Social Services Law. Individuals eligible for FHP are required to receive services from a managed care plan unless they are participating in the Family Health Plus premium assistance program.

360-10.2 Scope

This section identifies the topics addressed by the Subpart.

360-10.3 Definitions

This section includes definitions necessary to understand the regulations.

360-10.4 Individuals required to enroll in a Medicaid managed care organization

This section identifies the individuals who will be required to enroll in an MCO.

360-10.5 Individuals exempt or excluded from enrolling in a Medicaid mandatory managed care organization

This section identifies the circumstances in which a Medicaid recipient is exempt or excluded from enrollment in a mandatory managed care program. The section also includes the procedures for requesting an exemption or exclusion and the timeframes for processing the request. This section also describes the notices that must be provided to a Medicaid recipient if his/her request is denied.

360-10.6 Good cause for changing or disenrolling from an MCO

This section describes the good cause reasons for an enrollee to change MCOs and the process for requesting a change or disenrollment. This section also identifies the timeframes for processing the request and the notices that must be provided to the enrollee regarding his/her request.

360-10.7 Good cause for changing primary care providers

This section describes the good cause reasons for a managed care enrollee to change primary care providers, the process through which the enrollee may request such a change and the timeframes for processing the request.

360-10.8 Fair Hearing Rights

This section identifies the circumstances in which a Medicaid or FHP enrollee may request a fair hearing. Enrollees may request a fair hearing for enrollment decisions made by the local social services district and decisions made by an MCO or its management contractor about services. The section describes the notices that must be sent to advise the enrollee of his/her of her fair hearing rights. The section also explains when aid continuing is available for managed care issues and how the enrollee requests it when requesting a fair hearing.

360-10.9 Marketing/Outreach

This section defines marketing/outreach and establishes marketing/outreach guidelines for MCOs including requiring MCOs to submit a marketing/outreach plan, requiring MCOs to get approval of materials before distribution, and establishing limits for marketing/outreach representative reimbursement.

360-10.10 MCO unacceptable practices

This section identifies additional unacceptable practices for MCOs. These are generally related to marketing/outreach.

360-10.11 MCO sanctions and due process

This section identifies the actions the Department is authorized to take when an MCO commits an infraction.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 360-10.8(g)(2).

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

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

DMV Road Test

I.D. No. MTV-18-14-00004-P

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

Proposed Action: Amendment of section 3.5(e) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 502(4)(f) and 508(4)

Subject: DMV road test.

Purpose: Prohibit the use of recording equipment in vehicles during a DMV road test.

Text of proposed rule: A new subdivision (e) is added to section 3.5 to read as follows:

(e)(1) Use of recording equipment prohibited in motor vehicles. No applicant or any other person, other than a Department of Motor Vehicles employee or other party designated by the Department, may use any audio, visual or other recording equipment in or on a motor vehicle operated by an applicant during a skills test. The skills test shall not be conducted if the applicant or any other person, other than a Department of Motor Vehicles employee or other designated party, uses or attempts to use audio, visual or other recording equipment during the skills test.

(2) The provisions of paragraph (1) of this subdivision shall not apply to equipment that is installed in or on a motor vehicle by the Department or a party designated by the Department for security or employee monitoring purposes. The Department of Motor Vehicles employee conducting the skills test shall determine if the skills test may be taken with such equipment installed in or on the vehicle.

Text of proposed rule and any required statements and analyses may be obtained from: Michelle Seabury, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: michelle.seabury@dmv.ny.gov

Data, views or arguments may be submitted to: Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: ida.traschen@dmv.ny.gov

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) § 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL § 502(4)(f) law authorizes the Commissioner to promulgate regulations regarding the skills test that is required to obtain a driver's license. VTL § 508(4) authorizes the Commissioner to promulgate regulations with respect to the administration of VTL Article 19, Licensing of Drivers.

2. Legislative objectives: In order to obtain a New York State driver's license, the Vehicle and Traffic Law provides that an applicant for a license must pass a knowledge test and a skills test (also known as a road test) in a representative motor vehicle. The Legislature has granted the Commissioner broad authority to establish guidelines for the administration of the skills test.

The purpose of the skills test is to ensure that an applicant has the requisite skills to safely operate a motor vehicle. Such test must be given in a secure environment where there are limited distractions. By prohibiting the use of video, audio and other recording devices during the skills test, the Department will ensure that the applicant can demonstrate his or her skills without unnecessary distractions.

3. Needs and benefits: This proposed regulation would prohibit any person from using audio, visual or other equipment during a skills test. This is necessary to ensure that the person taking the test is not distracted by any recording devices.

The use of recording devices creates a distraction for both the applicant and the examiner, thereby compromising the safety of the vehicle occupants and the motoring public. The applicant-driver and the Department examiner, who are aware that they are being taped, may focus more attention on the video recording process than on the skills test and their surroundings. Skills tests are conducted in real world traffic situations that are fluid and subject to rapid change. Any distractions create a potential hazard.

In addition, any recording might be displayed on the Internet for mass circulation. This would not only compromise the privacy of the applicant, but if the recording is edited, it might depict the skills test in an inaccurate manner, so as to embarrass the applicant or the examiner.

Finally, the regulation authorizes the Department to use recording devices, because the Department wishes to reserve the right to use such devices, in rare circumstances, for training or investigatory purposes. For example, the Department may need to record the activities of an employee who is suspected of engaging in fraud or malfeasance, or other inappropriate behavior. Further, the recording device serves as a useful tool to monitor customers who are engaging in or who have previously engaged in abusive or threatening behavior during a skills test.

The regulation also authorizes recording by "a party designated by the Department." Many school bus operators install cameras in school buses to monitor driver and passenger behavior for security purposes. The cameras can be deactivated only if the hard drive is removed, which imposes a burden on the bus company. Allowing this exception to the general rule relieves the bus company of the unnecessary burden of removing the hard drive.

4. Costs:
(i) Cost to the regulated parties for the implementation of and continuing compliance with the rule: There is no cost to regulated persons.
(ii) Costs to the agency, the State and local governments for the implementation of, and continued administration of, the rule: There are no costs to the Department, the State or to local governments. The Department is the only agency authorized to administer and regulate skills tests for drivers, and prohibiting the videorecording of skills tests does not impose any costs.
(iii) The information, including the source of such information and the methodology upon which the cost analysis is based: The Department's Office of Operations relied on its experience in conducting the skills test to determine that prohibiting video recording equipment in motor vehicles used for skills tests will have no fiscal impact on the Department, the State, local governments, or motorists taking the skills test.
5. Local government mandates: There are no local government mandates because local governments do not have jurisdiction to give skills tests.
6. Paperwork: There are no paperwork requirements.
7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.
8. Alternatives: The Department is aware that some of the 674 licensed driving schools might want to record the skills tests taken by their students. Although such recordings could be beneficial for educational purposes, the negative highway safety implications outweigh any such benefits.
A no action alternative was not considered because the Department believes that this rule is necessary to ensure the privacy and safety of both the skills test applicant and the motor vehicle license examiner.
9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.
10. Compliance schedule: The Department anticipates that all affected parties will be able to achieve compliance with the rule upon adoption.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.
This proposal prohibits the use of video recording equipment in and on motor vehicles used for a Department of Motor Vehicles skills test. Due to its narrow focus, this rule will not impose an adverse economic impact on reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for Submetering of Electricity

I.D. No. PSC-18-14-00007-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 whether to grant, deny or modify, in whole or part, the petition filed by EBNB 70 Pine Owner LLC to submeter electricity at 70 Pine Street, New York, New York.

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

Subject: Petition for submetering of electricity.

Purpose: To consider the request of EBNB 70 Pine Owner LLC to submeter electricity at 70 Pine Street, New York, 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 EBNB 70 Pine Owner LLC to submeter electricity at 70 Pine Street, New York, NY, located in the territory of Consolidated Edison Company, Inc.

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

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

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

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

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

(14-E-0126SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minor Electric Rate Filing

I.D. No. PSC-18-14-00008-P

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

Proposed Action: The Commission is considering a tariff filing by Bath Electric, Gas and Water Systems, requesting approval to increase its annual revenues by approximately $300,000 or 7.0% in PSC No. 1—Electricity, to become effective September 1, 2014.

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

Subject: Minor electric rate filing.

Purpose: To approve an increase in annual electric revenues by approximately $300,000 or 7.0%.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Bath Electric, Gas and Water Systems (Bath or the Village) requesting approval to increase its annual revenues by $300,000 or 7.0% to P.S.C. No. 1—Electricity. The proposed filing has an effective date of September 1, 2014.

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

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

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

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

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

(14-E-0140SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Financing Proposed by Affiliates of Alliance Energy New York LLC

I.D. No. PSC-18-14-00009-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 a financing proposed by affiliates of Alliance Energy New York LLC.

Statutory authority: Public Service Law, section 69

Subject: Financing proposed by affiliates of Alliance Energy New York LLC.

Purpose: To consider financing proposed by affiliates of Alliance Energy New York LLC.

Substance of proposed rule: The Public Service Commission is consider-

ing a petition filed by Allegany Generating Station LLC, Alliance NYGT LLC, Carthage Energy LLC, Power City Partners LLC, Seneca Power Partners, L.P., Sterling Power Partners, L.P, Alliance Energy Transmissions LLC, and Alliance Energy Transmissions- Syracuse LLC, as affiliates of Alliance Energy New York LLC, requesting approval of a financing pursuant to Public Service Law (PSL) § 69. The financing would be for a maximum of $30 million and the proceeds would be used for working capital needs, operational losses and capital expenses. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: 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-M-0143SP1)