

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 Financial Services

EMERGENCY RULE MAKING

Public Retirement Systems

I.D. No. DFS-43-14-00002-E

Filing No. 866

Filing Date: 2014-10-10

Effective Date: 2014-10-10

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; 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, January 17, 2014, April 16, 2014, and July 14, 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 January 7, 2015.

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 to do 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, consul-

tants 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.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Hospital Observation Services

I.D. No. HLT-43-14-00001-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 405.19; and addition of section 405.32 to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803, 2805-v and 2805-w
Subject: Hospital Observation Services.

Purpose: To amend current observation services provisions to be in compliance with changes in Public Health Law, Section 2805-v.

Text of proposed rule: Paragraph (2) of subdivision (e) of section 405.19 is amended to read as follows:

(2) Every person arriving at the emergency service for care shall be promptly examined, diagnosed and appropriately treated in accordance with triage and transfer policies and protocols adopted by the emergency service and approved by the hospital. Such protocols must include written agreements with local emergency medical services (EMS) in accordance with subparagraph (b)(1)(i) of this section. All patient care services shall be provided under the direction and control of the emergency services director or attending physician. In no event shall a patient be discharged or transferred to another facility, unless evaluated, initially managed, and treated as necessary by an appropriately privileged physician, physician assistant, or nurse practitioner. No later than eight hours after presenting in the emergency service, every person shall be admitted to the hospital, or assigned to [an] observation [unit] services in accordance with [subdivision (g) of this] section 405.32 of this part, or transferred to another hospital in accordance with paragraph (6) of this subdivision, or discharged to self-care or the care of a physician or other appropriate follow-up service. [Hospitals which elect to use physician assistants or nurse practitioners shall develop and implement written policies and treatment protocols subject to approval by the governing body that specify patient conditions that may be treated by a registered physician assistant or nurse practitioner without direct visual supervision of the emergency services attending physician.]

Subdivision (g) of section 405.19 is repealed.

A new section 405.32 is added to read as follows:

405.32 Observation services.

(a) *General.*

(1) *Observation services are post-stabilization services appropriate for short-term treatments, assessment, and re-assessment of those patients for whom diagnosis and a determination concerning inpatient admission, discharge, or transfer can reasonably be expected within forty-eight hours.*

(2) *If observation services are provided, the services shall be provided in a manner which protects the health and safety of the patients in accordance with generally accepted standards of medical practice.*

(3) *Direct referral is defined as a patient referred by a community, hospital outpatient clinic, or diagnostic and treatment center physician or appropriately licensed practitioner to the hospital for observation services without receiving emergency room or critical care services on the day observation care begins. The referring practitioner must be a member of the medical staff and must have conducted a physical assessment of the patient within the previous eight hours from the referral.*

(4) *Patients may be assigned to observation services only by order of a physician or appropriately licensed practitioner.*

(5) *Patients may be assigned to observation services only through the emergency department or by direct referral in accordance with hospital policies, procedures and bylaws, in conformance with applicable statutes and regulations.*

(b) *Organization and Notice.*

(1) *The medical staff shall develop and implement written policies and procedures, approved by the governing body, that are based on the clinical needs of the patient, that shall specify:*

(i) *the organizational structure for providing observation services, including the specification of authority and accountability of the services,*

(ii) *the proper clinical location for the care of a patient requiring observation services,*

(iii) *the appropriate medical and administrative oversight of observation services*

(iv) *clinical criteria for observation assignment and discharge,*

(v) *assignment of a physician, nurse practitioner, or physician assistant who will be responsible for the care of the patient and timely discharge from observation services, and*

(vi) *integration with related services and quality assurance activities of the hospital.*

(2) *The hospital, in conjunction with the discharge planning program of the hospital, shall establish and implement written criteria and guidelines specifying the circumstances, the actions to be taken, and the appropriate contact agencies and individuals to accomplish adequate discharge planning for persons in need of post observation treatment or services but not in need of inpatient hospital care.*

(3) *Patients in observation shall be cared for by staff appropriately trained and in sufficient numbers to meet the needs of the patients.*

(4) *Patients being assigned to the observation services, or the patient*

representative, shall be provided with an oral and written notice within twenty-four hours of such placement that the patient is not admitted to the hospital and is under observation status. The hospital shall make a good faith effort to obtain written acknowledgment of receipt of the notice by the patient or the patient representative, and if not obtained, document its good faith efforts to obtain such acknowledgment and the reason why the acknowledgment was not obtained. Such written notice shall include, but not be limited to the following information:

(i) a statement that observation status may affect the patient's Medicare, Medicaid and/or private insurance coverage for the current hospital services, including medications and other pharmaceutical supplies, as well as coverage for any subsequent discharge to a skilled nursing facility or home and community based care; and

(ii) that the patient should contact his or her insurance plan to better understand the implications of being placed in observation status.

(c) Locations. Hospitals may provide observation services in the following locations:

(1) Inpatient beds;

(2) Distinct Observation Units; or

(3) In a hospital designated as a critical access hospital pursuant to Subpart F of Part 485 of Title 42 of the Code of Federal Regulations or a sole community hospital pursuant to section 412.92 of Title 42 of the Code of Federal Regulations, or any successor provisions, observation services may be provided in the emergency department.

(d) Distinct Observation Units.

(1) Physical Standards

(i) The observation unit shall comply with the applicable provisions of Parts 711 and 712-2 and section 712-2.4 of this Title for construction projects approved or completed after January 1, 2011, except that the unit need not be adjacent to the emergency department.

(ii) Observation unit beds shall not be counted within the state certified bed capacity of the hospital and shall be exempt from the public need provisions of Part 709 of this Title.

(iii) The observation unit shall be marked with a clear and conspicuous sign that states: "This is an observation unit for visits of up to 48 hours. Patients in this unit are not admitted for inpatient services."

(2) Any hospital seeking to establish a distinct observation unit shall, not less than 90 days prior:

(i) if no construction, as defined in subdivision 5 of section 2801 of the Public Health Law, will be needed, no construction waivers are being requested, and no service will be eliminated, notify the Department in writing of the general location of the unit and the number of beds; and submit a certification from a licensed architect or engineer, in the form specified by the Department, that the space complies with the applicable provisions of Parts 711 and 712-2 and section 712-2.4 of this Title for construction projects approved or completed after January 1, 2011; or

(ii) if construction, as defined in subdivision 5 of section 2801 of the Public Health Law, will be needed, or construction waivers are being requested, or a service will be eliminated:

(a) submit a request for limited review under 710.1(c)(5) of this Title, provided that for purposes of Part 710, a construction project involving only the creation of an observation unit and the addition of observation unit beds shall not be subject to review under section 710.1(c)(2) or (3) of this Title, unless the total project cost exceeds \$15 million or \$6 million respectively; and

(b) comply with the applicable provisions of Parts 711 and 712-2 and section 712-2.4 of this Title for construction projects approved or completed after January 1, 2011.

(3) Any hospital operating an observation unit pursuant to a waiver granted by the Department shall be required to comply with the provisions of this subdivision within 12 months of its effective date.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the proposed revision to Title 10 NYCRR Part 405 is section 2803 of the Public Health Law (PHL), which authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health, to effectuate the provisions and purposes of Article 28 of the PHL with respect to minimum standards for hospitals and section 2805-v of the PHL, which authorizes PHHPC and the Commissioner to adopt regulations with respect to observation services in general hospitals. In addition, Section 2805-w of the Public Health Law requires patient notice of observation services.

Legislative Objectives:

While observation services have been widely used, it wasn't until 2011 a Medicaid rate was implemented and 2012 that regulations were adopted creating operational standards for observation units, pursuant to a recommendation adopted by Governor Cuomo's Medicaid Redesign Team. In January 2013 Governor Cuomo signed legislation (L. 2013, ch. 5) creating section 2805-v of the Public Health Law in relation to hospital observation services which differ from the type of observation services provided for in the current regulations. In addition, Chapter 397 of the Laws of 2013 added a new Section 2805-w to the Public Health Law specific to patient notice of observation services.

The proposed changes are designed to make the regulations consistent with sections 2805-v and 2805-w, as well as make modifications based on the experiences of hospitals and the desire to bring the regulations more in line with Medicare rules, while still assuring patient safety and quality of care.

Current Requirements:

Current regulations require that observation services be rendered in a discrete unit, under the direction and control of the emergency services. Additionally, observation services are currently limited to twenty-four hours, at which time the hospital must either discharge or admit the patient. Observation services have been identified as a means of improving patient care and relieving overcrowding in emergency departments by increasing efficiency and patient through-put. However, the current regulations differ significantly from sections 2805-v and 2805-w and from Medicare rules.

Needs and Benefits:

The proposed regulations repeal 405.19(g) and create a new section 405.32. In response to the recent legislation, the new regulations will allow observation services to be rendered in a distinct unit or in inpatient beds, with no limit on the number of observation beds. The facility will be able to determine the appropriate oversight, and the maximum observation stay will increase to forty-eight hours. Many of the provisions in the current section 405.19(g) are retained in the new 405.32(d).

Additionally, proposed changes would allow hospitals to accept direct referrals to observation by properly privileged and credentialed community providers, following appropriately adopted policies and procedures. The new regulations will also require both verbal and written notice be given to patients explaining that observation services are considered outpatient services with all concurrent applicable insurance rules.

These regulatory changes incorporate the statutory changes and take into account the desire for appropriate consistency with Medicare rules and operational experiences over the past year, while maintaining proper safeguards and attention to patient safety and quality of care.

COSTS

Costs to Private Regulated Parties:

This regulation creates no additional burdens or costs to regulated parties. It will eliminate the requirement for discrete units which may have required construction costs to be in compliance with construction standards.

Costs to Local Government:

There are no costs to local government.

Costs to the Department of Health:

The proposed amendment would impose no new costs on the Department.

Costs to Other State Agencies:

There are no costs to other State agencies or offices of State government.

Local Government Mandates:

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

Paperwork:

This regulation requires no additional paperwork other than written notice to patients about their assignment to observation services and signage at the entrance to the observation area.

Duplication:

There are no relevant State regulations which duplicate, overlap or conflict with the proposed amendment. Federal Medicare payment rules set forth standards for reimbursement of observation services. These proposed regulations provide clear and consistent operating standards for observation services. The regulations do not conflict with Medicare payment rules.

Alternatives:

The Department believes that Chapter 5 of the Laws of 2013 requires the Department to promulgate these regulations. The Department considered not requiring verbal and written notice to patients regarding their assignment to observation services. Based on the literature and recent newspaper articles, the Department determined that such information was important for patients to know.

Federal Standards:

The proposed amendment does not exceed any minimum operating standards for health care facilities imposed by the Federal government.

Compliance Schedule:

The proposed amendments will be effective 90 days after publication of a Notice of Adoption in the New York State Register. Facilities operating observation units pursuant to a waiver approved by the Department will have 12 months to comply with these regulations.

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas. The regulation includes an exemption for critical access hospitals and sole community hospitals, allowing them to utilize emergency room beds.

Job Impact Statement

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

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

Physician Assistants and Specialist Assistants

I.D. No. HLT-08-14-00001-RP

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

Proposed Action: Amendment of Part 94 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 3308, 3701 and 3702

Subject: Physician Assistants and Specialist Assistants.

Purpose: Allows LPAs to prescribe controlled substances (including Schedule II) to patients under the care of the supervising physician.

Text of revised rule: PART 94

PHYSICIAN[’S] ASSISTANTS AND SPECIALIST[’S] ASSISTANTS

Section 94.1 Definitions.

(a) [Registered] *licensed* physician[’s] assistant means an individual who is currently [registered] *licensed* as a physician[’s] assistant by the New York State Department of Education.

(b) Registered specialist[’s] assistant means an individual who is currently registered as a specialist[’s] assistant by the New York State Department of Education.

(c) Hospital means an institution or facility possessing a valid operating certificate issued pursuant to article 28 of the Public Health Law and authorized to employ physician[’s] assistants pursuant to part 707 of the State Hospital Code.

(d) Physician means a practitioner of medicine licensed to practice medicine pursuant to article 131 of the Education Law.

94.2 Supervision and scope of duties.

(a) A [registered] *licensed* physician[’s] assistant or a registered specialist[’s] assistant may perform medical services but only when under the supervision of a physician. Such supervision shall be continuous but shall not necessarily require the physical presence of the supervising physician at the time and place where the services are performed. *The licensed physician assistant or registered specialist assistant shall retain records documenting the continuous supervision by the physician who is responsible for such supervision.*

(b) Medical acts, duties and responsibilities performed by a [registered] *licensed* physician[’s] assistant or registered specialist[’s] assistant must:

(1) be assigned to him or her by the supervising physician;

(2) be within the scope of practice of the supervising physician; and

(3) be appropriate to the education, training and experience of the [registered] *licensed* physician[’s] assistant or registered specialist[’s] assistant.

(c) No physician may employ or supervise more than [two] *four* [registered] *licensed* physician[’s] assistants and two *registered* specialist[’s] assistants in his or her private practice.

(d) No physician may supervise more than six [registered] *licensed* physician[’s] assistants or registered specialist[’s] assistants or any combination thereof [employed by] *in a hospital setting, no matter if the licensed physician assistants or registered specialist assistants are employed or contracted by a hospital.*

(e) Prescriptions and medical orders may be [written] *issued* by a [registered] *licensed* physician[’s] assistant as provided in this subdivision when assigned by the supervising physician.

(1) A [registered] *licensed* physician[’s] assistant may [write] *issue* prescriptions for a patient who is under the care of the physician responsible for the supervision of the [registered] *licensed* physician[’s] assistant. The prescription shall be *issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title*, written on the *blank* form of the supervising physician and shall include the name, address and telephone number of the *supervising physician and the name of the licensed physician assistant*. The prescription shall also bear the name, the address, the age of the patient and the date on which the prescription was [written] *issued*.

(2) [Prescriptions for controlled substances not listed under section 80.67 of this Part shall be written on the blank form of the supervising physician and shall include all other information required by Article 28 of the Public Health Law and Part 80 of this Title.] *A licensed physician assistant, in good faith and acting within his or her lawful scope of practice, and to the extent assigned by his or her supervising physician, may prescribe controlled substances as a practitioner under Article 33 of the Public Health Law, to patients under the care of such physician responsible for his or her supervision. Licensed physician assistants may issue prescriptions for controlled substances under section 3306 of the Public Health Law provided that such prescriptions shall be issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title.*

(3) [Registered physician’s assistants may write prescriptions for those controlled substances listed under section 80.67 of this Part which are not classified as Schedule II controlled substances, provided that such prescriptions shall be written on official New York State forms issued to the physician’s assistant.] *The licensed physician assistant shall sign all such prescriptions with his or her own name followed by the letters L.P.A. and his or her State Education Department registration number, except that an electronic prescription must contain the electronic signature of the licensed physician assistant and shall include the name, address and telephone number of the supervising physician.*

(4) [The registered physician’s assistant shall sign all such prescriptions by printing the name of the supervising physician, printing his/her own name and additionally signing his/her own name followed by the letters R.P.A. and his/her State Education Department registration number.] *A licensed physician assistant employed or extended privileges by a hospital may, if permissible under the bylaws, policies and procedures of the hospital, issue prescriptions for controlled substances listed under section 3306 of the Public Health Law on official New York State prescription forms issued to the hospital. Such prescriptions shall be issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title and must include the imprinted name of the licensed physician assistant and the name of the physician responsible for his or her supervision.*

(5) Registered physician’s assistants may not write prescriptions for controlled substances listed under section 3306 of the Public Health Law as Schedule II controlled substances.

(6) (5) A [registered] *licensed* physician[’s] assistant employed or extended privileges by a hospital may, if permissible under the bylaws, [rules and regulations] *policies and procedures* of the hospital, write medical orders, including those for controlled substances, for inpatients under the care of the physician responsible for his supervision. Countersignature of such orders may be required if deemed necessary and appropriate by the supervising physician or the hospital, but in no event shall countersignature be required prior to execution.

(f) A physician supervising or employing a [registered] *licensed* physician[’s] assistant or registered specialist[’s] assistant shall remain medically responsible for the medical services performed by the [registered] *licensed* physician[’s] assistant or registered specialist[’s] assistant whom such physician supervises or employs.

(g) Qualified individuals may be registered as specialist[’s] assistants in the following categories:

(1) Orthopedic assistant. A specialist[’s] assistant registered in this category is an individual:

(i) who satisfactorily completed a program for the training of orthopedic assistants approved by the New York State Department of Education; or

(ii) who possesses equivalent education, training and experience. Training and experience while in military service which led to an orthopedic specialist, orthopedic cast room technician, or orthopedic clinic techni-

cian rating and two years of satisfactory experience as an orthopedic assistant working under the supervision of an orthopedic surgeon within the past five years; or completion of medical corps school and five years of satisfactory experience as an orthopedic assistant working under the supervision of an orthopedic surgeon within the past eight years may be considered equivalent education, training and experience for the purpose of registration in this category.

(2) Urologic assistant. A specialist[’s] assistant registered in this category is an individual:

(i) who satisfactorily completed a program for the training of urologic assistants approved by the New York State Department of Education; or

(ii) who possesses equivalent education, training and experience. Training and experience while in military service which led to a urology surgical technician or urological technician or clinical specialist rating and two years of satisfactory experience as a urologic assistant working under the supervision of an urologist within the past five years; or completion of medical corps school and five years of satisfactory experience as an urologic assistant working under the supervision of an urologist within the past eight years may be considered equivalent education, training and experience for the purpose of registration in this category.

(3) Acupuncture. A specialist[’s] assistant registered in this category shall be employed or supervised only by a physician authorized to administer acupuncture in accordance with the rules and regulations of the New York State Department of Education and is an individual:

(i) who satisfactorily completed a program of training in acupuncture approved by the New York State Department of Education; or

(ii) who possesses equivalent education and training acceptable to the New York State Department of Education; and

(iii) in addition to satisfying the requirements of subparagraphs (i) and (ii) of this paragraph has completed at least five years of experience in the use of acupuncture acceptable to the New York State Department of Education.

(4) Radiologic assistant. A specialist[’s] assistant in this category is an individual:

(i) who is licensed as a radiologic technologist by the New York State Department of Health; and

(ii) who satisfactorily completed a program for the training of radiologic assistants approved by the New York State Education Department.

Revised rule compared with proposed rule: Substantive revisions were made in section 94.2(a), (c), (d), (e), (e)(1) and (4).

Text of revised proposed 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.ny.gov

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

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

Revised Regulatory Impact Statement, 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.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Modification to the Commission’s Electric Safety Standards

I.D. No. PSC-43-14-00004-P

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

Proposed Action: The Commission is considering a petition filed by the New York State utilities to modify the Electric Safety Standards, including revisions to the reporting requirements contained in the standards.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: Modification to the Commission’s Electric Safety Standards.

Purpose: To consider revisions to the Commission’s Electric Safety Standards.

Substance of proposed rule: The Public Service Commission is considering the joint petition of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Gas & Electric Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, Inc., and Rochester Gas & Electric Corporation seeking modification to the Public Service Commission’s Electric Safety Standards, Appendix A. The utilities are proposing revisions to the data reporting requirements contained in the standards, specifically with respect to shock reports from the public and the summary of deficiencies and repair activity resulting from the facility inspection process. In addition, the Commission may consider various revisions to the reporting requirements contained in Appendix B, Event Notification Requirements, to the standards. These revisions may include an update to reference the Electric Incident Reporting System currently in use and a clarification on the reporting of personal injury accidents as required in 16 NYCRR Part 125.

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.

(04-M-0159SP10)

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

City of Yonkers Withholding Tables and Other Methods

I.D. No. TAF-43-14-00003-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 251.1(b); repeal of appendix 10-A; and addition of new appendix 10-A to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First, 671(a)(1), 697(a), 1321, 1329(a), 1332(a); Code of the City of Yonkers, sections 15-105, 15-108(a), 15-111; City of Yonkers Local Laws, No. 6-2013 and 11-2014; L. 2009, ch. 57, Part Z-1, section 5 and L. 2013, ch. 70

Subject: City of Yonkers withholding tables and other methods.

Purpose: To provide current City of Yonkers withholding tables and other methods.

Substance of proposed rule (Full text is posted at the following State website:<http://www.tax.ny.gov>): Sections 671(a)(1) and 1329(a) of the Tax Law, and section 15-105 of the Code of the City of Yonkers require that employers withhold from employee wages amounts that are substantially equivalent to the amount of New York State personal income tax and City of Yonkers income tax surcharge reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule repeals Appendix 10-A of Title 20 NYCRR and adds a new Appendix 10-A to provide new City of Yonkers withholding tables and other methods. The new tables and other methods implement changes necessitated by City of Yonkers Local Law No. 11-2014 pursuant to Tax Law section 1321 that increased the City of Yonkers income tax surcharge rate from 15 to 16.75 percent of net state income tax, effective January 1, 2014. Specifically, the amendments to City of Yonkers withholding tax tables reflect the implementation of the 16.75 percent surcharge rate over

a twelve-month period, rather than the shorter implementation period required for tax year 2014. Chapter 70 of the Laws of 2013 extended the authority contained in Section 1321 to taxable years beginning before 2016. City of Yonkers Local Law No. 6-2013 extended the City of Yonkers resident income tax surcharge and its non-resident earnings tax to taxable years ending on or before December 31, 2015.

The rule also amends the City of Yonkers provisions regarding withholding on supplemental wages to reflect the new rates of withholding.

This rule applies to wages and other compensation subject to withholding paid on or after January 1, 2015.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen D. O'Connell, Tax Regulations Specialist, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: Kathleen.OConnell@tax.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations as are necessary to enforce the personal income tax; section 1329(a) of the Tax Law and section 15-105 of the Code of the City of Yonkers provide that the City of Yonkers income tax surcharge shall be withheld in the same manner and form as that required for State income tax; section 1332(a) of the Tax Law and section 15-108(a) of the Code of the City of Yonkers provide that the income tax surcharge shall be administered and collected by the Commissioner in the same manner as the tax imposed by Article 22 of the Tax Law. Section 1321 authorizes the City of Yonkers to adopt and amend local laws imposing a city income tax surcharge to be administered, collected and distributed by the Commissioner. Section 5 of Part Z-1 of Chapter 57 of the Laws of 2009 requires the Commissioner to adopt rules to implement changes in the withholding tax tables and methods relating to the income tax rate changes made by Part Z-1. City of Yonkers Local Law No. 11-2014 amended section 15-111 of the Code of the City of Yonkers to increase the city income tax surcharge from 15 to 16.75 percent of net state income tax. Chapter 70 of the Laws of 2013 extended the authority contained in Section 1321 to taxable years beginning before 2016. City of Yonkers Local Law No. 6-2013 extended the City of Yonkers resident income tax surcharge and its non-resident earnings tax to taxable years ending on or before December 31, 2015.

2. Legislative objective: New Appendix 10-A of Title 20 NYCRR contains the revised City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after January 1, 2015. Appendix 10-A reflects the increase in the City of Yonkers income tax surcharge rate from 15 to 16.75 percent of net state income tax, pursuant to amendments to section 15-111 of the Code of the City of Yonkers made by Local Law No. 11-2014 of the City of Yonkers, which was enacted under the authority of Section 1321 of the Tax Law. Specifically, the amendments to City of Yonkers withholding tax tables reflect the implementation of the 16.75 percent surcharge rate over a twelve-month period, rather than the shorter implementation period required for tax year 2014. Amendments to provisions regarding withholding on supplemental wages are also made to reflect the new rates of withholding.

3. Needs and benefits: This rule sets forth amendments to the City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after January 1, 2015, implementing the new City of Yonkers income tax surcharge rate pursuant to section 15-111 of the Code of the City of Yonkers as amended by City of Yonkers Local Law 11-2014 over a twelve-month period, rather than over the shorter period required for tax year 2014. This rule benefits taxpayers by providing City of Yonkers withholding rates that more accurately reflect the current income tax rates. If this rule is not promulgated, the use of the existing withholding tables would cause some over-withholding for some taxpayers.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Code of the City of Yonkers already mandate withholding in amounts that are substantially equivalent to the amounts of New York State and City of Yonkers personal income tax on residents reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendix 10-A of Title 20 NYCRR to the rates of the City of Yonkers income tax surcharge on residents, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to make amendments to the City of Yonkers Income Tax Surcharge on Residents Regulations and to Appendix 10-A arises due to the statutory change in the rate in the City of Yonkers income tax surcharge rate applied over a twelve-month period, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis Bureau of Tax and Fiscal Studies, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be notified of the changed tables and other methods and directed to the Department's Web site for the new tables and other methods.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since sections 671(a) and 1329(a) of the Tax Law, section 15-105 of the Code of the City of Yonkers and Chapter 57 of the Laws of 2009 require that withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods.

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject area.

10. Compliance schedule: The required information will be made available to affected employers in sufficient time to implement the revised City of Yonkers withholding tables and other methods for wages and other compensation paid on or after January 1, 2015.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, that are currently subject to the City of Yonkers withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised City of Yonkers withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms, or paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of such services.

4. Compliance costs: Small businesses and local governments are already subject to the City of Yonkers withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Section 671(a)(1) of the Tax Law requires that New York State withholding tables and other methods be promulgated. Section 1329(a) of the Tax Law requires that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York

State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores; the Tax section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State. In addition, the City of Yonkers was consulted.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(10) of the State Administrative Procedure Act, that is currently subject to the City of Yonkers withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms or other paperwork.

Further, many employers currently utilize bookkeepers, accountants, and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the City of Yonkers withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these City of Yonkers changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 671(a)(1) of the Tax Law requires that the New York State withholding tables and other methods be promulgated. Section 1329(a) of the Tax Law requires that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York Association of Convenience Stores; the Tax section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State.

6. Initial review of the rule, pursuant to SAPA 207, as amended by L. 2012, ch. 462; the proposed initial review period for this rule is 5 years after the year in which it is adopted, rather than 3 years. The justification for a five year review period is that the proposed amendment is necessary to implement the increase in the City of Yonkers income tax surcharge rate from 15 to 16.75 percent of net state income tax, pursuant to amendments to section 15-111 of the Code of the City of Yonkers made by Local Law No. 11-2014 of the City of Yonkers, which was enacted under the authority of Section 1321 of the Tax Law. New Appendix 10-A and the amendments to the provisions relating to withholding on supplemental wages merely reflect the rate increase enacted by the City of Yonkers. The substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further change to either Yonkers' local law or the New York State Tax Law, affecting Yonkers' rate of tax or the New York State Tax income tax rates on which it is based. Accordingly, there is no need for a shorter review period. The Department invites public comment during the public comment period for the rule.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities. The purpose of the rule is to

provide City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after January 1, 2015. This rule sets forth amendments reflecting the revision of the City of Yonkers income tax surcharge rate pursuant to section 15-111 of the Code of the City of Yonkers as amended by City of Yonkers Local Law No. 11-2014. Chapter 70 of the Laws of 2013 extended the authority contained in Tax Law Section 1321 to taxable years ending before 2016. City of Yonkers Local Law No. 6-2013 extended the City of Yonkers resident income tax surcharge and its non-resident earnings tax to taxable years ending on or before December 31, 2015.

The new Appendix 10-A reflects the increase in the City of Yonkers income tax surcharge rate from 15 to 16.75 percent of net state income tax pursuant to section 15-111 of the Code of the City of Yonkers. Specifically, the amendments to the City of Yonkers withholding tax tables reflect the implementation of the 16.75 percent surcharge rate over a twelve-month period, rather than the shorter implementation period required for tax year 2014.

The amendments to the City of Yonkers provisions regarding withholding on supplemental wages are also made to reflect the new rates of withholding.