

# RULE MAKING ACTIVITIES

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

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

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

## Department of Agriculture and Markets

### NOTICE OF ADOPTION

#### Cattle Importation

**I.D. No.** AAM-22-14-00007-A

**Filing No.** 746

**Filing Date:** 2014-08-21

**Effective Date:** 2014-09-10

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

**Action taken:** Amendment of Part 53 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 72 and 74

**Subject:** Cattle importation.

**Purpose:** To ease burden of interstate shipment of young calves and conform with federal animal disease traceability requirements.

**Text or summary was published** in the June 4, 2014 issue of the Register, I.D. No. AAM-22-14-00007-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Dr. Jeffrey Huse, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502, email: Jeffrey.Huse@agriculture.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

## State Commission of Correction

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

#### Classification of Minor and Adult Inmates

**I.D. No.** CMC-36-14-00013-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 7013.4 and 7013.6 of Title 9 NYCRR.

**Statutory authority:** Correction Law, sections 45(6), (15) and 500-b(6)

**Subject:** Classification of minor and adult inmates.

**Purpose:** To conform Commission of Correction inmate classification regulations to the recently amended provisions of Correction Law.

**Text of proposed rule:** Subdivision (b) of section 7013.4 of Title 9 is amended to read as follows:

(b) Each basic category contains the following four subcategories:

- (1) male adults, ages [19] 18 and over;
- (2) male minors, ages 16 to [18] 17 inclusive;
- (3) female adults, ages [19] 18 and over; and
- (4) female minors, ages 16 to [18] 17 inclusive.

Subdivision (d) of section 7013.4 of Title 9 is amended to read as follows:

(d) Correctional facilities meeting the requirements of subdivision (c) of this section may be permitted to reduce from 12 classification categories to the following four categories:

- (1) male adults, ages [19] 18 and over;
- (2) male minors, ages 16 to [18] 17 inclusive;
- (3) female adults, ages [19] 18 and over; and
- (4) female minors, ages 16 to [18] 17 inclusive.

Section 7013.6 of Title 9 is amended to read as follows:

(a) Nothing contained in this Part shall prevent the chief administrative officer from commingling inmates in different classification categories in the same area for purposes including, but not limited to:

(1) special housing as defined in section 7013.2(h) of this Part, provided minors and adults are separately grouped to prevent access between such classification categories;

(2) meals served in dining areas located outside facility housing areas;

- (3) visitation;
- (4) exercise held in areas located outside facility housing areas;
- (5) educational/vocational programs;
- (6) work programs;
- (7) divine worship; or
- (8) any other organized facility program or activity.

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, General Counsel, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.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:

Subdivision (6) of section 45 of the Correction Law authorizes the Com-

mission of Correction to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all person confined in the correctional facilities of New York State. Subdivision (15) of section 45 of the Correction Law allows the Commission to adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of its functions, powers and duties. More specifically, Correction Law section 500-b(6) requires the Commission to promulgate rules and regulations to assure that persons in custody in local correctional facilities will be afforded appropriate precautions for their personal safety and welfare in assignment to housing.

2. Legislative objectives:

By vesting the Commission with this rulemaking authority, the Legislature intended the Commission to promulgate and maintain minimum standards which provide for the effective management of inmate populations by establishing a formal and objective system for the consistent classification of local correctional facility inmates.

3. Needs and benefits:

Effective March 31, 2014, section 500-b of the Correction Law, applicable to local correctional facilities, was amended to change the minimum age classification of an adult inmate from nineteen (19) to eighteen (18) [L.2014, c. 55, pt. M, §§ 1 to 3]. Previously, the statute mandated county jails to classify inmates under the age of nineteen (19) years separately from those nineteen (19) years and older, requiring an assignment of facility housing that provided a physical separation between the two groups. This statutory amendment was designed to align the state's age classifications with those of the U.S. Department of Justice's Prison Rape Elimination Act (PREA) National Standards (Part 115 of Title 28 of the Code of Federal Regulations), thus allowing local correctional facilities to comply with both federal and state mandates. The presently proposed amendment simply aligns the Commission's regulations to the recently revised section 500-b of the Correction Law.

Further, the presently proposed amendment clarifies Commission regulations regarding the allowable commingling of minor and adult inmates. Correction Law § 500-b(4) clearly prohibits housing minor and adult inmates in the same room, dormitory, cell or tier of a local correctional facility, "unless separately grouped to prevent access" between the two classification groups. As currently written, 9 NYCRR § 7013.6 authorizes commingling inmates of different classification categories in special housing units (which include admission/orientation housing, medical/mental health observation, and punitive/administrative segregation), but makes no mention of the requirement of Correction Law § 500-b(4) that minors and adults be separately grouped to prevent access. To eliminate errors and confusion caused by those reading the regulation alone, the Commission feels it is appropriate to incorporate the statute's requirement in its corresponding regulation.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. The proposed rule serves only to reconcile the Commission's inmate classification regulations with recently amended statutory requirements.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The regulation does not apply to state agencies or governmental bodies. As set forth above in subdivision (a), there will be no additional costs to local governments.

c. This statement detailing the projected costs of the rule is based upon the Commission's oversight and experience relative to the operation and function of a local correctional facility.

5. Local government mandates:

None.

6. Paperwork:

This rule does not require any additional paperwork on regulated parties. The proposed rule serves only to reconcile the Commission's inmate classification regulations with recently amended statutory requirements.

7. Duplication:

While this rule mirrors statutory inmate classification requirements for local correctional facilities, it does not duplicate any existing State or Federal requirement.

8. Alternatives:

The alternative, maintaining its current regulations for inmate age classifications, was dismissed by the Commission as it would have conflicted with the recently amended statutory requirements of Correction Law § 500-b.

9. Federal standards:

There are no applicable minimum standards of the federal government.

10. Compliance schedule:

Each county correctional facility is expected to be able to achieve compliance with the proposed rule immediately upon its Notice of Adoption.

### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to conform Commission of Correction inmate classification regulations to the recently amended provisions of Correction Law § 500-b. Accordingly, it will not have an adverse impact on small businesses or local governments, nor impose any additional significant reporting, record keeping, or other compliance requirements on small businesses or local governments.

### Rural Area Flexibility Analysis

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to conform Commission of Correction inmate classification regulations to the recently amended provisions of Correction Law § 500-b. Accordingly, it will not impose an adverse economic impact on rural areas, nor impose any additional significant record keeping, reporting, or other compliance requirements on private or public entities in rural areas.

### Job Impact Statement

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to conform Commission of Correction inmate classification regulations to the recently amended provisions of Correction Law § 500-b. As such, there will be no impact on jobs and employment opportunities.

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## Education Department

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### EMERGENCY RULE MAKING

#### Special Education Services and Programs for Preschool Children with Disabilities

**I.D. No.** EDU-12-14-00013-E

**Filing No.** 748

**Filing Date:** 2014-08-22

**Effective Date:** 2014-08-22

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

**Action taken:** Amendment of section 200.16(c)(3); and addition of section 200.20(b)(3) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 308(not subdivided), 4401(1)-(11), 4402(1)-(7), 4403(1)-(5), (9), (11), (13), (15), (20), 4410(1)-(5), (9), (9-a), (9-b), (9-d), (10), (11) and (13); L. 2013, ch. 545, sections 1 and 2

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

**Specific reasons underlying the finding of necessity:** The purpose of the proposed amendment is to conform the Commissioner's Regulations to Education Law section 4410, as amended by Chapter 545 of the Laws of 2013, which was enacted to address certain findings in relation to audits of preschool providers conducted by the Office of the State Comptroller.

The proposed amendment to section 200.16(c) would require the Committee on Preschool Special Education to submit a written notice to the Commissioner when it places a preschool student with a disability in a program operated by the same provider who evaluated the student.

The proposed amendment to section 200.20(b) would add a requirement that providers ensure that executive directors or individuals assigned with executive director responsibilities have an education background in a field related to business, administration and/or education and have the knowledge and ability to oversee a preschool special education program; ensure that executive directors reside within a reasonable geographic distance from the program to ensure appropriate oversight of the day to day activities of the program; and that individuals who are assigned in a full-time role as the executive director are not engaging in activities that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

The proposed amendment was adopted as an emergency action at the March 10-11, 2014 Regents meeting, effective March 11, 2014 and readopted as an emergency action at the May Regents meeting to ensure that it remains continuously in effect until the effective date of its permanent adoption. At the June Regents meeting, the May emergency rule was repealed and a revised proposed amendment was adopted by emergency action, effective June 24, 2014.

Because the Board of Regents meets at monthly intervals, the earliest the revised proposed amendment could be adopted by regular action after publication of the Notice of Emergency Adoption and Revised Rule Making in the State Register on July 9, 2014 and expiration of the 30-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the September 15-16, 2014 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the June meeting, would be October 1, 2014, the date a Notice of Adoption would be published in the State Register. However, the June emergency rule will expire on August 22, 2014, 60 days after its filing with the Department of State on June 24, 2014. A lapse in the rule's effective date could disrupt implementation of Chapter 545 of the Laws of 2013 during the 2014-2015 school year.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the March Regents meeting, readopted at the May Regents meeting, and revised and adopted at the June Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the September 15-16, 2014 Regents meeting, which is the first scheduled Regents meeting after publication of the revised proposed rule in the State Register and expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act for State agency revised rule makings.

**Subject:** Special Education Services and Programs for Preschool Children with Disabilities.

**Purpose:** To implement L. 2013, ch. 545, relating to CPSE placement of a child in an approved program that also conducted an evaluation of the child, and qualifications for executive directors of approved preschool programs.

**Text of emergency rule:** 1. Paragraph (3) of subdivision (c) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective August 23, 2014, as follows:

(3) Prior to making any recommendation that would place a child in an approved program owned or operated by the same agency which conducted the [initial] evaluation of the child, the committee may exercise its discretion to obtain an evaluation of the child from another approved evaluator. *If the committee recommends placing a child in an approved program that also conducted an evaluation of the child, it shall indicate in writing that the placement is appropriate for the child and shall provide written notice to the commissioner of such recommendation on a form prescribed by the commissioner.*

2. A new paragraph (3) of subdivision (b) of section 200.20 of the Regulations of the Commissioner of Education is added, effective August 23, 2014, as follows:

(3) Each approved preschool program shall ensure that:

(i) *the executive director or person assigned to perform the duties of a chief executive officer hired or assigned on or after April 17, 2014, shall have earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or shall hold a New York State certification or license to provide an evaluation of and/or a related service to a student with a disability as such term is defined in section 200.1(qq) of this Part. In addition, the executive director, or person assigned to perform the duties of a chief executive officer, shall, at a minimum, have the following qualifications:*

(a) *knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities;*

(b) *knowledge of and ability to comply with applicable laws and regulations;*

(c) *ability to maintain or supervise the maintenance of financial and other records;*

(d) *ability to establish the approved program's policy, program and budget; and*

(e) *ability to recruit, employ, train, direct and evaluate qualified staff.*

(ii) *the executive director or person assigned to perform the duties of a chief executive officer shall reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and*

(iii) *if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-12-14-00013-EP, Issue of March 26, 2014. The emergency rule will expire October 20, 2014.

**Text of 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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the Education Department and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law 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 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

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

Education Law 4402 establishes districts' duties regarding education of students with disabilities.

Education Law 4403 outlines the Department's and district's responsibilities regarding special education programs and services to students with disabilities. Section 4403(3) authorizes the Department to adopt regulations as the Commissioner deems in their best interests.

Education Law 4410 outlines special education services and programs for preschool children with disabilities. Section 4410(3) authorizes the Commissioner to adopt regulations.

Sections 1 and 2 of Chapter 545 of the Laws of 2013 amended Education Law section 4410 in relation to special education placements for preschool children with disabilities and requirements for executive directors of preschool special education programs.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is required by sections 1 and 2 of Chapter 545 of the Laws of 2013 to address certain findings made by the Office of the State Comptroller in its audits of preschool providers. The statute requires: (1) a Committee on Preschool Special Education (CPSE) that recommends placement of a child in an approved program that also conducted an evaluation of the child to indicate in writing that such placement is appropriate and provide notice of such recommendation to the Commissioner; and (2) a provider of preschool special education services or programs to certify pursuant to regulations promulgated by the Commissioner that it will take measures to ensure its executive director or person performing duties of a chief executive officer meets the criteria established by the Commissioner to be an executive director and, if paid as a full time executive director, that such executive director is employed in a full time, full year position and shall not engage in activity that would interfere or impair such executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

##### **3. NEEDS AND BENEFITS:**

The proposed amendment would ensure increased review by CPSEs in the selection of preschool providers and would establish qualifications for executive directors of preschool programs to ensure that they have the appropriate background and qualifications and reside in a reasonable geographic distance from the program to ensure appropriate oversight of the preschool program.

##### **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 is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013 and does not impose any additional costs on the State, local governments, private regulated parties or the State Education Department beyond those inherent in the statute.

**5. LOCAL GOVERNMENT MANDATES:**

Consistent with sections 1 and 2 of Chapter 545 of the Laws of 2013, the proposed amendment establishes requirements for school districts to report certain information on a preschool child with a disability's selected provider and establishes qualifications for executive directors of approved preschool programs.

Section 200.16(c)(3) is amended to require a committee on preschool special education, when placing a child in the same program that conducted the child's evaluation, to indicate in writing that the placement is appropriate and to notify the Commissioner.

Section 200.20(c) is amended to require each approved preschool program to ensure that an executive director or persons assigned to perform the duties of a chief executive officer hired or assigned on or after April 17, 2014 has earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or shall hold a New York State certification or license to provide an evaluation of and/or a related service to a student with a disability as such term is defined in section 200.1(qq) of this Part. In addition, the executive director shall, at a minimum, have appropriate qualifications to oversee a special education preschool program including, knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities; knowledge of and ability to comply with applicable laws and regulations; ability to maintain or supervise the maintenance of financial and other records; ability to establish the approved program's policy, program and budget; and ability to recruit, employ, train, direct and evaluate qualified staff. Further, the proposed amendment would require each executive director or persons assigned to perform the duties of a chief executive officer to reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and to require that, if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

**6. PAPERWORK:**

The proposed amendment requires a written notification by school districts to the Commissioner on a form prescribed by the Commissioner.

**7. DUPLICATION:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2014 and will not duplicate, overlap or conflict with any other State or federal statute or regulation.

**8. ALTERNATIVES:**

The Department considered requiring all executive directors of preschool programs to meet the new qualifications but determined that doing so may result in individuals losing their current positions. The Department also considered a new reporting form for CPSEs to submit notification to the Commissioner of the provider recommendation but determined it would reduce school district and State Education Department administrative burden and costs to add this information to an existing form ("Preschool STAC-1: Request for Commissioner's Approval of Reimbursement for Services for students with Disabilities") which school districts must currently submit for each preschool student with a disability. Including this notice on the STAC-1 would minimize the administrative burden of school districts for additional reporting as well as provide the Department with the ability to verify and run reports on such data using existing technology.

**9. FEDERAL STANDARDS:**

The proposed amendment does not exceed any minimum standards of the federal government for the same or similar subject areas and is not required by federal law or regulations, but will ensure consistency with recent changes to State statute.

**10. COMPLIANCE SCHEDULE:**

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

**Regulatory Flexibility Analysis****1. EFFECT OF RULE:**

The proposed amendment of section 200.16 applies to each of the 695 public school districts in the State. The proposed amendment of section 200.20 applies to approve preschool programs for preschool children with disabilities funded pursuant to Education Law section 4410. It is estimated that 115 of such providers are small businesses.

**2. COMPLIANCE REQUIREMENTS:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013, which requires the Department to establish regulations regarding the qualifications of executive directors of preschool programs for students with disabilities and reporting to the Department when a school district places a child with the same provider that evaluated the child for special education. The proposed amendment

does not impose any additional compliance requirements on small businesses or local governments beyond those inherent in the statute.

Section 200.16(c)(3) is amended to require a committee on preschool special education, when placing a child in the same program that conducted the child's evaluation, to indicate in writing that the placement is appropriate and to notify the Commissioner on a form prescribed by the Commissioner.

Section 200.20(b) is amended to add a new paragraph (3) to require each approved preschool program to ensure that an executive director or person assigned to perform the duties of a chief executive officer, who is hired or assigned on or after April 17, 2014, has earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or holds a New York State certification or license to provide an evaluation of and/or a related service to a student with a disability and that such individuals have appropriate qualifications to oversee a special education preschool program including, at a minimum, knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities; knowledge of and ability to comply with applicable laws and regulations; ability to maintain or supervise the maintenance of financial and other records; ability to establish the approved program's policy, program and budget; and ability to recruit, employ, train, direct and evaluate qualified staff. Further, the proposed amendment would require each executive director or persons assigned to perform the duties of a chief executive officer to reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and to require that, if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

**3. PROFESSIONAL SERVICES:**

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

**4. COMPLIANCE COSTS:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013 and does not impose any additional costs on small businesses or local governments beyond those inherent in the statute.

**5. ECONOMICAL AND TECHNOLOGICAL FEASIBILITY:**

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

**6. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013, and has been carefully drafted to meet State statutory requirements while minimizing adverse impact. The proposed amendment does not impose any additional costs or compliance requirements on small businesses or local governments beyond those inherent in the statute. To minimize the administrative burden on school districts imposed by statute, the regulations would provide that districts submit information on the preschool student's placement on a form that they are currently required to submit for State reimbursement purposes ("Preschool STAC-1: Request for Commissioner's Approval of Reimbursement for Services for students with Disabilities"). Including this notice on the STAC-1 would minimize the administrative burden of school districts for additional reporting as well as provide the Department with the ability to verify and run reports on such data using existing technology.

**7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

Copies of the proposed amendment have been provided to District Superintendents and the chief officers of the Big 5 city school districts with the request that they distribute them to school districts within their supervisory districts for review and comment. The proposed amendment was disseminated to approve preschool special education providers, including those that are small businesses.

**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 Chapter 545 of the Laws of 2013 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

**Rural Area Flexibility Analysis****1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

The proposed amendment will apply to all public school districts and approved preschool programs for preschool children with disabilities funded pursuant to Education Law section 4410 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. Currently, there are 130 approved preschool programs located in rural areas.

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

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the New York State (NYS) Laws of 2013, which requires the Department to establish regulations regarding the qualifications of executive directors of preschool programs for students with disabilities and reporting to the Department when a school district places a child with the same provider that evaluated the child for special education. The proposed amendment 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.

Section 200.16(c)(3) is amended to require a committee on preschool special education, when placing a child in the same program that conducted the child's evaluation, to indicate in writing that the placement is appropriate and to notify the Commissioner on a form prescribed by the Commissioner.

Section 200.20(c) is amended to require each approved preschool program to ensure that an executive director or persons assigned to perform the duties of an executive director assigned or hired on or after April 17, 2014 has earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or holds a New York State certification or license to provide an evaluation of and/or related service to a student with a disability, and that such individuals have appropriate qualifications to oversee a special education preschool program including, at a minimum, knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities; knowledge of and ability to comply with applicable laws and regulations; ability to maintain or supervise the maintenance of financial and other records; ability to establish the approved program's policy, program and budget; and ability to recruit, employ, train, direct and evaluate qualified staff. Further, the proposed amendment would require each executive director or persons assigned to perform the duties of a chief executive officer to reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and to require that, if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

The proposed amendment does not impose any additional professional service requirements on entities in rural areas.

**3. COSTS:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013 and would not impose any additional costs to school districts or providers in rural areas, beyond those inherent in the statute.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013, and has been carefully drafted to meet State statutory requirements while minimizing adverse impact. Since the statutory requirements apply to all school districts and approved providers in the State, it is not possible to adopt different standards for these entities located in rural areas. The proposed amendment does not impose any additional costs or compliance requirements on these entities beyond those inherent in the statute. To minimize the administrative burden on school districts imposed by statute, the regulations would provide that districts submit information on the preschool student's placement on a form that they are currently required to submit for State reimbursement purposes ("Preschool STAC-1: Request for Commissioner's Approval of Reimbursement for Services for students with Disabilities"). Including this notice on the STAC-1 would minimize the administrative burden of school districts for additional reporting as well as provide the Department with the ability to verify and run reports on such data using existing technology.

**5. RURAL AREA PARTICIPATION:**

The proposed amendment was submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas. The proposed amendment was disseminated to approved preschool special education providers, including those that are located 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 Chapter 545 of the Laws of 2013 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

**Job Impact Statement**

The proposed amendment is necessary to implement sections 1 and 2 of Chapter 545 of the Laws of 2013 relating to the placement of children in preschool special education programs requirements for executive directors of preschool special education programs. The statute requires: (1) Committees on Preschool Special Education (CPSE) that recommend placement of a child in an approved program that also conducted an evaluation of the child to indicate in writing that such placement is appropriate and provide notice of such recommendation to the Commissioner; and (2) a provider of preschool special education services or programs to certify pursuant to regulations promulgated by the Commissioner that it will take measures to ensure its executive director or person performing duties of a chief executive officer meets the criteria established by the Commissioner to be an executive director and, if paid as a full time executive director, that such executive director is employed in a full time, full year position and shall not engage in activity that would interfere or impair such executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

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

**Assessment of Public Comment**

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

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Nurse Practitioner Collaborative Relationships**

**I.D. No.** EDU-36-14-00002-P

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

**Proposed Action:** Amendment of sections 29.14 and 64.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6509(9) and 6902(3); L. 2014, ch. 56, part D

**Subject:** Nurse Practitioner Collaborative Relationships.

**Purpose:** To implement part D of chapter 56 of the Laws of 2014.

**Text of proposed rule:** 1. Subdivision (a) of section 29.14 of the Rules of the Board of Regents is amended, effective January 1, 2015, to read as follows:

(a) Unprofessional conduct in the practice of nursing shall include all conduct prohibited by sections 29.1 and 29.2 of this Part, except as provided in this section, and shall also include the following:

(1) ...

(2) ...

(3) Failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician of paragraph (a) of subdivision (3) of section 6902 of the Education Law or the collaborative relationships requirements of paragraph (b) of subdivision (3) of section 6902 of the Education Law.

2. Subdivision (g) of section 64.5 of the Regulations of the Commissioner of Education is added, effective January 1, 2015, to read as follows:

(g) Collaborative relationships.

(1) Definitions. As used in this subdivision:

(i) Collaborative relationships shall mean that a nurse practitioner communicates, in person, by telephone, or through written means

including electronically, with a physician who is qualified to collaborate in the specialty area involved, or in the case of a hospital, the nurse practitioner communicates with a physician qualified to collaborate in the specialty area involved and who has privileges at such hospital, for the purposes of exchanging information, as needed, in order to provide comprehensive patient care and to make referrals, as necessary.

(ii) Physician shall mean a New York State licensed and registered physician.

(iii) Hospital shall mean a hospital as defined by Public Health Law section 2801(1).

(2) Notwithstanding any provision in this section to the contrary and insofar as authorized by Education Law section 6902(3)(b), in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and practice protocols as set forth in subdivisions (a), (b), (c), (d) and (e) of this section, a nurse practitioner may have collaborative relationships, with one or more physicians or a hospital, as such terms are defined in paragraph (1) of this subdivision, provided that the following criteria are met:

(i) The nurse practitioner shall have more than three thousand six hundred hours of experience practicing as a licensed or certified nurse practitioner pursuant to the laws of New York or any other state or as a nurse practitioner while employed by the United States Veterans Administration, the United States Armed Forces or the United States Public Health Service.

(ii) The nurse practitioner shall complete and maintain a form, prescribed by the department, to which the nurse practitioner shall attest, that describes the nurse practitioner's current collaborative relationships. The nurse practitioner shall also acknowledge on the form that if reasonable efforts to resolve any dispute that may arise with the collaborating physician, or, in the case of a collaboration with a hospital, with a physician qualified to collaborate in the specialty area involved and having professional privileges at such hospital, about a patient's care are not successful, the recommendation of the physician shall prevail. The form shall be updated as needed and may be subject to review by the department, upon its request.

(iii) In addition to the form required by subparagraph (ii) of this paragraph, the nurse practitioner shall maintain documentation in written or electronic form that supports his or her collaborative relationships.

**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:** Office of the Professions, Office of the Deputy Commissioner, State Education Department, State Education Building, 2M, 89 Washington Ave., Albany, NY 12234, (518) 486-1765, email: opdepcom@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

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

Subdivision (9) of section 6509 of the Education Law authorizes the Board of Regents to define unprofessional conduct in the professions.

Subparagraphs (i), (ii), (iii), (iv), and (v) of paragraph (a) of subdivision (3) of section 6902 of the Education Law, as amended by Part D of Chapter 56 of the Laws of 2014, define the requirements for practice as a nurse practitioner and the standards for such practice, except as permitted by paragraph (b) of subdivision (3) of section 6902 of the Education Law.

Paragraph (b) of subdivision (3) of section 6902 of the Education Law, as amended by Part D of Chapter 56 of the Laws of 2014, defines collaborative relationships and establishes the criteria for authorizing qualified nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians qualified to collaborate in the specialty involved or a hospital licensed under Article 28 of the Public Health Law (Article 28 hospital), that provides services through licensed physicians qualified to collaborate in the specialty involved and having privileges at such institution, in lieu of practicing in collaboration with a physician in accordance with a written practice agreement and written practice protocols, pursuant to paragraph (a) of subdivision (3) of section 6902 of the Education Law. Paragraph (b) of subdivision (3) of section 6902 of the Education Law further establishes several recordkeeping, documentation, and compliance requirements for nurse practitioners

practicing under collaborative relationships, as well as specific unprofessional conduct provisions for all nurse practitioners.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed rule implements Part D of Chapter 56 of the Laws of 2014, which amended subdivision (3) of section 6902 of the Education Law, to establish criteria for qualified nurse practitioners to practice pursuant to collaborative relationships. The proposed rule also implements the statute by establishing recordkeeping and documentation requirements for nurse practitioners practicing pursuant to such relationships, as well as specific unprofessional conduct provisions for all nurse practitioners.

##### 3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to increase access to needed health care services in New York State, while protecting the public, by establishing criteria for authorizing only qualified nurse practitioners to practice, pursuant to collaborative relationships with one or more physicians or an Article 28 hospital, in lieu of practicing in collaboration with a physician in accordance with a written practice agreement and written practice protocols. The proposed rule is necessary to conform the Rules of the Board of Regents and the Regulations of the Commissioner of Education to Part D of Chapter 56 of the Laws of 2014.

As required by statute, the proposed rule is also needed to establish recordkeeping, documentation, and compliance requirements for nurse practitioners practicing pursuant to collaborative relationships, as well as specific unprofessional conduct provisions for all nurse practitioners.

##### 4. COSTS:

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

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

(c) Cost to private regulated parties: The proposed rule does not impose any additional costs on regulated parties beyond those imposed by statute. As required by Education Law section 6902(3), each nurse practitioner, practicing pursuant to collaborative relationships, must complete and maintain a form, prescribed by the Department, to which the nurse practitioner must attest, that describes the nurse practitioner's current collaborative relationships. The form must be updated as needed and may be subject to review by the Department, upon its request. In addition to this form, the nurse practitioner must maintain documentation in written or electronic form that supports his or her collaborative relationships. The costs of complying with these requirements are expected to be minimal.

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

##### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of Part D of Chapter 56 of the Laws of 2014. It does not impose any program, service, duty, or responsibility upon local governments.

##### 6. PAPERWORK:

The proposed rule imposes no new reporting or other paperwork requirements beyond those imposed by the statute.

The proposed rule requires each nurse practitioner, practicing pursuant to collaborative relationships, to complete and maintain a form, prescribed by the Department, to which the nurse practitioner must attest, that describes the nurse practitioner's current collaborative relationships. The form must be updated as needed and may be subject to review by the Department, upon its request. In addition to this form, the nurse practitioner must maintain documentation in written or electronic form that supports his or her collaborative relationships.

##### 7. DUPLICATION:

The proposed rule is necessary to implement Part D of Chapter 56 of the Laws of 2014. There are no other state or federal requirements on the subject matter of this proposed rule. Therefore, the proposed rule does not duplicate other existing state or federal requirements.

##### 8. ALTERNATIVES:

The proposed rule is necessary to implement Part D of Chapter 56 of the Laws of 2014 relating to the regulation of nurse practitioners seeking to practice pursuant to collaborative relationships and the establishment of specific unprofessional conduct provisions for all nurse practitioners. There are no significant alternatives to the proposed rule and none were considered.

##### 9. FEDERAL STANDARDS:

Since there are no applicable federal standards governing nurse practitioner practice, the proposed rule does not exceed any minimum federal standards for the same or similar subject areas.

##### 10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to conform the Rules of the Board of Regents and the Regulations of the Commissioner of Education to Part D of Chapter 56 of the Laws of 2014. The proposed rule will become effective on January 1, 2015, which is also the effective date of Part D of

Chapter 56. It is anticipated that qualified nurse practitioners seeking to practice pursuant to collaborative relationship in this State will be able to comply with the proposed rule by the effective date.

#### **Regulatory Flexibility Analysis**

The proposed rule implements the requirements of subdivision (3) of section 6902 of the Education Law, as amended by Part D of Chapter 56 of the Laws of 2014, by establishing criteria for authorizing nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians qualified to collaborate in the specialty involved or a hospital licensed under Article 28 of the Public Health Law (Article 28 hospital), that provides services through licensed physicians qualified to collaborate in the specialty involved and having privileges at such institution, in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and protocols as set forth in Education Law § 6902(3)(a). The proposed rule also establishes that unprofessional conduct in the practice of nursing includes the failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician as set forth in Education Law § 6902(3)(a) or the collaborative relationships requirements of Education Law § 6902(3)(b). The proposed rule further requires nurse practitioners to complete and maintain a form, prescribed by the Department, to which they must attest, that describes their current collaborative relationships, which must be updated as needed. In addition, the proposed rule requires nurse practitioners to maintain documentation in written or electronic form that supports their collaborative relationships.

The proposed rule will not impose any reporting, recordkeeping, or other compliance requirements or costs, or have any adverse impact, on small businesses or local governments. Because it is evident from the nature of the proposed rule that it will not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

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

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

The proposed rule will apply to all New York State certified and registered nurse practitioners, who seek to practice, pursuant to collaborative relationships with one or more licensed physicians qualified to collaborate in the specialty involved or a hospital licensed under Article 28 of the Public Health Law (Article 28 hospital), that provides services through licensed physicians qualified to collaborate in the specialty involved and having privileges at such institution, in lieu of practicing in collaboration with a physician in accordance with a written practice agreement and written practice protocols, 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 miles or less. Of the approximately 19,600 nurse practitioners who are registered to practice in New York State, approximately 2,420 reported that their permanent address of record is in a rural county of New York State.

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

The proposed rule is necessary to conform the Rules of the Board of Regents and the Commissioner's Regulations with Education Law section 6902 as amended by Part D of Chapter 56 of the Laws of 2014, which will become effective January 1, 2015. The proposed rule will allow certain experienced nurse practitioners to practice with more autonomy, pursuant to collaborative relationships with one or more physicians or a hospital. The proposed rule establishes several recordkeeping and documentation requirements for nurse practitioners practicing pursuant to collaborative relationships, as well as specific unprofessional conduct provisions for all nurse practitioners.

The proposed addition of paragraph (3) to subdivision (a) of section 29.14 of the Rules of the Board of Regents establishes that unprofessional conduct in the practice of nursing includes the failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician as set forth in Education Law § 6902(3)(a) or the collaborative relationships requirements of Education Law § 6902(3)(b).

The proposed addition of subdivision (g) to section 64.5 of the Regulations of the Commissioner of Education establishes criteria for authorizing qualified nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians or an Article 28 hospital, in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and protocols. The proposed rule requires that nurse practitioners seeking to practice, pursuant to collaborative relationships, must have more than 3,600 hours of qualifying experience.

The proposed rule further requires nurse practitioners, under collaborative relationships, to complete and maintain a form, prescribed by the Department, to which they must attest, that describes their current col-

laborative relationships, which must be updated as needed and may be subject to review by the Department, upon its request. The proposed rule also requires nurse practitioners to acknowledge on the aforementioned form that if reasonable efforts to resolve any disputes that may arise with the collaborating physician, or, in the case of a collaboration with a hospital, with a physician qualified to collaborate in the specialty area involved and having professional privileges at such hospital, about a patient's care are not successful, the recommendation of the physician shall prevail.

In addition, to above-referenced form, the proposed rule requires nurse practitioners to maintain documentation in written or electronic form that supports their collaborative relationships.

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

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

The proposed rule will not require any registered nurse practitioner to practice pursuant to collaborative relationships. With respect to registered nurse practitioners seeking to practice pursuant to collaborative relationships, including those in rural areas, the rule does not impose any additional costs beyond those required by statute. There may be minimal costs to nurse practitioner in complying with the recordkeeping and documentation requirements in the proposed addition of subdivision (g) to section 64.5 of Regulations of the Commissioner of Education.

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

The proposed rule is necessary to conform the Rules of the Board of Regents and the Commissioner's Regulations with Education Law section 6902, as amended by Part D of Chapter 56 of the Laws of 2014. The statutory requirements do not make exceptions for individuals who live or work in rural areas. Thus, the Department has determined that the proposed rule's requirements should apply to all nurse practitioners registered in New York State who seek to practice pursuant to collaborative relationships. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

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

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of nurse practitioners. These organizations included the State Board for Nursing and professional associations representing the nursing profession, nursing educators, and the medical professions. These groups have members who live, work, or provide nursing education 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 rule is necessary to implement statutory requirements in section 6902 of the Education Law, as added by Part D 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 rule implements the requirements of subdivision (3) of section 6902 of the Education Law, as amended by Part D of Chapter 56 of the Laws of 2014, by establishing criteria for authorizing nurse practitioners to practice, pursuant to collaborative relationships with one or more licensed physicians qualified to collaborate in the specialty involved or a hospital licensed under Article 28 of the Public Health Law (Article 28 hospital), that provides services through licensed physicians qualified to collaborate in the specialty involved and having privileges at such institution, in lieu of complying with the requirements relating to collaboration with a physician, collaborative practice agreements and protocols as set forth in Education Law § 6902(3)(a). The proposed rule also establishes that unprofessional conduct in the practice of nursing includes the failure by a nurse practitioner to comply with either the requirements relating to collaboration with a physician as set forth in Education Law § 6902(3)(a) or the collaborative relationships requirements as set forth in Education Law § 6902(3)(b). The proposed rule further requires nurse practitioners to complete and maintain a form, prescribed by the Department, to which they must attest, that describes their current collaborative relationships, which must be updated as needed. In addition, the proposed rule requires nurse practitioners to maintain documentation in written or electronic form that supports their collaborative relationships.

The proposed addition of paragraph (3) to subdivision (a) of section 29.14 of the Rules of the Board of Regents and addition of subdivision (g)

to section 64.5 of the Regulations of the Commissioner implement specific statutory requirements and directives. Therefore, any impact on jobs and employment opportunities created by establishing criteria for authorizing nurse practitioners to practice pursuant to collaborative relationships with one or more licensed physicians or an Article 28 hospital and the reporting requirements for such relationships is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform to the requirements of the statute.

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

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Dental Hygiene Collaborative Arrangements

**I.D. No.** EDU-36-14-00004-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 61.9 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6606(1), (2), 6608 and 6611(10); L. 2013, ch. 239

**Subject:** Dental Hygiene Collaborative Arrangements.

**Purpose:** To implement chapter 239 of the Laws of 2013.

**Text of proposed rule:** 1. The introductory paragraph of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

The practice of dental hygiene, in accordance with section 6606 of the Education Law, shall be performed *either* under the supervision of a licensed dentist *or pursuant to a collaborative arrangement as defined in subdivision (f) of this section.*

2. Subdivision (b) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(b) The following services may be performed under the general supervision of a licensed dentist:

- (1) . . .
- (2) . . .
- (3) . . .
- (4) providing patient education *and counseling relating to the improvement of oral health;*
- (5) [placing and exposing X-ray films] *taking and exposing dental radiographs;*
- (6) . . .
- (7) . . .
- (8) taking *and assessing* medical history including the measuring and recording of vital signs *as an aid to diagnosis by the dentist and to assist the dental hygienist in providing dental hygiene services;*
- (9) [charting caries and] *performing dental and/or periodontal [conditions] assessments as an aid to diagnosis by the dentist and to assist the dental hygienist in providing dental hygiene services;*
- (10) applying pit and fissure sealants; [and]
- (11) applying desensitizing agents to the teeth[.];
- (12) *placing and removing temporary restorations;*
- (13) *making assessments of the oral and maxillofacial area as an aid to diagnosis by the dentist;*

(14) *taking impressions for study casts. Study casts shall mean only such casts as will be used for purposes of diagnosis and treatment planning by the dentist and for the purposes of patient education; and*

(15) *providing dental health care case management and care coordination services, which shall include, but not be limited to:*

- (i) *community outreach;*
- (ii) *improving oral outcomes;*
- (iii) *improving access to dental care by assisting people in establishing an ongoing relationship with a dentist, in order to promote the comprehensive, continuous and coordinated delivery of all aspects of oral health care; and*
- (iv) *assisting people to obtain dental health care.*

3. Subdivision (c) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(c) The following services may be performed only under the personal supervision of a licensed dentist:

- (1) . . .
- (2) . . .
- (3) *taking impressions for study casts. Study casts shall mean only such casts as will be used for purposes of diagnosis and treatment planning by the dentist and for the purposes of patient education;]*
- (4) (3) *placing or removing matrix bands;*
- (5) (4) *applying a topical medication not related to a complete dental prophylaxis;*
- (6) (5) *placing and removing periodontal dressings;*
- (7) (6) *selecting and prefitting provisional crowns;*
- (8) (7) *selecting and prefitting orthodontic bands;*
- (9) (8) *removing orthodontic arch wires and ligature ties;*
- (10) (9) *taking impressions for space maintainers, orthodontic appliances, and occlusal guards;*
- (11) (10) *placing and removing temporary separating devices; and*
- (12) (11) *placing orthodontic ligatures.*

4. Subdivision (e) of section 61.9 of the Regulations of the Commissioner of Education is amended, effective January 1, 2015, to read as follows:

(e) In accordance with section 29.1(b)(9) and (10) of this Title, a licensed dental hygienist *performing services under the supervision of a licensed dentist or pursuant to a collaborative arrangement as defined in subdivision (f) of this section* is not permitted to provide dental services or dental supportive services that the licensed dental hygienist knows or has reason to know that he or she is not competent to perform, and a licensed dentist is not permitted to delegate to a licensed dental hygienist dental services or dental supportive services that the licensed dentist knows or has reason to know that the licensed dental hygienist is not qualified by training, experience or by licensure to perform.

5. Subdivision (f) of section 61.9 of the Regulations of the Commissioner of Education is added, effective January 1, 2015, to read as follows:

(f) *Collaborative arrangement.*

(1) *Definitions. As used in this subdivision:*

(i) *Collaborative arrangement shall mean an agreement between a registered dental hygienist working for a hospital and a licensed and registered dentist who has a formal relationship with the same hospital.*

(ii) *Hospital shall mean a hospital as defined by Public Health Law section 2801(1).*

(2) *Requirements. A registered dental hygienist providing services pursuant to a collaborative arrangement shall:*

(i) *only provide those services that may be provided under general supervision as specified in subdivision (b) of this section, provided that the physical presence of the collaborating dentist is not required for the provision of such services;*

(ii) *instruct individuals to visit a licensed dentist for comprehensive examination or treatment;*

(iii) *possess and maintain certification in cardiopulmonary resuscitation in accordance with the requirements for dentists set forth in section 61.19 of this Part and the following:*

(a) *At the time of his or her registration renewal, the dental hygienist shall attest to having met the cardiopulmonary resuscitation requirement or attest to meeting the requirements for exemption as defined in clause (b) of this subparagraph.*

(b) *A dental hygienist may be granted an exemption to the cardiopulmonary resuscitation requirement if he or she is physically incapable of complying with the requirements of this subparagraph. Documentation of such incapacity shall include a written statement by a licensed physician describing the dental hygienist's physical incapacity. The dental hygienist shall also submit an application to the department for exemption which verifies that another individual will maintain certification and be present at the location where the dental hygienist provides dental hygiene services, pursuant to a collaborative arrangement, while the dental hygienist is treating patients.*

(c) *Each dental hygienist shall maintain for review by the department records of compliance with the cardiopulmonary resuscitation certification requirement, including the dental hygienist's cardiopulmonary resuscitation certification card; and*

(iv) *provide collaborative services only pursuant to a written agreement that is maintained in the practice setting of the dental hygienist and collaborating dentist. Such written agreement shall include:*

(a) *provisions for:*

(1) *referral and consultation;*

(2) *coverage for emergency absences of either the dental hygienist or collaborating dentist;*

(3) *resolution of disagreements between the dental hygienist and collaborating dentist regarding matters of treatment, provided that, to the extent a disagreement cannot be resolved, the collaborating dentist's treatment shall prevail;*

(4) *the periodic review of patient records by the collaborating dentist; and*

(5) such other provisions as may be determined by the dental hygienist and collaborating dentist to be appropriate; and

(b) protocols, which may be updated periodically, identifying the services to be performed by the dental hygienist in collaboration with the dentist and reflecting accepted standards of dental hygiene. Protocols shall include provisions for:

(1) case management and care coordination, including treatment;

(2) appropriate recordkeeping by the dental hygienist; and

(3) such other provisions as may be determined by the dental hygienist and collaborating dentist to be appropriate.

(3) Collaborative arrangements shall not supersede any law or regulation which requires identified services to be performed under the personal supervision of a dentist.

**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:** Office of the Professions, Office of the Deputy Commissioner, State Education Department, State Education Building, 2M, 89 Washington Ave., Albany, NY 12234, (518) 486-1765, email: opdepcom@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

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

Subdivision (1) of section 6606 of the Education Law, as amended by Chapter 239 of the Laws of 2013, defines the practice of dental hygiene and allows registered dental hygienists, working for a hospital, as defined in Article 28 of the Public Health Law (Article 28 hospital), pursuant to a collaborative arrangement with a New York State licensed and registered dentist, who has a formal relationship with the same hospital, to provide dental services that are currently provided under the general supervision of a dentist, without requiring the physical presence of the collaborating dentist during the provision of such services. Subdivision (2) of section 6606 of the Education Law further authorizes the Commissioner of Education to promulgate regulations defining the functions a dental hygienist may perform that are consistent with the training and qualifications for a license as a dental hygienist.

Section 6608 of the Education Law, as amended by Chapter 239 of the Laws of 2013, allows dental supportive services to be provided by a registered dental hygienist working for an Article 28 hospital under a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same hospital.

Subdivision (10) of section 6611 of the Education Law, as amended by Chapter 239 of the Laws of 2013, requires dentists and registered dental hygienists working for an Article 28 hospital, pursuant to a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same hospital, to become certified in cardiopulmonary resuscitation (CPR) and maintain this certification, which shall be included in the mandatory continuing education hours requirement acceptable for dentists to the extent provided in regulations of the Commissioner of Education. Subdivision (10) of section 6611 of the Education Law also provides for an exemption to this requirement if the dentist or dental hygienist is physically incapable of performing CPR, as long as the dentist or dental hygienist makes arrangements for another individual in the office to administer CPR.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013. Consistent with the authority provided by Chapter 239 and the aforementioned statutes, the proposed rule establishes requirements to allow registered dental hygienists, working for an Article 28 hospital, pursuant to a collaborative arrangement with a New York State licensed and registered dentist, who has a formal relationship with the same hospital, to provide dental services that are currently provided under the general supervision of a dentist, without requiring the physical presence of the collaborating dentist during the provision of such services.

##### 3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013. The purpose of the proposed rule is to provide greater access for New Yorkers to receive important dental services, such as, but not limited

to, teeth cleaning, fluoride applications, varnishes, sealants, x-rays and patient education, by establishing the requirements for collaborative arrangements, which will allow registered dental hygienists working for Article 28 hospitals, which include community health centers, hospital based dental clinics, local health department dental clinics, and nursing homes to provide dental services that are currently provided under the general supervision of a dentist, without requiring the physical presence of the collaborating dentist during the provision of such services.

Specifically, the proposed rule establishes the requirements for collaborative arrangements, which include the requirement that collaborative services can only be provided by a dental hygienist pursuant to a written agreement, which must be maintained in the practice setting of the dental hygienist and the collaborating dentist. The proposed rule also establishes requirements regarding the types of provisions that must be included in this written agreement.

The proposed rule requires a dental hygienist, providing services pursuant to a collaborative arrangement, to possess and maintain certification in cardiopulmonary resuscitation (CPR) and to maintain, for review by the Department, records of compliance with this requirement, including his or her CPR certification card. The proposed rule also establishes requirements for an exemption to this CPR certification requirement.

The proposed rule further modifies certain regulatory provisions relating to the general and personal supervision of dental hygienists by dentists, as these provisions required clarification.

##### 4. COSTS:

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

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

(c) Cost to private regulated parties: The proposed rule does not impose any additional costs on regulated parties beyond those imposed by statute. The proposed rule permits, but does not require, any registered dental hygienist to practice pursuant to collaborative arrangements. With respect to registered dental hygienists seeking to practice pursuant to collaborative arrangements, the rule does not impose any additional costs beyond those required by statute. There may be minimal costs to dental hygienists in complying with the CPR certification, record keeping and documentation requirements in the proposed section 61.9(f) of the Commissioner's Regulations.

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

##### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of Chapter 239 of the Laws of 2013 relating to the practice and regulation of dental hygiene pursuant to collaborative arrangements and does not impose any programs, service, duty, or responsibility upon local governments.

##### 6. PAPERWORK:

The proposed rule requires that a dental hygienist can only provide collaborative services pursuant to a written agreement that is maintained in the practice setting of the dental hygienist and the collaborating dentist. This required written agreement must include provisions for referral and consultation; coverage for emergency absences of either the dental hygienist or collaborating dentist; resolution of disagreements between the dental hygienist and collaborating dentist regarding matters of treatment; and the periodic review of patient records by the collaborating dentist. The proposed rule further requires the written agreement to include protocols, which may be updated periodically, identifying the services to be performed by the dental hygienist in collaboration with the dentist and that reflect accepted standards of dental hygiene. These protocols must include provisions for case management and care coordination, including treatment; and appropriate recordkeeping by the dental hygienist. The proposed rule also provides that the written agreement may include any other provisions, including provisions relating to protocols, that the dental hygienist and collaborating dentist determine to be appropriate. Additionally, the proposed rule requires each dental hygienist to maintain, for review by the Department, records of compliance with the CPR certification requirement, including his or her CPR certification card.

##### 7. DUPLICATION:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013 and does not duplicate other existing state or federal requirements.

##### 8. ALTERNATIVES:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013. There are no significant alternatives to the proposed rule and none were considered.

##### 9. FEDERAL STANDARDS:

Since there are no applicable federal standards for dental hygienists, the proposed rule does not exceed any minimum federal standards for the same or similar subject areas.

## 10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013, which becomes effective January 1, 2015. It is anticipated that registered dental hygienists working in Article 28 hospitals seeking to provide dental services pursuant to a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same hospital, will be able to comply with the proposed rule by the effective date.

**Regulatory Flexibility Analysis**

The proposed rule implements the requirements of Chapter 239 of the Laws of 2013 by establishing requirements to allow a dental hygienist working for a hospital, as defined by Article 28 of the Public Health Law (Article 28 hospital), pursuant to a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same Article 28 hospital, to provide certain dental services that are currently provided under the general supervision of a dentist, as defined in subdivision (b) of section 61.9 of the Regulations of the Commissioner of Education, without requiring the physical presence of the collaborating dentist during the provision of such services. Article 28 hospitals include community health centers, hospital-based dental clinics, local health department dental clinics, and nursing homes, all of which are overseen and regulated by the New York State Department of Health. The proposed rule will not impose any new reporting, recordkeeping, or other compliance requirements, or have an adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the proposed rule that it will not adversely affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

**Rural Area Flexibility Analysis**

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

The proposed rule would allow a dental hygienist working for a hospital, as defined by Article 28 of the Public Health Law (Article 28 hospital), pursuant to a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same Article 28 hospital, to provide certain dental services that are currently provided under the general supervision of a dentist, 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 miles or less. Of the approximately 9,813 dental hygienists who are registered to practice in New York State, approximately 791 reported that their permanent address of record is in a rural county of New York State.

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

As required by Chapter 239 of the Laws of 2013, which will become effective January 1, 2015, the proposed rule will allow dental hygienists, who work in Article 28 hospitals, to provide certain dental services, such as, but not limited to, teeth cleaning, fluoride applications, varnishes, sealants, x-rays and patient education, with more autonomy, pursuant to collaborative arrangements with dentists, who have formal relationships with the same hospitals. Article 28 hospitals include community health centers, hospital-based dental clinics, local health department dental clinics, and nursing homes, all of which are overseen and regulated by the New York State Department of Health. The proposed amendments to the introductory paragraph and subdivisions (b), (c) and (e) of section 61.9 of the Regulations of the Commissioner of Education and addition of subdivision (f) to section 61.9 to the Regulations of the Commissioner of Education implement the dental hygiene collaborative arrangement requirements of Chapter 239.

The proposed amendment to the introductory paragraph of 61.9 of the Regulations of the Commissioner of Education establishes that a dental hygienist must practice either under the supervision of a licensed dentist or pursuant to a collaborative arrangement.

The proposed amendments to subdivisions (b) and (c) of section 61.9 of the Regulations of the Commissioner of Education modify provisions relating to the general and personal supervision of dental hygienists by dentists, as these provisions required clarification.

The proposed amendment to subdivision (e) of section 61.9 of the Regulations of the Commissioner of Education establishes that a dental hygienist performing services pursuant to a collaborative arrangement is not permitted to provide dental services or dental supportive services that the licensed dental hygienist knows or has reason to know that he or she is not competent to perform, and a licensed dentist is not permitted to delegate to a licensed dental hygienist dental services or dental supportive services that the licensed dentist knows or has reason to know that the licensed dental hygienist is not qualified by training, experience or by licensure to perform.

The proposed addition of subdivision (f) to section 61.9 of the Regulations of the Commissioner of Education establishes the requirements for collaborative arrangements, which include authorizing a registered dental hygienist providing services, pursuant to such an arrangement, to only provide those services that may be provided under the general supervision of a dentist as defined in subdivision (b) of section 61.9 of the Regulations of the Commissioner of Education, without requiring the physical presence of the collaborating dentist during the provision of such services.

In addition, the proposed rule requires dental hygienists to instruct individuals to visit a licensed dentist for comprehensive examination or treatment.

The proposed rule further requires dental hygienists, providing services pursuant to a collaborative arrangement, to possess and maintain certification in cardiopulmonary resuscitation (CPR) and to attest, at the time of his or her registration renewal, that he or she meets the CPR certification requirement or the requirements for an exemption to it. The proposed rule establishes the following requirements for the CPR certification requirement exemption: (a) the dental hygienist must be physically incapable of complying with the CPR certification requirement and have a written statement by a licensed physician describing his or her physical incapacity; and (b) he or she must submit an application for exemption to the Department that verifies that another individual will maintain CPR certification and be physically present at the location where the dental hygienist provides dental services, pursuant to a collaborative arrangement, while the dental hygienist is treating patients.

The proposed rule also requires each dental hygienist to maintain, for review by the Department, records of compliance with the CPR certification requirement, including his or her CPR certification card.

Moreover, the proposed rule provides that a dental hygienist can only provide collaborative services pursuant to a written agreement that is maintained in the practice setting of the dental hygienist and the collaborating dentist. This required written agreement must include provisions for referral and consultation; coverage for emergency absences of either the dental hygienist or collaborating dentist; resolution of disagreements between the dental hygienist and collaborating dentist regarding matters of treatment; and the periodic review of patient records by the collaborating dentist. The proposed rule further requires the written agreement to include protocols, which may be updated periodically, identifying the services to be performed by the dental hygienist in collaboration with the dentist and that reflect accepted standards of dental hygiene. These protocols must include provisions for case management and care coordination, including treatment; and appropriate recordkeeping by the dental hygienist. The proposed rule also provides that the written agreement may include any other provisions, including provisions relating to protocols, that the dental hygienist and collaborating dentist determine to be appropriate.

## 3. COSTS:

The proposed rule will not require any registered dental hygienist to practice pursuant to collaborative arrangements. With respect to registered dental hygienists seeking to practice pursuant to collaborative arrangements, including those in rural areas, the rule does not impose any additional costs beyond those required by statute. There may be minimal costs to dental hygienists in complying with the CPR certification, record keeping and documentation requirements in the proposed addition of subdivision (f) to section 61.9 of the Regulations of the Commissioner of Education.

## 4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 239 of the Laws of 2013. The statutory requirements do not make exceptions for individuals who live or work in rural areas. Thus, the Department has determined that the proposed rule's requirements should uniformly apply to all dental hygienists registered in New York State, who seek to practice pursuant to collaborative arrangements. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

## 5. RURAL AREAS PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of dental hygienists. These organizations included the Council for Hospital Dentistry, Office of Persons with Developmental Disabilities, Community Health Center Association of New York, Area Health Education Centers, Rural Health Association and professional associations representing the dental hygiene profession, dental hygiene educators and the dentistry professions. These groups have members who live or work or provide dental hygiene education 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 rule is necessary to implement the statutory requirements of Chapter 239 of the Laws of 2013, 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 rule implements Chapter 239 of the Laws of 2013 by establishing requirements to allow dental hygienists working for hospitals, as defined by Article 28 of the Public Health, pursuant to a collaborative arrangement with a licensed and registered dentist, who has a formal relationship with the same hospital, to provide dental services that are currently provided under the general supervision of a dentist, without requiring the physical presence of the collaborating dentist during the provision of such services. The proposed rule also requires that a dental hygienist can only provide collaborative services pursuant to a written agreement, which must be maintained in the practice setting of the dental hygienist and the collaborating dentist. The proposed rule requires that this written agreement include provisions for referral and consultation; coverage for emergency absences of either the dental hygienist or collaborating dentist; resolution of disagreements between the dental hygienist and collaborating dentist regarding matters of treatment; and the periodic review of patient records by the collaborating dentist. The proposed rule further requires this written agreement to include protocols, identifying the services to be performed by the dental hygienist in collaboration with the dentist, which must reflect accepted standards of dental hygiene, as well as provisions for case management and care coordination, including treatment; and appropriate recordkeeping by the dental hygienist.

The proposed rule requires a dental hygienist, providing services pursuant to a collaborative arrangement, to possess and maintain certification in cardiopulmonary resuscitation (CPR) and to maintain, for review by the Department, records of compliance with this requirement, including his or her CPR certification card. The proposed rule also establishes requirements for an exemption to this CPR requirement.

The proposed rule further modifies certain regulatory provisions relating to the general and personal supervision of dental hygienists by dentists, as these provisions required clarification.

Since the proposed rule implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing requirements for the practice of dental hygiene pursuant to collaborative arrangements is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform to the requirements of the statute.

The proposed rule will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed rule 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.

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

**School Accountability – High School Performance Levels and Performance Index**

**I.D. No.** EDU-36-14-00007-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 100.18(b)(14) and (15) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), (20), 308(not subdivided), 309(not subdivided), 3204(3), 3713(1) and (2)

**Subject:** School accountability – high school performance levels and performance index.

**Purpose:** To align Commissioner’s Regulations with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

**Text of proposed rule:** Paragraphs (14) and (15) of subdivision (b) of section 100.18 of the Regulations of the Commissioner of Education are amended, effective December 3, 2014, as follows:

- (14) Performance levels shall mean:
  - (i) . . .

- (ii) for high school *when using Regents examinations based on 2005 Learning Standards or the State alternate assessment:*

- (a) level 1 (well below proficient):
  - (1) a score of 64 or less on the Regents comprehensive examination in English or a Regents mathematics examination;
  - (2) a failing score on a State-approved alternative examination for those Regents examinations;
  - (3) a score of level 1 on a State alternate assessment;
  - (4) a cohort member who has not been tested on the Regents comprehensive examination in English or a Regents mathematics examination or State-approved alternative examination for these Regents examinations;

- (b) level 2 (below proficient):
  - (1) a score between 65 and 74 on the Regents comprehensive examination in English or between 65 and 79 on a Regents examination in mathematics;

- (c) level 3 (proficient):
  - (1) a score between 75 and 89 on the Regents comprehensive examination in English or between 80 and 89 on a Regents examination in mathematics; or a passing score on a State-approved alternative to those Regents examinations;

- (d) level 4 (excels in standards):
  - (1) a score of 90 or higher on the Regents comprehensive examination in English or a Regents mathematics examination;
  - (2) a score of level 4 on a State alternate assessment.

- (iii) for high school *when using Regents examinations measuring the Common Core Learning Standards:*

- (a) level 1 (*does not demonstrate knowledge and skills for Level 2*):
  - (1) a score of level 1 on the Regents examination in English language arts or a Regents mathematics examination;

- (2) a failing score on a State-approved alternative examination for those Regents examinations;

- (3) a cohort member who has not been tested on the Regents examination in English language arts or a Regents mathematics examination or State-approved alternative examination for these Regents examinations;

- (b) level 2 (*partially meets Common Core expectations, i.e., Local Diploma level*):
  - (1) a score of level 2 on the Regents examination in English language arts or a Regents examination in mathematics;

- (c) level 3 (*partially meets Common Core expectations, i.e., Regents diploma level*):
  - (1) a score of level 3 on the Regents examination in English language arts or a Regents Examination in mathematics;

- (d) level 4 (*meets Common Core expectations*):
  - (1) a score of Level 4 on the Regents examination in English language arts or a Regents examination in mathematics;

- (2) a passing score on a State-approved alternative examination for those Regents examinations.

- (e) level 5 (*Exceeds Common Core expectations*):
  - (1) a score of level 5 on the Regents examination in English language arts or a Regents examination in mathematics;

- (iii) (iv) Notwithstanding the provisions of this section:

- (a) . . .
- (b) . . .
- (c) . . .

- (15) Performance index shall be calculated based on the student performance levels as follows:

- (i) . . .
- (ii) For high school *when using Regents examinations based on 2005 Learning Standards*, each student scoring at level 1 will be credited with 0 points, each student scoring at level 2 with 100 points, and each student scoring at level 3 or 4 with 200 points. The performance index for each accountability group will be calculated by summing the points and dividing by the number of students in the group.

- (iii) For high school *when using Regents examinations measuring the Common Core Learning Standards*, each student scoring at level 1 and Level 2 will be credited with 0 points, each student scoring at level 3 with 100 points, and each student scoring at level 4 or 5 with 200 points. For high school *when using the State alternate assessment commencing with the 2013-14 school year*, each student scoring at level 1 will be credited with 0 points, each student scoring at level 2 with 100 points, and each student scoring at level 3 or 4 with 200 points. The performance index for each accountability group will be calculated by summing the points and dividing by the number of students in the group.

**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:** Cosimo Tangorra Jr., Deputy Commissioner, State Education Department, Office of P-12 Education, State Education Building, 2M West, 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.

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Education Law section 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 210 authorizes Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and professions in the State.

Education Law section 215 authorizes Commissioner to require schools and school districts to submit reports containing such information as Commissioner shall prescribe.

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 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges Commissioner with general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes SED to alter the subjects of required instruction.

Education Law section 3713(1) and (2) authorize State and school districts to accept federal law making appropriations for educational purposes and authorize Commissioner to cooperate with federal agencies to implement such law.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy relating to public school and district accountability.

##### **3. NEEDS AND BENEFITS:**

The proposed amendment is necessary to align the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

In June 2014, the Board of Regents established five levels of performance on the new English language arts and mathematics Regents Examinations that measure the Common Core Learning Standards (CCLS).

Under current Commissioner's Regulations, for Regents Examinations results based on the 2005 learning standards, schools and districts receive no credit on the High School Performance Index when a student scores at Level 1 (below 65) on the examination, partial credit when the student scores at Level 2 (between 65 and the aspirational performance measure) and full credit when the student performs at Level 3 and 4 (at or above the aspirational performance measure).

The proposed amendment will provide that, for Regents Examination results based on Common Core assessments, schools and districts will receive no credit when a student scores at Levels 1 or 2 (below 65) on the

examination, partial credit when the student scores at Level 3 (between 65 and the cut point for meeting the Common Core learning expectations) and full credit when the student performs at Level 4 and 5 (meeting or exceeding the Common Core learning expectations). For students who take the New York State Alternate Assessment (NYSAA), which is now aligned to the CCLS, schools and districts would continue to receive no credit for student performance at Level 1, partial credit for student performance at Level 2, and full credit for student performance at Levels 3 and 4.

Adoption of the proposed amendment is necessary in order for New York to smoothly integrate into the High School Performance Index student results from Regents Examinations based on the 2005 learning standards and results from Regents Examinations based on the CCLS. These regulations will be applied first to 2013-14 school year results.

It should be noted that the proposed amendment will have a limited impact on schools and districts during the 2013-14 through 2015-16 school years. Most of the students who are graduating in the next two years will have already taken Regents Examinations based on the 2005 Learning Standards and, therefore, student results will be incorporated into the High School Performance Index based on performance on those tests. As successive cohorts of students graduate, the High School Performance Index for schools and districts will increasingly reflect the performance of students on Common Core Regents Examinations.

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

Cost to the State: none.

Costs to local government: none.

Cost to private regulated parties: none.

Cost to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment does not impose any costs on the State, local governments, private regulated parties or the State Education Department. The proposed amendment merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

##### **5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment will not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

##### **6. PAPERWORK:**

The proposed amendment does not impose any specific recordkeeping, reporting or other paperwork requirements.

##### **7. DUPLICATION:**

The proposed amendment does not duplicate existing State or federal requirements.

##### **8. ALTERNATIVES:**

There were no significant alternatives and none were considered. The proposed amendment is necessary to align the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics, and does not impose any additional costs or compliance requirements.

##### **9. FEDERAL STANDARDS:**

The proposed amendment does not exceed any minimum standards of the Federal government for the same or similar subject areas.

##### **10. COMPLIANCE SCHEDULE:**

It is anticipated parties will be able to achieve compliance with the rule by its effective date. The proposed amendment does not impose any additional costs or compliance requirements on regulated parties and merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

#### **Regulatory Flexibility Analysis**

##### **Small Businesses:**

The proposed amendment relates to public school and school district accountability and is necessary to align the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

The proposed amendment applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and does not impose any adverse economic impact, reporting, record keeping 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 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:

1. EFFECT OF RULE:

The rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act of 1965, as amended.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on local governments and merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

In June 2014, the Board of Regents established five levels of performance on the new English language arts and mathematics Regents Examinations that measure the Common Core Learning Standards (CCLS).

Under current Commissioner's Regulations, for Regents Examinations results based on the 2005 learning standards, schools and districts receive no credit on the High School Performance Index when a student scores at Level 1 (below 65) on the examination, partial credit when the student scores at Level 2 (between 65 and the aspirational performance measure) and full credit when the student performs at Level 3 and 4 (at or above the aspirational performance measure).

The proposed amendment will provide that, for Regents Examination results based on Common Core assessments, schools and districts will receive no credit when a student scores at Levels 1 or 2 (below 65) on the examination, partial credit when the student scores at Level 3 (between 65 and the cut point for meeting the Common Core learning expectations) and full credit when the student performs at Level 4 and 5 (meeting or exceeding the Common Core learning expectations). For students who take the New York State Alternate Assessment (NYSAA), which is now aligned to the CCLS, schools and districts would continue to receive no credit for student performance at Level 1, partial credit for student performance at Level 2, and full credit for student performance at Levels 3 and 4.

Adoption of the proposed amendment is necessary in order for New York to smoothly integrate into the High School Performance Index student results from Regents Examinations based on the 2005 learning standards and results from Regents Examinations based on the CCLS. These regulations will be applied first to 2013-14 school year results.

3. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any costs on local governments. The proposed amendment merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment imposes no technological requirements or costs on school districts.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any costs or compliance requirements on local governments, but merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

It should be noted that the proposed amendment will have a limited impact on schools and districts during the 2013-14 through 2015-16 school years. Most of the students who are graduating in the next two years will have already taken Regents Examinations based on the 2005 Learning Standards and, therefore, student results will be incorporated into the High School Performance Index based on performance on those tests. As successive cohorts of students graduate, the High School Performance Index for schools and districts will increasingly reflect the performance of students on Common Core Regents Examinations.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule 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 were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

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 long-range Regents policy relating to public school and school district accountability. The proposed amendment aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics. 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 NUMBER OF RURAL AREAS:

The proposed amendment applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act (ESEA) of 1965, as amended, 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.

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

The proposed amendment does not impose any additional compliance requirements on entities in rural areas and merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

In June 2014, the Board of Regents established five levels of performance on the new English language arts and mathematics Regents Examinations that measure the Common Core Learning Standards (CCLS).

Under current Commissioner's Regulations, for Regents Examinations results based on the 2005 learning standards, schools and districts receive no credit on the High School Performance Index when a student scores at Level 1 (below 65) on the examination, partial credit when the student scores at Level 2 (between 65 and the aspirational performance measure) and full credit when the student performs at Level 3 and 4 (at or above the aspirational performance measure).

The proposed amendment will provide that, for Regents Examination results based on Common Core assessments, schools and districts will receive no credit when a student scores at Levels 1 or 2 (below 65) on the examination, partial credit when the student scores at Level 3 (between 65 and the cut point for meeting the Common Core learning expectations) and full credit when the student performs at Level 4 and 5 (meeting or exceeding the Common Core learning expectations). For students who take the New York State Alternate Assessment (NYSAA), which is now aligned to the CCLS, schools and districts would continue to receive no credit for student performance at Level 1, partial credit for student performance at Level 2, and full credit for student performance at Levels 3 and 4.

Adoption of the proposed amendment is necessary in order for New York to smoothly integrate into the High School Performance Index student results from Regents Examinations based on the 2005 learning standards and results from Regents Examinations based on the CCLS. These regulations will be applied first to 2013-14.

The proposed amendment imposes no additional professional service requirements.

3. COMPLIANCE COSTS:

The proposed amendment does not impose any costs on rural areas. The proposed amendment merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

## 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any costs or compliance requirements on local governments, but merely aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics.

It should be noted that the proposed amendment will have a limited impact on schools and districts during the 2013-14 through 2015-16 school years. Most of the students who are graduating in the next two years will have already taken Regents Examinations based on the 2005 Learning Standards and, therefore, student results will be incorporated into the High School Performance Index based on performance on those tests. As successive cohorts of students graduate, the High School Performance Index for schools and districts will increasingly reflect the performance of students on Common Core Regents Examinations.

## 5. RURAL AREA PARTICIPATION:

The proposed amendment was submitted for review 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 long-range Regents policy relating to public school and school district accountability. The proposed amendment aligns the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics. 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 relates to public school and school district accountability and is necessary to align the Commissioner's Regulations pertaining to high school performance levels and the computation of the high school performance index with the June 2014 Board of Regents approval of the cut points for the five performance levels on the new Common Core Regents Examinations in English language arts and mathematics. The proposed amendment applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

11-0507, 11-0509, 11-0511, 71-0703 and 71-0307; Agriculture and Markets Law, section 167(3-a), arts. 9, 11 and 14

**Subject:** Prohibited and regulated invasive species.

**Purpose:** To control invasive species by reducing the introduction of new and the spread of existing populations in the State.

**Substance of final rule:** A new Part 575 will be adopted under 6 NYCRR Chapter V, Subchapter C. Existing Subchapter C, Real Property and Land Acquisition, will become Subchapter D, and existing Subchapter D, Water Regulation, will be placed in a new Subchapter E. This document provides a summary of the final invasive species regulations. The Express Terms of Part 575 control should a conflict exist between this summary document and the Express Terms.

As a result of public comments received, and an effort to clarify the proposed regulations, the following changes were made to the final regulations: modified the definitions of "Native Species", "Natural Areas" and "Person" in 575.2; the common name of Small Carpet Grass, the common name of European Frogbit, the scientific name of Border Privet *Ligustrum obtusifolium*, and the scientific name of Broadleaf Water-milfoil Hybrid *Myriophyllum heterophyllum* x *M. laxum* in 575.3 (d)(2). *Tenck Tinca tinca* was changed from regulated to prohibited in 575.3 (d)(3). The Japanese Mystery Snail *Bellamya japonica* was changed from regulated to prohibited and the scientific name of Carpet Tunicate *Didemnum* spp. was modified to include several species, in 575.3 (d)(4). The common name of Goldfish was corrected in 575.4 (c)(3). Also, the European Rabbit *Oryctolagus cuniculus* was changed from prohibited to regulated in 575.4 (c)(5). A duplication error was corrected under 575.7 Petitions; and two minor clarifications were made under 575.8. These non-substantive changes will not have a significant impact on the regulated public and do not require a revised or new rulemaking.

## Section 575.1: Purpose, scope and applicability

The purpose of the final invasive species regulations is to provide rules and procedures to identify, classify and establish a permit system in an effort to restrict the sale, purchase, possession, propagation, introduction, importation, and transport of invasive species in New York, as part of the New York State Department of Environmental Conservation's ("DEC") statewide invasive species management program, as required by Environmental Conservation Law (ECL) sections 9-1709 and 71-0703. The regulations set forth in this Part may be complemented by existing regulations promulgated by the DEC and the New York State Department of Agriculture and Markets ("DAM") and local laws or regulations designed to restrict the sale, purchase, possession, propagation, introduction, importation, transport and disposal of specific invasive species in New York. These existing regulations continue to apply, unless in conflict, superseded or expressly stated otherwise in this Part.

## Section 575.2: Definitions

As used in this Part, the following words and terms have the meanings ascribed in the final rule under section 575.2: Animal, Certificate of Inspection, Commissioner, Compliance Agreement, Container, Control, Cultivar, Department, Disposal, Ecosystem, Education, Environmental Notice Bulletin, Free-living State, Fungi, Import, Incidental, Introduce, Invasive Species, Limited Permit, Native Species, Natural Areas, Nonnative Species, Person, Plant, Possess, Prohibited Invasive Species, Propagate, Propagule, Public Lands, Public Waters, Purchase, Reasonable Precautions, Regulated Invasive Species, Research, Sell, Species, and Transport. "Invasive Species" means a species that is nonnative to the ecosystem under consideration, and whose introduction causes or is likely to cause economic or environmental harm or harm to human health. For the purposes of this Part, the harm must significantly outweigh any benefits. The remainder of the definitions are not included in this summary.

## Section 575.3: Prohibited invasive species

Prohibited invasive species are identified in section 575.3 by scientific and common names and by specific categories of species including: algae and cyanobacteria, plants, fish, terrestrial and aquatic invertebrates, and terrestrial and aquatic vertebrates, and fungi. Species are not listed in this summary. Except as otherwise provided by this Part, no person shall knowingly possess with the intent to sell, import, purchase, transport, or introduce any prohibited invasive Species. Except as otherwise provided by this Part, no person shall sell, import, purchase, transport, introduce or propagate any prohibited invasive species. Prohibited invasive species shall only be disposed of in a manner that renders them nonliving and nonviable. A person may possess, sell, purchase, transport or introduce for a maximum of one year following the effective date of this Part, Japanese Barberry, a prohibited invasive species. Furthermore, a person may possess, sell, offer for sale, distribute, transport, or otherwise market or trade live Eurasian boars until September 1, 2015; however, no person shall knowingly import, propagate or introduce Eurasian boars into a free-living state. "Free-living state" is defined as unconfined and outside the control of a person, and provides that species released to public lands and waters, as well as natural areas, are considered to be in a "free-living state."

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Prohibited and Regulated Invasive Species

**I.D. No.** ENV-43-13-00013-A

**Filing No.** 753

**Filing Date:** 2014-08-25

**Effective Date:** 2015-03-10

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

**Action taken:** Addition of new Part 575 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, art. 9, title 17, sections 1-0101, 3-0301, 9-0105, 9-1303, 9-1701, 9-1705, 9-1707, 9-1709,

**Section 575.4: Regulated invasive species**

Regulated invasive species are identified in section 575.4 by scientific and common names and by specific categories of species including: algae and cyanobacteria, plants, fish, aquatic invertebrates, and terrestrial and aquatic vertebrates. Species are not listed in this summary. Except as otherwise provided by in this Part, no person shall knowingly introduce into a free-living state or introduce by a means that one knew or should have known would lead to the introduction into a free-living state any regulated invasive species, although such species shall be legal to possess, sell, buy, propagate and transport.

**Section 575.5: Classifications**

Section 575.5 provides that in classifying a nonnative species as either a Prohibited or Regulated species, DEC and DAM apply the invasiveness ranking system established in 'A Regulatory System for Non-Native Species, June 2010, and consider one or more of the following ecological and socio-economic factors to determine the invasiveness rank of a species and whether it should be listed as prohibited or regulated: (1) whether a species meets the definition of an invasive species; (2) whether the species is currently on a federal list or listed in other states as an invasive species and its native habitat has climatic conditions similar to that of New York State; (3) ecological impacts; (4) biological characteristics and dispersal ability; (5) ecological amplitude and distribution; (6) difficulty of control; (7) economic benefits or negative impacts of the species; (8) human health benefits or negative impacts of the species; and (9) cultural or societal significance of the benefits or harm caused by the species. "Invasiveness Rank" means a rank assigned to a nonnative species, applying the criteria described above, to signify its level of invasiveness (Very High, High, Medium, Low or Insignificant). Species ranking "Moderate" or higher invasiveness in the ecological assessment are classified as "Regulated" or "Prohibited" based on the outcomes of the assessments, including a socio-economic assessment. Species that have been determined to be "High" or "Very High" invasiveness, posing a clear risk to New York's ecological well being, and for which the subsequent socio-economic assessments have determined that social or economic benefits are not significantly positive, are classified as "Prohibited." Species that have been determined to have "Moderate" invasiveness and the socio-economic assessments have determined there is no significantly negative or positive socio-economic harm or benefit are classified as "Regulated." Those species that have ranked "High" or "Very High" invasiveness in the ecological assessment, and pose a clear risk to New York's ecological well-being, but have significantly positive socio-economic benefit may be classified as "Regulated." In other instances, species ranking "Moderate," but have significantly negative socio-economic value, may be classified as "Prohibited." Grace periods may be established for species classified as Prohibited by DEC and DAM to allow businesses to plan for the management of existing stock. All future classifications of prohibited and regulated invasive species shall apply the invasiveness ranking system established in the Report and required by this section.

**Section 575.6: Conditions governing regulated invasive species**

Pursuant to section 575.6, a regulated invasive species that is sold or offered for sale shall have attached, a label with the words "Invasive Species-Harmful to the Environment" in at least 14 point bold font and will offer alternative non-invasive species information and provide instructions to prevent the spread of invasive species. Where it is impracticable to display a label, written notice shall be provided upon sale to the purchaser. Before supplying or planting a regulated invasive species as part of a landscape service, a person shall give written notice to the customer that the invasive species is harmful to the environment, including the common and scientific names of the invasive species immediately followed by the words "Invasive Species-Harmful to the Environment" in 14 point bold type or greater. The notice shall offer alternative non-invasive species and shall provide instructions to prevent the spread of invasive species. No person selling or offering for sale a regulated species shall conceal, detach, alter, deface, or destroy any label, sign, or notice required under this subpart. Any person who purchases a Regulated invasive species shall be required to follow any instructions required by this subpart and maintain the required instructions until the Regulated species is disposed of in a manner that renders it nonliving and nonviable.

Section 575.7: Petitions to add a species or remove a species from the invasive species list. Under section 575.7, a person may petition DEC to have a species added to or removed from the invasive species list. DEC may only classify additional nonnative species that meet the established criteria in section 575.5 for prohibited or regulated invasive species and may only remove previously classified invasive species if those invasive species no longer meet the established criteria in section 575.5. Under both circumstances, DEC must get concurrence from DAM.

**Section 575.8: Exemptions**

Section 575.8 provides exemptions from compliance with Part 575 for certain activities related to regulated and prohibited species, such as: if the DEC determines such activities or introduction were incidental or un-

knowing and not due to a person's failure to take reasonable precautions; transportation for disposal or identification; the control or management of invasive species; cultivars that meet certain criteria; persons authorized by permit or compliance agreements from DEC, DAM, or US Department of Agriculture; and wetland plant species associated with a vegetation treatment unit used in a wastewater treatment facility authorized by a DEC permit prior to the adoption of this Part. "Reasonable Precautions" is defined in this Part as "intentional actions that prevent or minimize the possession, transport, or introduction of invasive species."

**Section 575.9: Invasive species permits**

Under section 575.9, a person may possess, with intent to sell, import, purchase, transport or introduce a prohibited or regulated invasive species if the person has been issued a permit by DEC for research, education, or other approved activity. This section describes permit conditions and requirements for issuance of invasive species permits including: written application requirements, approval criteria, issuance and conditions, records and reporting, permits transfer/ alterations, violations and other permits or approvals. The permit would require that the applicant demonstrate to DEC's satisfaction that adequate safeguards are in place to control and dispose of the invasive species to prevent the potential spread. Specific language has not been included in this summary document.

**Section 575.10: Penalties and enforcement**

Section 575.10 provides that any person who violates this Part or any license or permit or order issued by the DEC pursuant to section 9-1709 of the ECL or pursuant to the provisions of this Part shall be liable for all penalties and other remedies provided for in the Environmental Conservation Law, including section 71-0703. Such penalties and remedies may be in addition to any other penalty available under other laws, including, but not limited to, permit revocation.

**575.11: Coordination**

Section 575.12 clarifies that Part 575 does not affect the existing authority of DAM and that DAM will be responsible for the inspection of registered growers and dealers of plant material for compliance with this Part. Furthermore, any violation issued by DAM shall be referred to the DEC for assessment of penalties pursuant to Environmental Conservation Law section 71-0703.

**Section 575.12: Severability**

If a provision of this Part or its application to any person or circumstance is determined to be contrary to law by a court of competent jurisdiction, pursuant to section 575.13, such determination shall not affect or impair the validity of the other provisions of this Part or the application to other persons and circumstances.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 575.2(u), (v), (x), 575.3(d)(2), (3), (4), 575.4(c)(3), (5), 575.7(b) and 575.8(a)(3).

**Text of rule and any required statements and analyses may be obtained from:** Leslie Surprenant, NYS DEC, Division of Lands and Forests, 625 Broadway, Albany, NY 12233, (518) 402-8980, email: leslie.surprenant@dec.ny.gov

**Additional matter required by statute:** A Negative Declaration was prepared in compliance with Article 8 of the Environmental Conservation Law.

**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 Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement since the changes involved spelling and other word corrections, minor text clarifications and two species moved from the regulated to the prohibited list and one species moved from the prohibited to the regulated list.

**Initial Review of Rule**

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

**Assessment of Public Comment**

The Departments of Environmental Conservation (DEC) and Agriculture and Markets (DAM) (collectively the "Departments") proposed draft invasive species regulations, known as Part 575 of 6 NYCRR, on October 23, 2014. A total of 264 unique comments were received from 223 individuals, or organizations, during the sixty day public comment period. Changes were made to the regulations to reiterate or further clarify the original meaning for the benefit of the public and take questions into account. These changes are noted below. As stated in the Notice of Adoption, non-substantive changes were made to sections 575.2, 575.3, 575.4, 575.7 and 575.8. The Assessment of Public Comment presents and responds to all of the unique comments that were received during the public comment period. A revised or new rule making is not required. A summary of the public comments received and the Departments' responses are noted below.

Public comments were received pertaining to the proposed definitions for this regulation. While most of the comments did not result in any modifications, several edits to the final regulations were made as a result of these comments. The term "New York State" was added to the definition of Native Species to be consistent with the definition of Nonnative Species. The final regulations read: "Native Species means with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or currently occurs in that ecosystem, or in New York State." The definition of Natural Areas was modified to include the term "and waters". The final regulations read: "Natural Areas means those lands and waters that are preserved, restored, or managed for their natural features, including but not limited to parks, forests, refuges, nature preserves, grasslands, wetlands and shorelines." Some commenters identified concerns with the unintentional introduction of invasive species and potential liability for the "control" or "disposal" of invasive species. In response, the Departments made clear that the definition of "introduce" includes both the intentional and unintentional release of invasive species, and that the regulations prohibit the transport, control or disposal of invasive species where it results in a new introduction of the species. The Departments further explained that the definition of "disposal" requires that the method of disposal prevent the establishment, introduction or spread of the disposed species. "Control" also requires preventing spread of invasive species from areas where they are present. However, the control, management and disposal of pre-existing invasive species, including the transportation of the species for these purposes is exempt from compliance with the provisions of this Part under section 575.8.

Public comments were received pertaining to the classification of Prohibited Invasive Species listed in section 575.3. While most of the comments did not result in any modifications to the Express Terms, several edits to the final regulations were made as a result of these comments and the professional opinions of DEC staff to correct technical issues. A correction to the spelling of the scientific name for Border Privet was made, *Ligustrum obtusifolium*. The scientific name for Broadleaf Water-milfoil Hybrid was corrected from *Myriophyllum x pinnatum* to *Myriophyllum heterophyllum x M. laxum* based on the latest scientific findings. The scientific name for Carpet Tunicate was changed to *Didemnum* spp. in order to recognize the fact that several tunicate species exist within the genus, depending on geographic location. European Rabbit, *Oryctolagus cuniculus*, was downgraded from prohibited to regulated classification recognizing the socio-economic importance of the species in that most domestic rabbits are of European heritage. In instances that changes were not made, the Departments determined that the specific invasive species posed an unacceptable ecological risk without a substantial countervailing socio-economic benefit and should be classified as prohibited. Specifically, the Departments explained that, in generating the lists of invasive species proposed to be prohibited or regulated, the Departments first applied a standard ecological assessment to each species. A scoring system based on ecological assessment determined each species' relative ecological risk and each species was assigned one of five ranks ranging from "Insignificant" to "Very High." Species ranking "Moderate" in the ecological assessment or higher were further assessed for their socio-economic benefit or harm and were assigned one of three ranks ("Significantly Positive" [high benefit], "Significantly Negative" [high harm] or "Equal Outcome" [neutral].)

Public comments were received pertaining to the classification Regulated Invasive Species within section 575.4. While most of the comments did not result in any modifications to the Express Terms, several edits to the final regulations were made as a result of these comments and the professional opinions of DEC staff to correct technical issues. The common name of *Carassius auratus* was changed to Goldfish, eliminating the hyphen used previously. Tench, *Tinca tinca*, was elevated to prohibited classification after a re-assessment of the ecological and socio-economic evaluation of the species. Japanese Mystery Snail, *Bellamya japonica*, was elevated to prohibited classification due to the fact that the species is nearly identical to the Chinese Mystery Snail, *Bellamya chinensis*, which ranked Very High and is classified as prohibited. In instances that changes were not made, the Departments determined that while the individual invasive species represented a potential significant ecological risk, the socio-economic assessment determined that the species provided a considerable positive benefit. The Departments further explained that the restrictions that are placed on regulated species will provide sufficient protection from the potential spread, while also ensuring continued economic benefits to nurseries, landscapers and other stakeholders.

Public comments were received pertaining to the process of classifying species as described in section 575.5. The general process for classifying invasive species is detailed in the regulations and the 2010 report "A Regulatory System for Non-native Species" prepared by the New York Invasive Species Council. In addition, a process is defined in the regulations for a person to petition for a species to be added or removed from the lists of prohibited and regulated species. Some comments urged the

Departments to consider using an expedited process for classifying invasive species. In response to this comment, the Departments determined that a rule making process is the most appropriate means to develop and revise the lists of prohibited and regulated species. The Departments plan to continue assessing non-native species for potential classification, as capacity and resources allow, and to post lists of the species assessed along with their ecological invasiveness assessments on its website and to periodically publish the same in the Environmental Notice Bulletin. The Departments intend to encourage industry to voluntarily label or avoid selling candidate species. Some comments were directed at the outcomes of either the ecological assessments or socio-economic assessment or the combined regulatory status results of the two tools utilized together. No substantive information was provided to alter the results of the two assessment tools, with the exceptions being those comments noted in the two paragraphs above. Several new species were suggested for ecological and socio-economic assessment, but this work is beyond the scope and capacity of the current regulations and will need to be addressed at a later time.

Some public comments were also received pertaining to the labeling requirements for the sale of listed regulated species. While the regulations provide general specifications pertaining to labeling requirements, many of the details pertaining to actual label wording and design will need to be developed in collaboration with the Department of Agriculture and Markets in the future.

Public comments were received pertaining to the enumerated exemptions in section 575.8. The comments generally suggested alternative wording to the exemptions specified. In response to these comments, the Departments have clarified that possession of a prohibited or regulated invasive species for disposal is exempt from compliance with the provisions of this Part. Subsection 575.8(a)(3) has been revised to read: "Compliance with the provisions of this Part do not apply to: ... a person who possesses or transports a prohibited invasive species or regulated invasive species for the purpose of identification or disposal." This change reflects, and is consistent with, the primary goal of ECL § 9-1709 to prevent the spread of invasive species by prohibiting or regulating the sale or importation of invasive species, rather than mandating certain management practices that would control or eradicate pre-existing invasive species. By providing exceptions for the control or disposal of pre-existing invasive species, DEC expects that the regulated community would be more likely to undertake efforts to prevent the spread of invasive species because it would remove the burden of having to obtain a DEC- issued permit.

Some comments also raised concerns with enforcement capacity of agencies pertaining to the final regulations. Agency staff recognizes that enforcement issues will need to be addressed in the future once the final regulations go into effect. No changes were made to this section of the express terms as a result of these comments.

One comment asked how often the Department of Agriculture and Markets inspects registered growers and dealers. The Department of Agriculture and Markets has a team of horticultural inspectors that inspect registered growers and dealers on a regular basis, depending on staff availability.

In addition to the specific comments addressed above, general comments were received pertaining to a number of varied subjects. A number of these comments were supportive of the proposed invasive species regulations. A couple of the comments opposed the proposed regulations citing economic losses to certain industries, such as the nursery and landscape industry, and other reasons. The proposed regulations will take effect 180 days after filing the final regulations. Further, there is an additional one year grace period for Japanese Barberry, *Berberis thunbergii*. This grace period is intended to provide time for businesses to manage stocks and adjust to the regulations. One comment suggested that landowners should be required to manage *Phyllostachys* species of running bamboo. Property owners are not liable for pre-existing prohibited invasive species on private lands. Several comments encouraged education and outreach pertaining to the regulations. The Departments of Environmental Conservation and Agriculture and Markets intend to develop and deliver education and outreach materials and methods as well as best management practices (BMPs) within the agencies' capacities and resources. Several comments were received pertaining to funding and financial incentives. Incentives and grants are beyond the scope of this rule making. Nonetheless, Partnerships for Regional Invasive Species Management (PRISMs) and other implementation underway in New York contribute substantially to education and outreach as well as strategic approaches to invasive species management and control. The Department of Environmental Conservation receives annual funding from the Environmental Protection Fund to support its implementation framework for all taxa of invasive species.

Finally, public comments were received pertaining to the supporting documents including the Regulatory Flexibility Analysis, Rural Area Flexibility, Job Impact Statement and Regulatory Impact Statement. The

typographical error noted in the Rural Area Flexibility Analysis has been corrected. One comment suggested that businesses can minimize the potential negative impacts of the regulations by expanding their stocks of native plants. The Regulatory Flexibility Analysis, Regulatory Impact Statement and Rural Area Flexibility Analysis all state that this is the case, and further state that new businesses that market non-invasive and native alternatives may start. The Job Impact Statement states that negative impacts to industry will be reduced by increasing sales of alternative non-invasive species along with the grace period for Eurasian boar, Sus Scrofa, and Japanese Barberry, Berberis Thunbergii.

A detailed table depicting all of the individual public comments received and agency responses can be found on the DEC's website at: <http://www.dec.ny.gov/>.

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## Department of Financial Services

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

#### Mandatory Underwriting Inspection Requirement for Private Passenger Automobiles

I.D. No. DFS-36-14-00015-P

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

**Proposed Action:** Amendment of Part 67 of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 3411, 5303 and art. 53

**Subject:** Mandatory Underwriting Inspection Requirement for Private Passenger Automobiles.

**Purpose:** Revise requirements regarding the inspection of private passenger automobiles for physical damage coverage.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.dfs.ny.gov/>):** Section 67.1 amends the definitions to clarify the types of vehicles subject to the inspection requirement and establishes definitions for a new, unused automobile, durable medium, and New automobile dealer.

Section 67.3(b)(3) is amended to reduce the minimum time frame from 4 years to 2 years for an insured to be eligible for an inspection waiver for an additional and/or replacement automobile when the insured has been continuously insured for automobile insurance, with the same insurer or another insurer under common control or ownership.

Section 67.3(b)(11) is added to allow an inspection waiver when an insured under a new policy had the automobile continuously insured for physical damage coverage by a previous insurer that inspected the automobile within the prior two years, or ownership.

Section 67.4(b) is amended to increase the inspection deferral period from 5 to 10 calendar days.

Section 67.5 is amended to recognize the use of new technology (digital photography, electronic storage and retrieval of inspection reports and photographs, use of email).

Section 67.7(c)(1)(i) is amended to expand the current renewal inspection notice requirement from 33 days prior to renewal date to at least 45 days but no more than 60 calendar days prior to the annual policy renewal date in order to track with Insurance Law section 3425.

The proposed rule also includes non-substantive technical changes designed to clarify various provisions in the regulation.

**Text of proposed rule and any required statements and analyses may be obtained from:** Camielle Barclay, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5299, email: [camielle.barclay@dfs.ny.gov](mailto:camielle.barclay@dfs.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: Sections 202 and 302 of the Financial Services Law, and Sections 301, 3411, 5303, and Article 53 of the Insurance Law.

Financial Services Law sections 202 and 302 and Insurance Law section 301 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 3411 requires insurers to inspect private passenger automobiles insured for physical damage coverage except as provided for in a regulation prescribed by the Superintendent.

Article 53 authorizes the Superintendent to approve plans for providing motor vehicle insurance coverage to persons who are unable to obtain coverage in the voluntary insurance market. The New York Automobile Insurance Plan ("NYAIP"), also commonly known as the Assigned Risk Plan, is the mechanism for providing such coverage. Insurance Law section 5303 specifies coverages that are available through the NYAIP, and subjects those coverages to the requirements of Insurance Law section 3411 as well as other provisions in the Insurance Law.

2. Legislative objectives: Insurance Law section 3411 directs the Superintendent to promulgate regulations implementing the section, which, among other things, requires insurers to inspect private passenger automobiles ("automobiles") when issuing physical damage coverage on the automobiles.

3. Needs and benefits: Insurance Law section 3411 prescribes a framework when insurers provide physical damage coverage for automobiles and the duties of insurers and insureds with respect to inspections of automobiles. Inspections of automobiles have been mandatory since 1977 in order to combat insurance fraud, and only under limited circumstances has the current rule permitted insurers to waive or defer inspections. However, with advances in technology to combat automobile physical damage insurance fraud, certain provisions of the current rule have been rendered obsolete or unduly burdensome to insurers and insureds. This proposed rule updates the regulation, which should reduce unnecessary expenses to insurers and consumers, while maintaining necessary requirements to combat fraud. The proposed rule also clarifies various provisions of the regulation, including the types of automobiles subject to the inspection requirement, as well as expands the optional inspection waivers available to insurers.

4. Costs: The proposed rule imposes no compliance costs on state or local governments. The proposed rule should reduce costs to insurers overall for the administration, processing of paperwork, operations and underwriting of automobile physical damage insurance. These savings ultimately should be passed to consumers.

5. Local government mandates: None.

6. Paperwork: The proposed rule does not generate any additional paperwork, other than a revised Plan of Operation that insurers would file with the Department if insurers choose to incorporate the optional waivers in the proposed rule. However, the rule reduces the paperwork requirements on an insurer by permitting an insurer to utilize separate entities such as CARCO Group, Inc., to maintain a central repository of its physical damage inspections reports.

7. Duplication: None.

8. Alternatives: Recognizing advances in technology and measures to reduce automobile insurance fraud, the Superintendent submitted an outreach draft to various stakeholders for comment. Some of the more significant comments that the Superintendent considered are set forth below.

Stakeholders recommended adding a number of optional waivers to the inspection requirement, including waivers for certain types of insureds, where the insured has other types of coverage with the insurer, and when the vehicle is at least three years old rather than seven years, as the current rule provides. The Superintendent considered those optional waivers and concluded that waiving the inspection requirement under those circumstances may present improper inducement and discrimination concerns, and could lead to increased instances of fraud. Other suggestions for optional waivers already were addressed in the Department's amended to the current rule.

The Superintendent also considered a suggestion that the rule no longer should require inspection reports to settle physical damage claims because to do so is counter-productive and would delay settlement. The Superintendent rejected this suggestion, concluding that using an inspection report in settling a physical damage claim is necessary to protect both the consumer and the insurer because the report confirms the condition of the insured's automobile, thus deterring fraud, which in turn, may lower insurance rates.

Stakeholders also recommended that the five-day inspection deferral period be expanded to 10-14 days. The Superintendent considered this alternative and agreed that a 10-day deferral period would give insureds at least one full weekend in which to comply with the inspection requirements. However, the Superintendent rejected any time longer than 10 days because to do so may lead to increased incidences of fraud.

9. Federal standards: None.

10. Compliance schedule: There is no compliance requirement placed on insurers because changes made to the regulation are optional and insurers could maintain their existing procedures. Insurers that opt to adopt those optional changes would be able to do so as soon as they file revised Plan of Operation with the Department.

#### Regulatory Flexibility Analysis

1. Small businesses: The Department of Financial Services finds that this rule will not impose any adverse economic impact on small busi-

nesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all property/casualty insurance companies licensed to do business and writing automobile physical damage insurance in New York State and the New York Automobile Insurance Plan (NYAIP), none of which falls within the definition of "small business" as defined in State Administrative Procedure Act section 102(8) as being both independently owned and having less than one hundred employees.

2. Local governments: The rule does not impose any adverse impacts, or any reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at property/casualty insurance companies, none of which are local governments.

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

The Department of Financial Services (the "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 adverse impact on jobs and employment opportunities. This rule revises the requirements placed on insurers with respect to the inspection of private passenger automobiles for physical damage coverage, specifically to eliminate or amend unnecessary or obsolete provisions that are unduly burdensome to insurers and insureds.

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## New York State Gaming Commission

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### EMERGENCY RULE MAKING

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

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

**Filing No.** 752

**Filing Date:** 2014-08-25

**Effective Date:** 2014-08-25

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

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

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

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

**Specific reasons underlying the finding of necessity:** The Commission has determined that immediate adoption of these rules is necessary for the preservation of the general welfare. Part F of Chapter 58 of the Laws of 2014 became effective on May 30, 2014 and restricts the acceptance of public assistance benefits in certain facilities, including horse racetracks, off-track horse betting facilities, video lottery facilities and commercial bingo establishments. Section 3 of Part F provides explicitly that "the New York state gaming commission shall be authorized to promulgate regulations on an emergency basis and immediately take such other actions as necessary to implement the provisions of this act."

The immediate adoption of these rules is necessary to implement sanctions for violations of the law since the law became effective May 30, 2014.

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

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

**Text of emergency rule:** Section 4009.3 of Part 4009 of Subchapter A of

Chapter I of Subtitle T of Title 9, Executive, of the NYCRR is amended to classify the existing text as subdivision (a) and add a new subdivision (b) as follows:

#### PART 4009

##### Pari-Mutuel Operation

§ 4009.3. Sale, exchange of tickets.

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

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

(1) *revocation of a license;*

(2) *suspension of a license;*

(3) *a fine; or*

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

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

#### PART 4122

##### Pari-Mutuel Wagering

§ 4122.3. Sale of pari-mutuel tickets.

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

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

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

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

(1) *revocation of a license;*

(2) *suspension of a license;*

(3) *a fine; or*

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

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

#### PART 4404

##### Operation of a Corporation

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

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

(a) *revocation of a license;*

(b) *suspension of a license;*

(c) *a fine; or*

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

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

#### PART 4500

##### Internet and Telephone Account Wagering

§ 4500.9. Conduct of wagering.

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

(b) The authorized pari-mutuel wagering entity may accept account wa-

gers via any wired or wireless communications device, including but not limited to wireline telephones, wireless telephones, and the internet subject to applicable laws, rules and the approved plan of operation.

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

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

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

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

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

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

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

(i) revocation of a license;

(ii) suspension of a license;

(iii) a fine; or

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

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

PART 4822

General Conduct of Bingo in Leased Premises

§ 4822.25. Restrictions on acceptance of public assistance.

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

(a) revocation of a license;

(b) suspension of a license;

(c) a fine; or

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

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

PART 5113

Suspensions, [and] Revocations and Other Discipline

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

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

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

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

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

(3) Conviction of any:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) restitution of money;

(b) restitution of property;

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

(d) making periodic reports to the commission as required; and

(e) payment of outstanding fines imposed by the commission.

Any or all of the conditions imposed by the commission pursuant to this Part may be imposed jointly and/or severally.

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§ 5113.7. Disciplinary hearings.

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

§ 5113.8. Final action by commission.

After notice and hearing, in the event the commission finds insufficient evidence to support the violations claimed, the commission may find the licensee not guilty of any of the grounds alleged for disciplinary action; in which event the disciplinary proceedings shall be terminated. The commission may, however, find the licensee guilty by a preponderance of the evidence of some or all of the grounds alleged for disciplinary action[.], in which event the commission may take one or more of the following actions:

(a) revoke the license; [and/or]

(b) suspend the license for a period of time not to exceed six months; [and/or]

(c) fine the licensee; or

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

This section does not prevent the commission from compromising or

settling at any time a formal hearing. Written findings of fact, conclusions of law, and an order must be entered before any decision of the commission shall be considered final.

#### PART 5117

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

##### § 5117.7. *Restrictions on acceptance of public assistance.*

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

**This notice is intended** to serve 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. SGC-24-14-00001-EP, Issue of June 18, 2014. The emergency rule will expire October 23, 2014.

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

#### **Regulatory Impact Statement**

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

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

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

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

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

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

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

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

Tax Law section 1617-a (a) authorizes the Gaming Commission to license the operation of video lottery gaming pursuant to the rules and regulations of the Gaming Commission.

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

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

The change to section 4009.3 restricts the acceptance of federal public

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

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

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

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

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

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

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

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

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

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

9. **FEDERAL STANDARDS:** The federal Middle Class Tax relief and Job Creation Act of 2012 (Pub. L. 112-96, 126 Stat. 156 enacted February 22, 2012) requires states to restrict the acceptance of public assistance in the manner implemented by Part F of Chapter 58 of the Laws of 2014.

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

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

#### **Job Impact Statement**

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

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

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

## **EMERGENCY RULE MAKING**

### **Implementation of Rules Pertaining to Gaming Facility Request for Application and Gaming Facility License Application**

**I.D. No.** SGC-28-14-00006-E

**Filing No.** 751

**Filing Date:** 2014-08-25

**Effective Date:** 2014-08-25

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

**Action taken:** Addition of Part 5300 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1305(20) and 1307(2)

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

**Specific reasons underlying the finding of necessity:** The Gaming Commission ("Commission") has determined that immediate adoption of these rules is necessary for the preservation of the general welfare. On March 31, 2014, the Gaming Facility Location Board, which the Commission established pursuant to section 109-a of the Racing, Pari-Mutuel Wagering and Breeding Law, issued a Request for Applications ("RFA") for applicants seeking a license to develop and operate a gaming facility in New York State pursuant to the Upstate New York Gaming Economic Development Act of 2013, as amended by Chapter 175 of the Laws of 2013 (the "Act"). The Act authorizes four upstate destination gaming resorts to enhance economic development in upstate New York, completed applications were due to the Gaming Facility Location Board by June 30, 2014. The immediate re-adoption of these rules is necessary to prescribe the form of the RFA and the information required to be submitted in response to the RFA. Standard rule making procedures would prevent the Commission from commencing the fulfillment of its statutory duties.

**Subject:** Implementation of rules pertaining to gaming facility request for application and gaming facility license application.

**Purpose:** To facilitate a fair and transparent process for applying for a license to operate a gaming facility.

**Substance of emergency rule:** This addition of Part 5300 of Subtitle T of Title 9 NYCRR will add new Sections 5300.1 through 5300.5 to allow the New York State Gaming Commission ("Commission") to prescribe the form of the application for a gaming facility license.

The new Part of the Gaming Commission regulations describes the form of application for applicants seeking a gaming facility license and the information the applicant must provide. Section 5300.1 sets forth the form of the application including disclosure of identifying information, finance and capital structure of the proposed gaming facility, economic and market analysis, proposed land and design of facility space, assessment of local support and plans to address regional tourism, problem gambling, workforce development and resource management. Section 5300.2 describes the scope of background information the applicant and related parties must provide in three disclosure forms, the Gaming Facility License Application Form, the Multi-Jurisdictional Personal History Disclosure Form and the Multi-Jurisdictional Personal History Disclosure Supplemental Form. Section 5300.3 describes the process by which all ap-

plicants for a gaming facility license shall submit fingerprints as part of a background investigation. Section 5300.4 describes the applicant's duty to update its application as necessary, following submission of the application. Section 5300.5 describes the application fee and procedure for refunding a portion of such fee in certain circumstances.

**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. SGC-28-14-00006-EP, Issue of July 16, 2014. The emergency rule will expire October 23, 2014.

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

#### **Regulatory Impact Statement**

1. **STATUTORY AUTHORITY:** Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") section 104(19) grants authority to the Gaming Commission ("Commission") to promulgate rules and regulations that it deems necessary to carry out its responsibilities. Racing Law section 1305(2) grants rule making authority to the Commission to implement, administer and enforce the provisions of Racing Law Article 13.

Racing Law section 1306(1) and section 1312(1) prescribe that the Gaming Facility Location Board ("Board"), which is established by the Commission, shall issue a request for applications ("RFA") for applicants seeking a license to develop and operate gaming facilities in New York State. On March 31, 2014, the Gaming Facility Location Board issued the RFA.

Racing Law section 1307(2) prescribes that the Commission regulate, among other things, the method and form of the application; the methods, procedures and form for delivery of information concerning an applicant's family, habits, character, associates, criminal record, business activities, and financial affairs; and the procedures for the fingerprinting of an applicant.

2. **LEGISLATIVE OBJECTIVES:** This emergency rule making carries out the legislative objectives of the above-referenced statutes by implementing the requirements of Racing Law section 1307(2).

3. **NEEDS AND BENEFITS:** This emergency rule making is necessary to enable the Board to carry out its statutory duty of issuing the RFA for applicants seeking a license to develop and operate a gaming facility in New York State.

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

(a) Costs to the regulated parties for the implementation of and continuing compliance with the rule: Those parties who choose to seek a gaming facility license will bear some costs. There is an application fee of \$1 million that is prescribed by Racing Law section 1316(8) to defray the costs of processing the application and investigating the applicant. The extent of other costs incurred by applicants will depend upon the efforts that they put into completing and submitting the application.

(b) Costs to the regulating agency, the State, and local governments for the implementation of and continued administration of the rule: The rules will impose some costs on the Commission in reviewing gaming facility applications and in issuing licenses, but it is anticipated that the \$1 million application fee paid by each applicant will offset such costs. The rules will not impose any additional costs on local governments.

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

5. **PAPERWORK:** The rules set forth the content of the application for a gaming facility license. The requirements apply only to those parties that choose to seek a gaming facility license.

6. **LOCAL GOVERNMENT:** The rules do not impose any mandatory program, service, duty, or responsibility upon local government because the licensing of gaming facilities is strictly a matter of State law.

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

8. **ALTERNATIVES:** The Commission is required to create these rules under Racing Law section 1307(2). Therefore, no alternatives were considered.

9. **FEDERAL STANDARDS:** There are no federal standards applicable to the licensing of gaming facilities in New York because such licensing is solely in accordance with New York State law.

10. **COMPLIANCE SCHEDULE:** The Commission anticipates that affected parties will be able to achieve compliance with the rules upon the adoption of the rules, which will occur upon filing.

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

This emergency rule making will not have any adverse impact on small businesses, local governments, jobs or rural areas. The rules prescribe the

method and form of the application for a gaming facility license; the methods, procedures and form for delivery of information concerning an applicant's family, habits, character, associates, criminal record, business activities, and financial affairs; and the procedures for fingerprinting an applicant. It is not expected that any small business or local government will apply for a gaming facility license.

The rules impose no adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. It is anticipated that the opening of up to four gaming facilities in upstate New York will create new job opportunities. The rules apply uniformly throughout the State to any applicant seeking a license to develop and operate a gaming facility in the State.

The proposal will not adversely impact small businesses, local governments, jobs, or rural areas. It does not require a full Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, or Job Impact Statement.

#### Assessment of Public Comment

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

## New York Gaming Facility Location Board

### EMERGENCY RULE MAKING

#### Rules Pertaining to Gaming Facility Request for Application and Related Fees and Related Hearings

I.D. No. GFB-21-14-00008-E

Filing No. 750

Filing Date: 2014-08-25

Effective Date: 2014-08-25

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

**Action taken:** Addition of Parts 600 and 601 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 1306(4), (9) and 1319

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

**Specific reasons underlying the finding of necessity:** The New York State Gaming Facility Location Board (the "Board") has determined that immediate re-adoption of these rules is necessary for the preservation of the general welfare. On March 31, 2014, the Board, which was established by the New York State Gaming Commission ("Commission"), issued a Request for Applications ("RFA") for applicants seeking a license to develop and operate a gaming facility in New York State pursuant to the Upstate New York Gaming Economic Development Act of 2013, as amended by Chapter 175 of the Laws of 2013 (the "Act"). The Act authorizes four upstate destination gaming resorts to enhance economic development in Upstate New York. The immediate re-adoption of these rules is necessary to prescribe required fee information for applicants that submitted an application in response to the RFA that was due June 30, 2014 and to enable the Board to have hearing procedures in place before any potential public hearing occurs. Standard rule making procedures would prevent the Board from commencing the fulfillment of its statutory duties.

**Subject:** Rules pertaining to gaming facility request for application and related fees and related hearings.

**Purpose:** To facilitate a fair and transparent process for applying for a license to operate a gaming facility.

**Text of emergency rule:** Subtitle R of Title 9, Executive, of the NYCRR is amended to name such Subtitle "Gaming Facility Location Board" and add new Parts 600 and 601 as follows:

#### PART 600

#### PUBLIC HEARINGS

##### § 600.1. Public Hearings.

(a) If the New York Gaming Facility Location Board conducts a public hearing, it shall cause the New York State Gaming Commission to post a notice of such hearing on the Gaming Commission's website a reasonable period of time before such hearing.

(b) Any member of the New York Gaming Facility Location Board may preside over a public hearing as chair of the meeting. The conduct of the meeting shall be in the sole and absolute discretion of the chair, who may decide whom to recognize to speak and limit the time allowed to any speaker and the number of speakers. The chair of the meeting may receive written testimony in the discretion of the chair.

#### PART 601

#### GAMING FACILITY LICENSE FEES

##### § 601.1. Gaming Facility License Fees.

(a) The license fee for a gaming facility license issued by the Gaming Commission pursuant to subdivision 4 of section 1315 of the Racing, Pari-Mutuel Wagering and Breeding Law shall be as follows, unless a gaming facility licensee has agreed to pay an amount in excess of the fees listed below:

(1) In Zone Two, Region One (Counties of Columbia, Delaware, Dutchess, Greene, Orange, Sullivan and Ulster), as such zone and region are defined in section 1310 of the Racing, Pari-Mutuel Wagering and Breeding Law, the following fees will apply to counties as designated below:

(i) \$70,000,000 for a gaming facility in Dutchess or Orange Counties;

(ii) \$50,000,000 for a gaming facility in Columbia, Delaware, Greene, Sullivan or Ulster Counties, if no license is awarded for a gaming facility located in Dutchess or Orange Counties; and

(iii) \$35,000,000 for a gaming facility in Columbia, Delaware, Greene, Sullivan or Ulster Counties, if a license is awarded for a gaming facility located in Dutchess or Orange Counties.

(2) \$50,000,000 in Zone Two, Region Two (Counties of Albany, Fulton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie and Washington), as such zone and region are defined in section 1310 of the Racing, Pari-Mutuel Wagering and Breeding Law;

(3) In Zone Two, Region Five (Counties of Broome, Chemung (east of State Route 14), Schuyler (east of State Route 14), Seneca, Tioga, Tompkins, and Wayne (east of State Route 14)), as such zone and region are defined in section 1310 of the Racing, Pari-Mutuel Wagering and Breeding Law, the following fees will apply to counties as designated below:

(i) \$35,000,000 for a gaming facility in Broome, Chemung, Schuyler, Tioga or Tompkins Counties;

(ii) \$50,000,000 for a gaming facility in Wayne or Seneca Counties; and

(iii) \$20,000,000 for a gaming facility in Broome, Chemung, Schuyler, Tioga or Tompkins Counties, if a license is awarded for a gaming facility located in Wayne or Seneca Counties.

(b) A gaming facility licensee shall pay the required license fee by electronic fund transfer according to directions issued by the Gaming Commission.

**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. GFB-21-14-00008-P, Issue of May 28, 2014. The emergency rule will expire October 23, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Corey Callahan, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301-7500, (518) 388-3408, email: sitingrules@gaming.ny.gov

#### Regulatory Impact Statement

1. STATUTORY AUTHORITY: Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") section 1306(1) and section 1312(1) prescribe that the Gaming Facility Location Board ("Board"), which is established by the Gaming Commission ("Commission"), shall issue a request for applications ("RFA") for applicants seeking a license to develop and operate a gaming facility in New York State. On March 31, 2014, the Gaming Facility Location Board issued the RFA.

Racing Law section 1306(4) authorizes the Board to determine a gaming facility license fee to be paid by an applicant.

Racing Law 1306(9) authorizes the Board to promulgate any rules and regulations that it deems necessary to carry out its responsibilities.

Racing Law section 1319 authorizes the Board to conduct hearings concerning the conduct of gaming and applicants for gaming facility licenses.

2. LEGISLATIVE OBJECTIVES: This emergency rule making carries out the legislative objectives of the above referenced statutes by implementing the requirements of Racing Law section 1306(4) and section 1319.

3. NEEDS AND BENEFITS: This emergency rule making is necessary

to enable the Board to carry out its statutory duty to prescribe the license fee for a gaming facility license issued by the Commission and prescribe public hearing procedures for the Board to follow in the event the Board conducts a public hearing concerning the conduct of gaming and applicants for gaming facility licenses.

**4. COSTS:**

(a) Costs to the regulated parties for the implementation of and continuing compliance with the rules: Those parties who choose to seek a gaming facility license will bear some costs, including the fee for the gaming facility license and the capital investment necessary to construct and operate a gaming facility.

(b) Costs to the regulating agency, the State, and local government: The rules will impose some costs on the Board to review gaming facility license applications and to conduct hearings, where necessary. The Board will rely on Commission staff to assist in these matters and the costs to the Commission are expected to be defrayed by the license fee and the \$1 million application fee that each applicant will pay as required by Racing Law section 1316(8). The rules will not impose any additional costs on local government.

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

5. PAPERWORK: The rules are not expected to impose any significant paperwork requirements for gaming facility applicants and licensees.

6. LOCAL GOVERNMENT: The rules do not impose any mandatory program, service, duty, or responsibility upon local government because the licensing of gaming facilities is strictly a matter of State law.

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

8. ALTERNATIVES: The Board is required to create these rules under Racing Law section 1306(4) and section 1319. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS: There are no federal standards applicable to the licensing of gaming facilities in New York because such licensing is solely in accordance with New York State law.

10. COMPLIANCE SCHEDULE: The Board anticipates that affected parties will be able to achieve compliance with the emergency rules upon the adoption of the rules, which will occur upon filing.

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

This emergency rule making will not have any adverse impact on small businesses, local governments, jobs, or rural areas. The rules prescribe the license fee for a gaming facility license issued by the New York State Gaming Commission and prescribe public hearing procedures that the Gaming Facility Location Board (“Board”) must follow in the event the Board conducts a public hearing concerning gaming and applicants for gaming facility licenses. It is not expected that any small business or local government will apply for a gaming facility license. To the extent that a small business or local government might participate in a Board hearing, each would be treated equally with any other participant in such hearing.

The rules impose no adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. It is anticipated that the opening of up to four gaming facilities in upstate New York will create new job opportunities. The rules apply uniformly throughout the State to any applicant seeking a license to develop and operate a gaming facility in the State.

The rules will not adversely impact small businesses, local governments, jobs, or rural areas. It does not require a full Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, or Job Impact Statement.

**Assessment of Public Comment**

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

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**Office of General Services**

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

**Procurement of New York State Food Products**

**I.D. No.** GNS-36-14-00001-P

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

**Proposed Action:** This is a consensus rule making to amend section 250.2 of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 200; and State Finance Law, section 165(4)(d)

**Subject:** Procurement of New York State food products.

**Purpose:** To provide guidance to State Agencies as to how they procure food.

**Text of proposed rule:** § 250.2 General provisions for purchasing commodities.

*(d) All solicitations for the purchase of food products shall include a list developed by the commissioner of agriculture and markets, of food products that are grown, produced or harvested in New York State or that were processed in facilities located in New York State. If applicable, all solicitations shall also include a notice that such New York State food products are available in sufficient quantities for competitive purchasing. Guidelines for assisting in increasing agencies’ use and purchase of New York food products and established by the commissioner and commissioner of agriculture and markets shall be located on the Office of General Services’ website.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Paula B Hanlon, New York State Office of General Services, 41st Floor, Corning Tower, Empire State Plaza, Albany, New York 12242, (518) 474-5607, email: RegsReceipt@ogs.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.

**Consensus Rule Making Determination**

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102(11)(b), it implements or conforms to non-discretionary statutory provisions and no one is likely to object to the rule as proposed. Chapter 553 of the Laws of 2013 amended State Finance Law § 165(4) in relation to the solicitation of available New York products.

Chapter 553 of the Laws of 2013 amended State Finance Law § 165(4) to require, among other things, that all solicitations for purchases of food products include a list, developed by the Commissioners of OGS and Agriculture and Markets, of food products that are grown, produced or harvested in New York, or that were processed in facilities located in New York. Additionally, Chapter 553 directs the Commissioner of OGS and the Commissioner of Agriculture and Markets to establish guidelines that will assist agencies in increasing their use and purchase of New York state food products.

**Job Impact Statement**

The Office of General Services projects no substantial adverse impact on jobs or employment opportunities in the State of New York as a result of the amendment of this rule. The amendment simply amends 9 NYCRR 250.2 to add a new subsection (d) requiring that all solicitations for the purchase of food products include a list developed by the commissioner of agriculture and markets, of food products that are grown, produced or harvested in New York State or that were processed in facilities located in New York State. Additionally, the amendment requires that guidelines be developed to assist in increasing agencies’ use and purchase of New York food products. There will be no change in the number of agency employees as a result of these regulations. Nothing in the proposed regulations will increase or decrease the number of jobs in New York State, have an adverse impact on specific regions in New York State or negatively impact jobs in New York State.

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**Department of Health**

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**NOTICE OF ADOPTION**

**Adult Day Health Care Programs and Managed Long Term Care**

**I.D. No.** HLT-35-13-00003-A

**Filing No.** 749

**Filing Date:** 2014-08-22

**Effective Date:** 2014-09-10

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

**Action taken:** Amendment of Part 425 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(v) and 2803(2); and Social Services Law, section 363-a(2)

**Subject:** Adult Day Health Care Programs and Managed Long Term Care.

**Purpose:** To create a hybrid model of adult day health care.

**Text or summary was published** in the August 28, 2013 issue of the Register, I.D. No. HLT-35-13-00003-P.

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

**Revised rule making(s) were previously published in the State Register** on June 11, 2014.

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

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

The revised rule making published in the New York State Register on June 11, 2014 revised the proposal by removing the definitions of “Hybrid Option” and “Social Adult Day Level Individual” and instead added a new definition of “Unbundled Services/Payment Option” to grant programs the ability to provide less than the full range of adult day health care services to functionally impaired individuals referred by a managed long term care plan or care coordination model. The Department must still be notified of a program’s election of this option 30 days in advance. As was the case before, the full range of adult day health care services will remain available to all registrants. In addition, each registrant will be provided a written copy of the services they are to receive while attending the program at the time of admission and following the continued-stay evaluation.

Additional revisions included removing the allowance to admit up to 30% over the approved program capacity, and changing it back to 10%, and clarifying which entity is responsible for each service – either the adult day health care program and/or the managed long term care plan or care coordination model.

During the public comment period 131 comments were received. Of those, only 2 respondents shared concerns or suggestions for further revisions to the proposal. They are below.

1. COMMENT: While flexibility in the design and delivery of services in ADHC programs is key for clients enrolled in MLTC, it is just as crucial that the same flexibility also encompass beneficiaries enrolled in main-stream Medicaid Managed Care and Special Needs Plans.

RESPONSE: We are evaluating this issue for possible action at a later time.

2. COMMENT: The ADHC will have to keep the same level of staffing even though the reimbursement/payment levels will be those of a social program for many registrants.

RESPONSE: Yes. Adult Day Health Care programs must maintain the appropriate staffing levels and provide or arrange for the appropriate services for each registrant in accordance with their comprehensive assessment. Further, Adult Day Health Care operators must make available specific services regardless of how many recipients need them. For instance, nursing services must be available.

3. COMMENT: Logistically the ADHC will need to get authorization for each individual service that is included in the unbundled service package. ADHCs will have to hire more staff to obtain the authorizations.

RESPONSE: This issue will be subject to discussion with the MLTC program.

4. COMMENT: There will be (as we have already seen) a shifting from patient centered care to MLTC paper requirements which the MLTCs are asking for. They are already regularly asking for documents that the DOH does not require.

RESPONSE: This will have to be evaluated after some experience under the new regulations.

5. COMMENT: Many of the services provided in the capitated ADHC are maintenance and not rehab. This way we have maintained the health and wellness of our registrants. In unbundled service model the MLTC plans will be reluctant to pay for maintenance therapy.

RESPONSE: This will be evaluated over time.

6. COMMENT: Each MLTC has their own separate requirements therefore standardized tools cannot be used.

RESPONSE: Each MLTC plan must use the UAS-NY.

7. COMMENT: MLTC plans are basing services on the UAS that they perform. Since the UAS relies on a 3-day time period and much of the assessment is anecdotal from the patient and the caregiver, services may be compromised.

RESPONSE: This is an issue that is being evaluated.

8. COMMENT: The MLTCs are not yet required to pay for rehabilitation services, however, ADHC is required to provide those services. Who will be paying for the services? The MLTC can rightfully say to bill Medicare for the services – which we cannot do.

RESPONSE: It is up to the MLTC plan to require the enrollee to receive the skilled services through an appropriate provider.

9. COMMENT: In the event FIDA does start, FIDA is an opt out-program. Who pays for the regulatory needed services for those patients who opt out?

RESPONSE: If a patient opts out of FIDA, other programs will still be available including MLTC.

## NOTICE OF ADOPTION

### Organ Transplant Provisions

**I.D. No.** HLT-08-14-00013-A

**Filing No.** 755

**Filing Date:** 2014-08-26

**Effective Date:** 2014-09-10

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

**Action taken:** Amendment of section 405.13, repeal of section 405.22(c) and (k), and addition of sections 405.30 and 405.31 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2800 and 2803

**Subject:** Organ Transplant Provisions.

**Purpose:** To update and add new provisions regarding organ transplant.

**Text or summary was published** in the February 26, 2014 issue of the Register, I.D. No. HLT-08-14-00013-P.

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

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

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

During the public comment period, three letters in support of the proposed regulation were received; one letter was from the Chair of the NYS Transplant Council and two other letters were entities (one a hospital and the other an organ procurement organization) that are planning to initiate the practice of vascularized composite tissue allograft (VCA) (aka face and hands) transplantation in the near future.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP)

**I.D. No.** HLT-36-14-00012-P

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

**Proposed Action:** Amendment of sections 505.14 and 505.28 of Title 18 NYCRR.

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

**Subject:** Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP).

**Purpose:** To establish definitions, criteria and requirements associated with the provision of continuous PC and continuous CDPA services.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.ny.gov](http://www.health.ny.gov)):** The proposed regulations conform the Department’s personal care services regulations at 18 NYCRR § 505.14 to State law [Social Services Law § 365-a(2)(e)(iv)], which caps social services districts’ authorizations for nutritional and environmental support functions, commonly referred to as housekeeping or Level I functions, to no more than eight hours per week for those Medicaid recipients who need only that level of care. The proposed regulations also revise the criteria for social services districts’ authorizations of continuous personal care services (i.e. “split-shift” services) and live-in 24-hour personal care services consistent with the preliminary injunction decision in *Strouchler v. Shah*, 891 F.Supp. 2d 504 (S.D.N.Y. 2012).

In subdivision 505.14(a), which contains definitions and provisions relating to the scope of personal care services, the definitions of “some assistance,” “total assistance,” and “continuous 24-hour personal care services” are repealed. Definitions of “continuous personal care services” and “live-in 24-hour personal care services” are added. Also added is a provision that personal care services shall not be authorized to the extent that the patient’s need for assistance can be met by voluntary assistance

from informal caregivers, formal services or adaptive or specialized equipment. With regard to nutritional and environmental support functions ("Level I" services), a provision is added limiting the authorization to no more than eight hours per week. The list of Level II personal care functions is amended by the addition of "turning and positioning."

In paragraph 505.14(b)(3), which specifies factors that the nursing assessment must include, the nursing assessment must include an evaluation whether adaptive or specialized equipment or supplies can meet the patient's need for assistance and whether such equipment or supplies can be provided safely and cost-effectively. The nursing assessment would no longer be required to include an evaluation of the degree of assistance required for each function or task, since the definition of "some assistance" and "total assistance" is deleted.

In paragraph 505.14(b)(4), which specifies the circumstances under which the local professional director must conduct an independent medical review, such reviews would have to be conducted in cases involving live-in 24-hour personal care services as well as cases involving continuous personal care services. The nursing assessment in continuous personal care services and live-in 24-hour cases would have to document certain factors, such as whether the physician's order had documented a medical condition that causes the patient to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding. The social assessment in live-in 24-hour cases would have to evaluate whether the patient's home has adequate sleeping arrangements for a personal care aide. In continuous personal care services and live-in 24-hour cases, the local professional director could consult with the patient's treating physician and conduct an additional assessment in the home. The final determination regarding the level of care to be authorized would have to be made with reasonable promptness, generally not to exceed seven business days after receipt of required documentation.

In subparagraph 505.14(b)(5)(v), the requirements for social services districts' notices to recipients for whom districts have determined to deny, reduce or discontinue personal care services would be revised and reorganized.

The proposed regulations make conforming changes to the Department's regulations governing the consumer directed personal assistance program ("CDPAP"), which are at 18 NYCRR § 505.28.

In subdivision 505.28(b), which contains definitions relating to the CPDAP, the definitions of "continuous 24-hour consumer directed personal assistance" "some assistance" and "total assistance" are repealed. The definition of "consumer directed personal assistance" is amended to delete references to "some or total" assistance. The definition of "personal care services" is amended to provide that, for individuals whose needs are limited to nutritional and environmental support functions (i.e. housekeeping tasks), personal care services shall not exceed eight hours per week. Definitions of "continuous consumer directed personal assistance" and "live-in 24-hour consumer directed personal assistance" are added.

In paragraph 505.28(d)(2), which specifies factors that the social assessment must include, the social assessment in continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance cases must document that all alternative arrangements for meeting the individual's needs have been explored or are infeasible. The social assessment for live-in 24-hour cases must evaluate whether the consumer's home has adequate sleeping accommodations for a live-in aide.

In paragraph 505.28(d)(3), which specifies factors that the nursing assessment must include, the nursing assessment in continuous consumer directed personal assistance cases and live-in 24-hour consumer directed personal assistance cases would have to document certain factors, such as whether the physician's order has documented a medical condition that causes the consumer to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks.

Paragraph 505.28(d)(5), which specifies requirements for the local professional director's review, is repealed and a new paragraph 505.28(d)(5) is added. Cases involving continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance would have to be referred to the local professional director or designee for review and final determination of the level and amount of services to be authorized. The local professional director or designee would be required to consider information in the social and nursing assessments and may consult with the consumer's treating physician and conduct an additional assessment in the home. The final determination of the level and amount of care to be authorized must be made with reasonable promptness, generally not to exceed seven business days after receipt of all information.

Subdivision 505.28(e), which pertains to the authorization process, would be amended to provide that consumer directed personal assistance shall not be authorized to the extent that a consumer's need for assistance can be met by voluntary assistance from informal caregivers, formal services or adaptive or specialized equipment.

**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: regsqna@health.state.ny.us

**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:**

Social Services Law ("SSL") § 363-a(2) and Public Health Law § 201(1)(v) empower the Department to adopt regulations implementing the State's Medical Assistance ("Medicaid") program. Under SSL §§ 365-a(2)(e) and 365-f, respectively, the Medicaid program includes personal care services and the consumer directed personal assistance program ("CDPAP"). Under SSL § 365-a(2)(e)(iv), personal care services cannot exceed eight hours weekly for individuals who need assistance only with nutritional and environmental support functions.

##### **Legislative Objectives:**

The Legislature vested the Department with responsibility to develop standards for personal care services and the CDPAP. The proposed regulations are consistent with this objective. They conform the Department's regulations to State law limiting the hours of services that may be authorized weekly for individuals who need assistance only with nutritional and environmental support functions. They also revise the standards for the authorization of personal care services and the CDPAP for Medicaid recipients who need a greater level of assistance, up to and including continuous services for 24 hours per day.

##### **Needs and Benefits:**

The proposed regulations conform the Department's regulations to SSL § 365-a(2)(e)(iv), which caps authorizations for nutritional and environmental support functions to eight hours per week for individuals whose needs are limited to that level of care. The term "nutritional and environmental support functions" refers to shopping, light cleaning, meal preparation and similar housekeeping tasks, long referred to in the Department's regulations as "Level I" tasks. Effective October 4, 2011, the Department adopted emergency regulations that conformed to the recent State law by capping Level I authorizations to no more than eight hours per week. (See Emergency Rule Making, I.D. No. HLT-42-11-00014-E, published in the NYS Register on October 19, 2011.) The proposed regulations adopt this eight hour cap on nutritional and environmental support functions as a permanent rule.

Many Medicaid recipients require a greater level of assistance than do those recipients who need assistance only with nutritional and environmental support functions. These include recipients who need assistance with personal care functions such as toileting, walking, transferring, and feeding, as well as positioning. The proposed regulations revise the standards governing social services districts' authorizations of personal care services and the CDPAP for individuals who need a greater level of assistance, up to and including live-in 24-hour services provided by one aide and 24-hour continuous services provided by more than one aide, commonly referred to as "split-shift" care.

The Department's October 4, 2011, emergency regulations established standards for the provision of continuous personal care services and live-in 24-hour personal care services. "Continuous personal care services" means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted. "Live-in 24-hour" personal care services means the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted. Similar amendments were made to the Department's CDPAP regulations.

In *Strouchler v. Shah*, a federal class action filed in April 2012, plaintiff Medicaid recipients of 24-hour split-shift services challenged the Department's emergency regulations. Plaintiffs alleged, in part, that the regulations denied medically necessary 24-hour split-shift care to recipients who needed toileting or turning and positioning every two hours at night because their need for assistance, although frequent, was deemed "predictable."

On September 4, 2012, the Court preliminarily enjoined the Department to clarify the interpretation and application of the Department's emergency regulations with respect to the availability of 24-hour "split-shift care for needs that are predicted and for patients whose only nighttime need is turning and positioning." See *Strouchler v. Shah*, 891 F.Supp. 2d 504 (S.D.N.Y. 2012).

On October 3, 2012, the Department issued this clarification. (See GIS 12 MA/026, entitled "Availability of 24-Hour Split-Shift Personal Care

Services,” posted on the Department’s website: [www.health.ny.gov/health\\_care/medicaid/publications/gis/](http://www.health.ny.gov/health_care/medicaid/publications/gis/).)

In GIS 12 MA/026, the Department noted that it was considering changes to its regulations and, in the interim, set forth specific clarifications. For example, the fact that a person’s needs are “predictable” does not preclude the receipt of 24-hour split-shift care. Further, a person’s need for turning and positioning or adult diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split-shift care. In all such cases, if the person has a documented medical need for the task to be performed with a frequency that would not allow a live-in aide to perform the task and still obtain an uninterrupted five hours of sleep, 24-hour split-shift care may be appropriate. This is consistent with the standard for live-in home care employees issued by the New York State Department of Labor.

The proposed regulations incorporate the concepts set forth in the Strouhler preliminary injunction decision and in GIS 12 MA/026 for determining whether 24-hour split-shift care or live-in 24-hour care would be appropriate for persons who need 24-hour care. They would define “continuous personal care services” as follows:

the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient’s medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep.

The proposed regulations also define “live-in 24-hour personal care services” as follows:

the provision of care by one personal care aide for a patient who, because of the patient’s medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep.

The proposed regulations delete the definitions of “some assistance” and “total assistance.” These definitions are subject to misinterpretation and are not useful for determining those persons who, because of their frequent need for assistance at night, may be eligible for 24-hour split-shift care.

The proposed regulations add “turning and positioning” as a discrete personal care function, the frequent need for which could warrant 24-hour split-shift care. The Department had long interpreted the task of “transferring” as also including “turning and positioning.” Nevertheless, it is indisputable that a bed-bound individual who needs frequent turning and positioning at night may be appropriate for 24-hour split-shift care even if that individual, due to his or her bed-bound status, does not need assistance with transferring. The proposed regulations make this clear.

The proposed regulations also require that the nursing assessments that districts currently complete or obtain include an evaluation of several factors set forth in GIS 12 MA/026. The local professional director or designee would be required to consider these factors when determining whether split-shift or live-in 24-hour care was appropriate.

The proposed regulations further provide that personal care services shall not be authorized when the patient’s need for assistance can be met by the voluntary assistance of informal caregivers, by formal services or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

The proposed regulations also make technical revisions to the Department’s regulations governing the content of notices that social services districts issue when denying, reducing or discontinuing personal care services.

The regulations adopt similar changes to the Department’s CDPAP regulations at 18 NYCRR § 505.28.

#### Costs to Regulated Parties:

Regulated parties include entities that contract with social services districts to provide personal care services or CDPAP services to Medicaid recipients. These entities include licensed home care services agencies and CDPAP fiscal intermediaries. The proposed regulations would not cause these entities to incur compliance costs. If these entities were formerly reimbursed for more than eight hours per week for providing light cleaning and other nutritional and environmental support functions to individuals whose needs were limited to such services, their Medicaid revenue has decreased. However, this is a consequence of State law and not of the proposed regulations.

#### Costs to State Government:

The statutory cap on nutritional and environmental support functions to no more than eight hours per week results in annual Medicaid State share cost-savings of approximately \$3.4 million. These cost-savings are a result of the change in State law rather than the proposed regulations.

The cost to State Medicaid expenditures of the remaining proposed

regulations cannot be estimated with precision. Since mid-2011, and with the federal government’s approval, the Department has gradually been transitioning the responsibility for the personal care services benefit from social services districts to managed care organizations and managed long term care plans. Some recipients remain excluded or exempt from enrolling in a managed care environment and would continue to receive split-shift or live-in 24-hour services that social services districts would authorize pursuant to the proposed regulations. The Department does not anticipate that costs associated with the proposed regulations would be significant. To a large extent, the proposed regulations merely clarify the Department’s long-standing policies and would thus be unlikely to increase State Medicaid costs. In addition, the proposed regulations also provide that personal care services shall not be authorized to the extent that a Medicaid recipient’s need for assistance can be safely and cost-effectively met by adaptive or specialized medical equipment or supplies or by the voluntary contributions of informal caregivers or formal services.

#### Costs to Local Government:

The regulation would not require social services districts to incur new costs. State law limits the amount that districts must pay for Medicaid services provided to district recipients.

#### Costs to the Department of Health:

There will be no additional costs to the Department.

#### Local Government Mandates:

The proposed regulations require that social services districts refer continuous personal care services and CDPAP cases to the local professional director or designee for review and final determination. In addition, districts must also refer cases in which live-in 24-hour care is indicated. The proposed regulations also require local professional directors to consider additional factors, which would be set forth in the nursing assessment, when reviewing cases in which split-shift or live-in 24-hour services are indicated.

#### Paperwork:

Social services districts currently complete or obtain nursing assessments for personal care services and CDPAP applicants and recipients. The proposed regulations require that the nursing assessment consider whether adaptive or specialized equipment or supplies could safely and cost-effectively meet the patient’s need for assistance. The proposed regulations also specify additional factors that nursing assessments must include when split-shift and live-in 24-hour services are indicated.

#### Duplication:

The proposed regulations do not duplicate any existing federal, state or local regulations.

#### Alternatives:

There is no alternative to the proposed regulations that conform to State law by capping authorizations for nutritional and environmental support functions to eight hours per week. With respect to the remaining proposed regulations, which revise the authorization criteria for continuous and live-in cases, there is no viable alternative. The proposed regulations must be consistent with the principles articulated in the Strouhler preliminary injunction decision and the Department’s GIS 12 MA/026. No significant alternatives were thus considered.

#### Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

#### Compliance Schedule:

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

### **Regulatory Flexibility Analysis**

#### Effect of Rule:

The proposed regulations limit authorizations of nutritional and environmental support functions to no more than eight hours per week for individuals who need only that level of assistance. This primarily affects licensed home care services agencies that provide only housekeeping (“Level I”) personal care services. Most recipients of Level I personal care services live in New York City. There are currently approximately nine entities that provide only Level I services in New York City.

The proposed regulations may also affect fiscal intermediaries that contract with social services districts for the provision of consumer directed personal assistance program (“CDPAP”) services to Medicaid recipients. Fiscal intermediaries are typically non-profit entities such as independent living centers but may also include licensed home care services agencies. There are approximately 46 fiscal intermediaries. If these entities received Medicaid payment in the past for services provided to CDPAP participants who needed assistance only with nutritional and environmental support functions, these entities may have experienced a slight decrease in reimbursable service hours. This is a consequence, however, of the 2011 amendment to Social Services Law § 365-a(2)(e)(iv) and not of the proposed regulations.

The proposed regulations that would establish revised eligibility criteria for continuous services for 16 or more hours (i.e. “split-shift” services) and live-in 24-hour services would primarily affect social services

districts, which assess Medicaid applicants and recipients for personal care services and the CDPAP. There are 62 counties in New York State, but only 58 social services districts. The City of New York comprises five counties but is one social services district. Most split-shift cases and live-in 24-hour services cases reside in New York City.

**Compliance Requirements:**

The proposed regulations do not impose compliance requirements on licensed home care services agencies that provide personal care services to Medicaid recipients or on fiscal intermediaries that contract with social services districts for the provision of CDPAP services to Medicaid recipients.

Social services districts currently assess whether Medicaid recipients are eligible for personal care services and the CDPAP. The nursing assessments that districts currently complete or obtain would be required to evaluate certain additional factors, including whether adaptive or specialized equipment or supplies would be safe and cost-effective and factors relevant to whether continuous or live-in 24-hour care should be authorized. In addition, continuous personal care and CDPAP cases, as well as live-in 24-hour cases, would be required to be referred to the local professional director or designee for review and final determination of the level of care to be authorized.

**Professional Services:**

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

**Compliance Costs:**

No capital costs would be imposed as a result of the proposed regulations. Nor would there be annual costs of compliance.

**Economic and Technological Feasibility:**

There are no additional economic costs or technology requirements associated with the proposed regulations.

**Minimizing Adverse Impact:**

The proposed regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients to determine whether they are eligible for personal care services or the CDPAP. Districts have long been required to refer certain cases to the local professional director or designee for final determination. Pursuant to the proposed regulations, districts would refer additional cases for such review and determination.

**Small Business and Local Government Participation:**

The Department solicited comments on the proposed regulations from the New York City Human Resources Administration (“HRA”), which administers the personal care services program and the CDPAP for New York City Medicaid recipients who are not enrolled in a managed care or managed long term care plan. Most of the State’s personal care services and CDPAP recipients reside in New York City. The Department revised the proposed regulations based on HRA’s comments.

**Cure Period:**

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

**Rural Area Flexibility Analysis**

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

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

The following 43 counties have populations of less than 200,000:

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

Greene

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

All social services districts, including county social services districts in rural counties, would be required to refer additional cases to their local professional directors or designees. The proposed regulations require that such referrals be made for recipients who may be appropriate for continuous services for 16 or more hours (i.e. “split-shift” services) as well as for recipients who may be appropriate for live-in 24-hour services. The regulations also specify additional documentation requirements for the nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients.

**Costs:**

There are no new capital or additional operating costs associated with the proposed regulations.

**Minimizing Adverse Impact:**

The proposed regulations would have minimal impact on rural areas. Most split-shift and live-in 24-hour care cases occur not in rural areas but in New York City.

**Rural Area Participation:**

The Department did not seek rural area participation with regard to the proposed regulations. With regard to that portion of the proposed regulations that caps weekly authorizations to no more than eight hours for Medicaid recipients who need assistance only with nutritional and environmental support functions, the proposed regulations merely conform to State law. With regard to that portion of the proposed regulations that revises the assessment and authorization requirements for split-shift and live-in 24-hour services, the proposed regulations primarily affect urban areas, particularly New York City, because they, not rural areas, have the greatest number of split-shift and live-in cases. In addition, this portion of the proposed regulations is intended to conform to standards articulated in the Strouchler litigation, to which the New York City Human Resources Administration was a defendant.

**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 regulations, that they would not have a substantial adverse impact on jobs and employment opportunities.

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## Office for People with Developmental Disabilities

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### NOTICE OF ADOPTION

**Applications for Certification of Need**

**I.D. No.** PDD-26-14-00011-A

**Filing No.** 754

**Filing Date:** 2014-08-26

**Effective Date:** 2014-09-10

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

**Action taken:** Amendment of section 620.7(a) of Title 14 NYCRR.

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

**Subject:** Applications for Certification of Need.

**Purpose:** To change requirements concerning the method of submission of CON applications.

**Text or summary was published** in the July 2, 2014 issue of the Register, I.D. No. PDD-26-14-00011-P.

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

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

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

**Assessment of Public Comment**

The agency received no public comment.

## Public Service Commission

### NOTICE OF ADOPTION

#### Approving the Financial Support to Battenkill Under the Maintenance Tier of the RPS Program

**I.D. No.** PSC-16-14-00013-A

**Filing Date:** 2014-08-20

**Effective Date:** 2014-08-20

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

**Action taken:** On 8/14/14, the PSC adopted an order approving the request of Battenkill Hydro Associates (Battenkill) to enter into a maintenance resource contract for its hydroelectric facility in Greenwich, NY.

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

**Subject:** Approving the financial support to Battenkill under the maintenance tier of the RPS Program.

**Purpose:** To approve the financial support to Battenkill under the maintenance tier of the RPS Program.

**Substance of final rule:** The Commission, on August 14, 2014, adopted an order approving Battenkill Hydro Associates' request to enter into a maintenance resource contract under the Renewable Portfolio Standard Program for its Greenwich, NY facilities with a production incentive of \$2.80 per MWh for a term of three years for actual electricity production beginning August 1, 2014, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(03-E-0188SA47)

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

#### Commission's Regulatory Framework Will be Revised to Create a Flexible Platform for New Energy Products and Services

**I.D. No.** PSC-36-14-00008-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 taking steps to transform regulation of the State's electric facilities by utilizing a Distributed System Platform provider to drive a market-based, efficient, clean, reliable and consumer oriented industry.

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

**Subject:** Commission's regulatory framework will be revised to create a flexible platform for new energy products and services.

**Purpose:** To allow energy efficiency and other distributed resources to take a primary role in the planning and operation of the grid.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to regulation of the electric industry as set forth in the August 22, 2014 New York State Department of Public Service Report entitled "Developing the REV Market in New York: DPS Staff Straw Proposal on Track One Issues" filed in Case 14-M-0101. In particular, the Commission is considering taking steps to revise its regulatory framework to enable utilities and other market participants, through a Distributed System Platform provider, to actively manage and coordinate a wide variety of distributed resources, to foster markets, to empower customers to reduce and optimize their energy usage, and to stimulate innovation and new products in the industry that will further enhance customer opportunity.

**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-0101SP8)

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

#### Modification to the Commission's Electric Safety Standards

**I.D. No.** PSC-36-14-00009-P

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

**Proposed Action:** The Commission is considering a 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 New York State utilities (Central Hudson Gas & Electric, Consolidated Edison, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, and Rochester Gas & Electric) have filed a joint petition for modification of the Public Service Commission's Electric Safety Standards. 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.

**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-0159SP9)

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

**Procurement of Main Tier Renewable Resources Will Become the Responsibility of the State's Electric Utilities**

**I.D. No.** PSC-36-14-00010-P

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

**Proposed Action:** The Commission is considering adopting a new mechanism for the procurement of supply-side large scale renewable resources.

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

**Subject:** Procurement of Main Tier renewable resources will become the responsibility of the State's electric utilities.

**Purpose:** To ensure the development of large-scale renewables in New York State to promote fuel diversity and reduce carbon emissions.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the methodology for procuring supply-side large scale renewable resources for the State of New York. In particular, the Commission is considering adopting a mechanism which would place the responsibility for procurement of Main Tier renewable resources on the State's electric utilities in accordance with the recommendation made in the August 22, 2014 New York State Department of Public Service Report entitled "Developing the REV Market in New York: DPS Staff Straw Proposal on Track One Issues" filed in Case 14-M-0101.

**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-0101SP9)

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

**To Defer Pension Settlement Losses Associated with Retirements in the Year Ended March 31, 2014**

**I.D. No.** PSC-36-14-00011-P

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

**Proposed Action:** The Commission is considering whether to approve, modify or reject, in whole or in part, a petition of Niagara Mohawk Power Corporation for Authorization to Defer Actuarial Experience Pension Settlement for the Fiscal Year 2014.

**Statutory authority:** Public Service Law, section 66

**Subject:** To defer pension settlement losses associated with retirements in the year ended March 31, 2014.

**Purpose:** To resolve the ratemaking of the pension settlement loss.

**Substance of proposed rule:** By petition dated February 28, 2014, and amended petition filed August 13, 2014, Niagara Mohawk Power Corporation d/b/a National Grid (NMPC) requested that the Commission allow the Company to defer and recover from rate payers approximately \$14.1 million of pension settlement losses incurred throughout fiscal year March 31, 2014. The pension settlement loss was triggered by Niagara Mohawk's employees retiring during the fiscal year and electing to be paid pension benefits in lump sums rather than as annuities. The Commission can grant, reject or modify, in whole or in part, the relief requested by NMPC in its petitions.

**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-0042SP1)

**Office of Temporary and  
Disability Assistance**

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

**Noncompliance with Supplemental Nutrition Assistance Program (SNAP) Work Requirements; SNAP Conciliation Process**

**I.D. No.** TDA-36-14-00014-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 385.11 and 385.12 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 95(1)(b); United States Code, title 7, sections 2011, 2013 and 2029

**Subject:** Noncompliance with Supplemental Nutrition Assistance Program (SNAP) work requirements; SNAP conciliation process.

**Purpose:** To render State regulations governing noncompliance and the conciliation process consistent with federal requirements.

**Text of proposed rule:** The caption for Article 4 of Subchapter B of Chapter II Title 18 NYCRR is amended to read as follows:

Part 385 Public Assistance and [Food Stamp] *Supplemental Nutrition Assistance Program (SNAP)* Employment Program Requirements.

The title of Part 385 of Title 18 NYCRR is amended to read as follows:  
**PUBLIC ASSISTANCE AND [FOOD STAMP] SNAP EMPLOYMENT PROGRAM REQUIREMENTS**

Title 18 NYCRR § 385.11 is amended to read as follows:

Subdivision (a) of § 385.11 is amended to read as follows:

(a) Conciliation for refusal or failure to comply with *public assistance* employment requirements.

Subdivision (b) of § 385.11 is amended to read as follows:

(b) Conciliation for the grievances of individuals assigned to *public assistance* work activities.

Paragraph (3) of subdivision (b) of § 385.11 is amended to read as follows:

(3) Such procedure must afford the individual an opportunity to dispute an assignment to a *public assistance* work activity made in accordance with the provisions of this Part.

A new subdivision (c) is added to § 385.11 to read as follows:

(c) *Conciliation for refusal or failure to comply with Supplemental Nutrition Assistance Program (SNAP) work requirements.*

(1) *The social services official shall issue a conciliation notice to a SNAP recipient who has failed or refused to comply with SNAP work requirements.*

(2) *Such notice shall:*

(i) *indicate that a failure or refusal to participate has occurred;*  
(ii) *indicate that the individual has a right to provide reasons for such failure or refusal to participate;*

(iii) *indicate that the individual has a right to avoid a reduction or discontinuance in SNAP benefits by timely demonstrating compliance with SNAP work requirements as determined by the social services district; and*

(iv) *indicate that the individual shall have 10 calendar days from the date of the notice to request a conciliation and/or an opportunity to timely demonstrate compliance with SNAP work requirements.*

(3) *If the individual does not contact the social services official within*

the time period set forth in paragraph (2) of this subdivision and provide a good cause reason for his or her failure or refusal to comply with SNAP work requirements, document an exemption from work requirements, or timely demonstrate compliance with SNAP work requirements, the social services official shall issue a 10-day notice of intent to discontinue or reduce SNAP benefits.

(4) If the individual does contact the social services official within the time period set forth in paragraph (2) of this subdivision, the individual shall be responsible for providing the social services official with reasons for his or her failure or refusal to comply, and may be required to produce documentation establishing such reasons as determined necessary by the social services district.

(i) If the social services official determines that the individual's failure or refusal to comply was with good cause, the conciliation procedure shall terminate.

(ii) If the social services official determines that the individual's failure or refusal to comply was without good cause, the social services official shall issue a 10-day notice of intent to discontinue or reduce SNAP benefits pursuant to paragraph (3) of this subdivision, unless the individual demonstrates compliance pursuant to paragraph (5) of this subdivision.

(5) Regardless of whether the individual provides reason for his or her failure to participate in SNAP work requirements, should the individual demonstrate compliance with SNAP work requirements as assigned and in the timeframe established by the social services district, then the conciliation procedure shall terminate.

(6) The conciliation period shall last no longer than 30 calendar days from the date of the conciliation notice, unless the social services official determines that the conciliation period should last longer.

Title 18 NYCRR § 385.12 is amended to read as follows:

Subdivision (b) of § 385.12 is amended to read as follows:

(b) Noncompliance of [food stamp] SNAP applicants and recipients with work [registration or work] requirements.

Paragraph (1) of subdivision (b) of § 385.12 is amended to read as follows:

(1) If an [individual] applicant has, without good cause [has], refused or failed to comply with [food stamp program work registration or assignment to work activities] a SNAP work requirement pursuant to the requirements of this Part, he/she will be ineligible to participate in SNAP in accordance with the provisions of this section. If an [individual] applicant is disqualified, and he/she is a member of an otherwise eligible household, he/she is treated as [an excluded] a disqualified member of the household during the period of disqualification, under section 387.16(c)(1) of this Title.

A new paragraph (2) is added to subdivision (b) of § 385.12 to read as follows:

(2) If a recipient has, without good cause, refused or failed to comply with a SNAP work requirement pursuant to the requirements of this Part, he/she will be ineligible to participate in SNAP in accordance with the provisions of this section. If a recipient is disqualified and he/she is a member of an otherwise eligible household, he/she is treated as a disqualified member of the household during the period of disqualification, under section 387.16(c)(1) of this Title.

Paragraphs (2)-(6) of subdivision (b) of § 385.12 are amended to read as follows:

(2) (3) Prior to notifying the household of the proposed disqualification, the social services district must determine whether good cause for noncompliance exists, in accordance with subdivision (c) of this section.

(3) (4) For [food stamp] SNAP recipients, within 10 calendar days of determining that the non-compliance was without good cause, the social services district must issue a timely and adequate notice of adverse action to the recipient. This notice must specify: (i) the particular act of noncompliance [,]; (ii) the proposed period of disqualification[, and]; (iii) that the individual may reapply in order to resume participation in [the food stamp program] SNAP at the end of the disqualification period[. The notice must also contain]; and (iv) information about ending the disqualification as specified in subdivision (e) of this section. The disqualification period begins with the first month following the expiration of the notice period unless a fair hearing is requested. In such case the disqualification period may not begin until the fair hearing request is withdrawn, the individual fails to appear at a scheduled fair hearing, or a fair hearing decision upholding the social services district's action is issued.

(4) (5) When a member of an applicant household has, without good cause, failed to comply with work [registration] requirements pursuant to section 385.3 of this Part, the social services district must inform the household of the individual's disqualification in the notice of action taken. This notice must specify: (i) the particular act of noncompliance [, the proposed period of disqualification,]; and (ii) that the individual may reapply [in order to resume participation in the food stamp program at the end of the disqualification period. The notice also must contain information

about ending the disqualification as specified in subdivision (e) of this section] for SNAP benefits, but must comply with SNAP work requirements as determined by the social services district or document an exemption from SNAP work requirements consistent with section 385.3 of this Title as part of the process for establishing eligibility for SNAP benefits, provided the individual is otherwise eligible.

(5) (6) A voluntary participant in a [food stamp] SNAP employment and training program who is exempt from [food stamp] SNAP work [registration] requirements and/or participation in an employment and training program must not be disqualified for failure to comply with the requirements of this Part unless the volunteer is sanctionable pursuant to paragraph [(6)] (7) of this subdivision.

(6) (7) Failure of certain [food stamp] SNAP applicants and recipients who are exempt from work [registration] requirements to comply with other work requirements. If a household contains a member who is exempt from work [registration] requirements solely because he/she is registered for work under an unemployment compensation work requirement or because he/she is subject to participation in work activities funded under title IV of the Social [Services] Security Act, and such individual refuses or fails to comply with the work requirements of those programs, such individual must be treated as though he/she has failed to comply with the requirements of this Part.

Subdivision (c) of section 385.12 is amended to read as follows:

(c) Good cause for failure to comply with public assistance and [food stamp] SNAP employment requirements.

Paragraph (1) of subdivision (c) of section 385.12 is amended to read as follows:

(1) The social services official is responsible for determining good cause in those instances where an individual has failed to comply with the requirements of this Part. In determining whether or not good cause exists, the social services official must consider the facts and circumstances, including information submitted by the individual subject to such requirements. Good cause includes circumstances beyond the individual's control, such as, but not limited to, illness of the [member] individual, illness of another household member requiring the presence of the [member] individual, inability to participate due to a domestic violence situation, a household emergency, or the lack of adequate child care for children [who have reached age 6 but are] under age 13.

Paragraph (3) of subdivision (d) of section 385.12 is amended to read as follows:

(3) Willing to comply as used in this section means that an individual, as required by the district, reports to and participates in an assigned work activity site or other location as assigned by the [local] social services district on time and prepared to engage in the assigned activity.

Subdivision (e) of section 385.12 is amended to read as follows:

(e) [Food stamp] SNAP sanctions for failure to comply with employment programs.

Paragraph (1) of subdivision (e) of section 385.12 is amended to read as follows:

(1) [The needs of an individual] An applicant who is required to [work register] participate in work activities [and] who, [has failed] without good cause, fails to comply with the requirements of this section [will not be considered in determining the needs of his/her household for food stamps for the periods set forth in this subdivision] shall be denied participation in SNAP until such time as he/she complies with SNAP work requirements as determined by the social services district or documents an exemption from SNAP work requirements consistent with section 385.3 of this Title.

Subparagraphs (i)-(iv) of paragraph (1) and subparagraphs (i)-(iv) of paragraph (4) of subdivision (e) of section 385.12 are REPEALED.

Paragraphs (2)-(4) of subdivision (e) of section 385.12 are renumbered paragraphs (3)-(5) of subdivision (e) of section 385.12, and a new paragraph (2) is added to subdivision (e) of section 385.12 to read as follows:

(2) The needs of a recipient who is required to participate in work activities and who has, without good cause, failed to comply with the requirements of this section will not be considered in determining the needs of his/her household for SNAP for the following time periods:

(i) For the first instance of failure to comply without good cause, a period of two months and thereafter until the individual complies with the requirements of this section as determined by the social services district.

(ii) For the second instance of failure to comply without good cause, a period of four months and thereafter until the individual complies with the requirements of this section as determined by the social services district.

(iii) For the third and all subsequent instances of failure to comply without good cause, a period of six months and thereafter until the individual complies with the requirements of this section as determined by the social services district.

The new paragraph (4) of subdivision (e) of section 385.12 is amended to read as follows:

(4) Eligibility may be reestablished during the disqualification period if the participating household requests that the disqualified individual be added to the household, [provided that] *and* the disqualified individual becomes exempt from the work requirement [other than by reason of participation in an employment program under title IV of the Social Security Act or in an unemployment compensation employment program] *pursuant to section 385.3 of this Part.*

The new paragraph (5) of subdivision (e) of section 385.12 is amended to read as follows:

(5) A disqualification for noncompliance with work [registration] requirements may be ended, after the time periods specified in paragraph [(1)] (2) of this subdivision, if the disqualified individual complies with the requirement which caused the disqualification [respectively, as follows:] *or an alternate work assignment as determined by the social services district.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Richard P. Rhodes, Jr., New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 486-7503, email: richard.rhodesjr@otda.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:

The federal Supplemental Nutrition and Assistance Program (SNAP) is authorized by Chapter 51 of Title 7 of the United States Code (U.S.C.). Pursuant to 7 U.S.C. § 2011, the federal SNAP will promote the general welfare and safeguard the health and well-being of the nation's population by raising levels of nutrition among low-income households.

Pursuant to 7 U.S.C. § 2013, the federal Secretary of Agriculture is authorized to administer the federal SNAP under which, at the request of the State agency, eligible households within the State will be provided an opportunity to obtain SNAP benefits.

Pursuant to 7 U.S.C. § 2029, the federal Secretary of Agriculture is authorized to allow States to operate SNAP Employment and Training (E&T) programs in accordance with federal requirements. The federal statute identifies, among other things, which household members may be required to participate in an E&T program, E&T program components, maximum hours of E&T participation, and disqualification period options.

Social Services Law (SSL) § 95 governs the administration of the SNAP E&T program in New York State. Pursuant to SSL § 95(1)(b), the Office of Temporary and Disability Assistance (OTDA) is authorized to be the designated agency to make SNAP benefits available for eligible needy families and individuals in New York State. Furthermore, the OTDA is authorized to perform such functions as may be appropriate, permitted or required by or pursuant to law.

2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies to enable SNAP applicants and recipients to engage in employment services so they may secure employment.

3. Needs and benefits:

The proposed changes are necessary to make OTDA regulations pertaining to noncompliance and notice requirements consistent with federal regulations and policy. SNAP applicants and recipients will benefit from these regulatory amendments as follows:

- SNAP applicants who fail to comply with work requirements without good cause are no longer subject to a durational sanction. A SNAP applicant who refuses or fails to comply with SNAP work requirements without good cause is ineligible for SNAP benefits, and the individual will be denied. The social services district (SSD) will be responsible for determining SNAP eligibility for the remaining members of a SNAP household, if any.

- SNAP recipients will have the opportunity to avoid the imposition of a SNAP sanction by timely demonstrating compliance with the work requirements of the E&T program as assigned by the SSD. SNAP recipients will also receive additional notification regarding the opportunity to present information to support claims of good cause or exemption from SNAP work requirements.

- The proposed regulatory amendments are described below:

A. Amendments to the title of Article 4 of Subchapter B of Chapter II Title 18 NYCRR and to the content description of Title 18 NYCRR:

- Replace the term “food stamp” with the term “Supplemental Nutrition Assistance Program (SNAP)” consistent with Chapter 41 of the Laws of 2012; note that the proposed regulatory amendments further reference “SNAP” as appropriate.

B. Amendments to 18 NYCRR § 385.11 Conciliation:

- § 385.11(a) clarifies that this subdivision relates to conciliation for public assistance employment requirements.

- § 385.11(b) clarifies that this subdivision relates to the grievance process for individuals assigned to public assistance work activities.

- § 385.11(b)(3) clarifies that this subdivision relates to public assistance work requirements.

- § 385.11(c) establishes a conciliation process for the SNAP E&T program, including notice requirements advising an individual of the opportunity to avoid the imposition of a SNAP E&T sanction by timely demonstrating compliance with SNAP work requirements, as assigned by the SSD.

- § 385.11(c)(1) instructs SSDs to provide a conciliation notice to SNAP recipients who have failed or refused to comply with SNAP work requirements.

- § 385.11(c)(2) instructs SSDs of the required elements of the conciliation notice, which include indicating that a failure or refusal to comply without good cause has occurred, advising the individual of the right to provide reasons for the failure or refusal to comply, advising the individual of the right to avoid a reduction or discontinuance of SNAP benefits by timely demonstrating compliance with SNAP work requirements as determined by the SSD, and advising that the individual shall have 10 calendar days from the date of the conciliation notice to request a conciliation and/or the opportunity to timely demonstrate compliance with SNAP work requirements.

- § 385.11(c)(3) instructs SSDs to issue a 10-day notice of intent to discontinue or reduce the SNAP benefit if the individual fails to contact the district within the time frame required and provide a good cause reason for their refusal or failure to comply with SNAP work requirements, or timely demonstrate compliance with SNAP work requirements as determined by the SSD.

- § 385.11(c)(4) instructs SSDs that, if the individual does contact the SSD within the 10 day timeframe established in § 385.11(c)(2), the individual may be required to produce documentation establishing their reasons for non-compliance as determined necessary by the SSD; that if the SSD determines that the individual had good cause for non-compliance, or is exempt from SNAP work requirements, the conciliation process ends; and that if the SSD determines that the individual's refusal or failure to comply was without good cause, the social services official shall issue a 10-day notice of intent to discontinue or reduce the SNAP benefit unless the individual demonstrates compliance pursuant to paragraph (5) of this subdivision.

- § 385.11(c)(5) instructs SSDs that, regardless of the determination of § 385.11(c)(4), if the individual demonstrates compliance as determined by the SSD the conciliation process ends.

- § 385.11(c)(6) instructs SSDs that the conciliation process that will be used for recipients who refuse or fail to comply with SNAP work requirements shall last no longer than 30 calendar days from the date of the conciliation notice, unless the social services official determines that the conciliation period should last longer.

C. Amendments to 18 NYCRR § 385.12 Failure to comply with the requirements of this part:

- § 385.12(b)(1) instructs SSDs to deny SNAP benefits to an applicant that refuses or fails to comply with SNAP work requirements without good cause.

- Paragraphs 2-6 of subdivision (b) of § 385.12 are renumbered and amended to read as follows:

- § 385.12(b)(2) clarifies that only a SNAP recipient is subject to a disqualification period for failure to comply with SNAP work requirements in accordance with the provisions of this section.

- § 385.12(b)(4) replaces the reference to “food stamps” with “SNAP” consistent with Chapter 41 of the Laws of 2012; note that the proposed regulatory amendments further reference “SNAP” where appropriate.

- § 385.12(b)(5) clarifies that an applicant may establish eligibility for SNAP benefits by reapplying and complying with SNAP work requirements, or documenting an exemption from SNAP work requirements as determined by the SSD, provided that the individual is otherwise eligible for SNAP benefits.

- § 385.12(b)(6) replaces the term “food stamp” with “SNAP” and the term “work registration” with the term “work requirements.”

- § 385.12(b)(7) replaces the term “work registration” with the term “work requirements” and corrects a reference to the Social Security Act.

- § 385.12(c) replaces the term “food stamp” with “SNAP” when describing “work requirements.”

- § 385.12(c)(1) deletes the descriptive phrase “who have reached age 6 but are” because a caretaker of a child under the age of 6 may be required to participate in a work experience assignment in accordance with § 385.3(a)(1)(iv); and adds “inability to participate due to a domestic violence situation” to list of examples of good cause for failure to comply with SNAP work requirements.

- § 385.12(d)(3) is amended to remove the word “local” when referencing the SSD, and to include that the individual must engage in an assigned work activity.

- § 385.12(e)(1) clarifies that an applicant who fails to comply with SNAP work requirements without good cause will be denied participation in SNAP until the applicant complies with SNAP work requirements or documents an exemption from SNAP work requirements, as determined by the SSD.

- § 385.12(e)(2) differentiates recipient disqualification for failure to comply with the requirements of this section without good cause from applicant noncompliance.

- § 385.12(e)(4) is modified to remove the phrase “other than by reason of participation in an employment program under title IV of the Social Security Act or in an unemployment compensation employment program” to be consistent with federal policy.

- § 385.12(e)(5) clarifies that SNAP eligibility may be reestablished following the disqualification period if the disqualified individual complies with SNAP work requirements as determined by the SSD.

#### 4. Costs:

OTDA does not anticipate that the proposed changes will require significant additional staff to implement and administer. It is estimated that the Statewide costs to SSDs for preparing these notices and processing those cases that demonstrate compliance will be in the range of approximately \$500,000 gross. Based on case type and the SSD’s determination consistent with federal requirements, these costs will be supported by a combination of federal and local funds. The proposed regulatory amendments are necessary to conform OTDA regulations with federal regulations and policies, including, but not limited to, a waiver approved by United States Department of Agriculture’s (USDA) Food and Nutrition Service (FNS) to modify certain provisions required by 7 C.F.R. § 273.7(f)(1)(ii). SSDs will be required to modify current procedures consistent with the proposed amendments, when adopted. Specifically, SSDs will be required to provide a written conciliation notice to SNAP recipients who refuse or fail to comply with SNAP work requirements, similar to the conciliation process already in place for public assistance. The requirement to provide SNAP recipients the opportunity to timely demonstrate compliance to avoid a SNAP E&T sanction may require additional work assignment opportunities, depending on the number of individuals who elect to demonstrate compliance.

#### 5. Local government mandates:

SSDs are currently required to determine work registrant status and determine appropriate work activity assignments and necessary support services for SNAP E&T participants. The proposed amendments will require SSDs to modify current procedures related to applicant noncompliance and to notify SNAP recipients of an opportunity for them to avoid a SNAP sanction by timely demonstrating compliance with SNAP E&T requirements, as required by the USDA. Federal regulations at 7 C.F.R. § 273.7(f)(1)(ii) require that a notice of adverse action issued to an individual who has refused or failed to comply with SNAP work requirements without good cause include information on or with the notice to describe the action that the individual may take to avoid disqualification before the effective date of the disqualification. OTDA discussed this requirement with several SSDs and determined that implementing this regulatory requirement through the conciliation process would reduce the administrative burden imposed upon SSDs. OTDA requested, and the USDA approved, a waiver authorizing OTDA to include this requirement as part of the conciliation process that is currently used in cases of noncompliance with public assistance work requirements. The conciliation process will be expanded to include noncompliance by non-public assistance SNAP recipients. OTDA will issue policy guidance and provide technical assistance to help SSDs implement the proposed amendments and to ensure that local procedures are consistent with federal regulations and requirements.

The proposed regulatory amendments will also benefit SNAP recipients who have refused or failed to comply with SNAP work requirements without good cause by providing them an opportunity to avoid a SNAP sanction by timely demonstrating compliance with SNAP work requirements as assigned by the SSD. The proposed amendments also provide an opportunity for SNAP recipients to provide documentation during the conciliation process supporting claims of good cause or exemption from SNAP work requirements.

#### 6. Paperwork:

The proposed amendments will require SSDs to issue a conciliation notice informing a SNAP recipient of the failure to comply with SNAP work requirements and of the opportunity to avoid a SNAP E&T sanction by timely demonstrating compliance within certain timeframes. OTDA has amended the conciliation notice issued to individuals who refuse or fail to comply with public assistance work requirements without good cause to include information regarding the opportunity to demonstrate compliance or to provide documentation demonstrating either good cause or an exemption from SNAP work requirements in those instances where the noncompliance applies to both public assistance and SNAP. The revised conciliation notice should reduce the number of separate notices that an SSD may

need to issue for noncompliance with SNAP work requirements; however, OTDA will also provide a separate notice for SSDs to use when the noncompliance only applies to the SNAP program.

#### 7. Duplication:

These proposed amendments do not duplicate, overlap, or conflict with any existing State or federal regulations.

#### 8. Alternatives:

The proposed amendments must be implemented to render OTDA regulations related to applicant noncompliance and notice requirements for recipient noncompliance with SNAP work requirements consistent with federal regulations and policy. SSDs must implement these changes to ensure that local procedures are consistent with federal regulations and policy. The amendments are proposed pursuant to the waiver granted by the FNS authorizing New York State to proceed in this regard. OTDA has determined that the proposed regulatory amendments will present less of an administrative burden to SSDs than would implementation absent the FNS waiver. The proposed amendments will also benefit SNAP recipients who have refused or failed to comply with SNAP work requirements without good cause by affording SNAP recipients an opportunity to avoid SNAP sanctions by timely demonstrating compliance with SNAP work requirements, as assigned by the SSD, or, where applicable, to provide documentation during the conciliation process supporting claims of good cause or exemption from SNAP work requirements.

#### 9. Federal standards:

The proposed changes are necessary to make OTDA regulations related to SNAP applicant noncompliance and notice requirements, and their implementation through local procedures, consistent with federal regulations and policy.

#### 10. Compliance schedule:

OTDA will provide necessary systems changes, client notification procedures, and an administrative directive to SSDs and agencies to assist in this process. SSDs will have the opportunity to review and comment on the program directive prior to final issuance by OTDA and will have time allotted to implement new procedures.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

The proposed amendments will have an effect on local governments, specifically, social services districts (SSDs), but not on small businesses.

#### 2. Compliance requirements:

The proposed amendments will have no effect on small businesses. SSDs are currently required to determine work registrant status, appropriate work activity assignments, and necessary support services for the Supplemental Nutrition and Assistance Program (SNAP). The proposed amendments will require SSDs to modify current procedures related to SNAP applicant noncompliance, to offer conciliation to SNAP recipients who refuse or fail to comply with SNAP work requirements, including those individuals who are applying for or receiving public assistance, and to offer an opportunity for SNAP recipients to avoid a SNAP Employment & Training (E&T) sanction by timely demonstrating compliance with SNAP work requirements, as directed by the SSD. The opportunity to discuss compliance with SNAP work requirements will be afforded through a conciliation process similar to the process used for noncompliance with public assistance work requirements already in place. OTDA will issue policy guidance and provide technical assistance to help SSDs implement the proposed changes to ensure local procedures are consistent with federal regulations and requirements. OTDA has amended the conciliation notice to be issued to individuals who refuse or fail to comply with public assistance work requirements without good cause to advise these individuals of the opportunity to timely demonstrate compliance with SNAP work requirements, or, where applicable, to provide documentation supporting claims of good cause or an exemption from SNAP work requirements in those instances where the noncompliance applies to both public assistance and SNAP. The revised conciliation notice used for noncompliance with public assistance work requirements should reduce the number of separate notices that SSDs need to issue for noncompliance with SNAP work requirements. OTDA will also provide a separate notice for SSDs to use when the noncompliance applies only to the SNAP program. SSDs that elect to use a local equivalent form will be required to amend their local conciliation notice, subject to OTDA approval.

#### 3. Professional services:

The requirement to deny SNAP benefits to a nonexempt applicant who refuses or fails to comply with SNAP work requirements without good cause should not require additional SSD staff to implement. OTDA will revise the Client Notices System to support this change and provide technical assistance to help SSDs implement this change. The requirements to offer conciliation to SNAP recipients who refuse or fail to comply with SNAP work requirements and to provide SNAP recipients the opportunity to timely demonstrate compliance in order to avoid a SNAP E&T sanction may require an SSD to develop additional work assignment opportunities, depending on the number of individuals who opt to reengage and timely

demonstrate compliance, and may require SSD staff to explain program options to individuals who fail to comply.

#### 4. Compliance costs:

The proposed amendments will not affect small businesses. SSDs will be required to modify local procedures, by denying a nonexempt SNAP applicant who refuses or fails to comply with SNAP work requirements without good cause and by offering conciliation to SNAP recipients, including the issuance of a written conciliation notice informing recipients of the opportunity to demonstrate either compliance with or exemption from SNAP work requirements within a designated time period to avoid a SNAP sanction. OTDA does not anticipate that the proposed amendments will significantly increase costs to local governments. It is estimated that the Statewide costs to SSDs for preparing these notices and processing those cases that demonstrate compliance will be in the range of approximately \$500,000 gross. Based on case type and the SSD's determination consistent with federal requirements, these costs will be supported by a combination of federal and local funds.

#### 5. Economic and technological feasibility of compliance:

The proposed amendments will not affect small businesses. SSDs currently have the economic and technological abilities to comply with these proposed regulations. OTDA will provide necessary systems changes, client notification procedures, and an administrative directive (ADM) to SSDs and agencies to assist with implementation, and will also issue policy guidance and provide technical assistance to help SSDs implement the proposed changes to ensure that local procedures are consistent with federal regulations and requirements.

#### 6. Minimizing adverse impact:

These proposed amendments will not affect small businesses. OTDA does not anticipate significant adverse economic impact on local governments. OTDA will issue policy guidance and provide technical assistance to help SSDs implement the proposed changes to ensure that local procedures are consistent with federal regulations and requirements. The amended conciliation notice used for noncompliance with public assistance work requirements should reduce the number of separate notices that SSDs need to issue for noncompliance with SNAP work requirements.

#### 7. Small business and local government participation:

The proposed amendments will not affect small businesses. The primary purpose for the promulgation of this rule is to bring State regulations regarding the SNAP E&T program into compliance with federal requirements. The proposed amendments will require SSDs to implement changes, but OTDA does not anticipate that the proposed amendments will have a significant adverse economic impact on local governments. OTDA will issue an ADM explaining the regulatory amendments and addressing their implementation by the SSDs. All SSDs will have an opportunity to review and comment on the draft version of the ADM. OTDA will also update its "New York State Temporary Assistance and SNAP Employment Policy Manual" (Policy Manual) to reflect the regulatory amendments. This update will include a detailed "Summary of Changes" setting forth the regulatory sections amended and explaining the revisions in detail, and SSDs will be afforded the opportunity to contact OTDA with any questions or concerns regarding the Policy Manual updates.

### **Rural Area Flexibility Analysis**

#### 1. Types and estimated numbers of rural areas:

The proposed amendments will affect the process and procedures used by the 44 rural social services districts (SSDs) in the State when a nonexempt individual refuses or fails to comply with Supplemental Nutrition Assistance Program (SNAP) work requirements.

#### 2. Reporting, recordkeeping and other compliance requirements; and professional services:

Rural SSDs are currently required to determine work registrant status and determine appropriate work activity assignments and necessary support services for SNAP Employment and Training (E&T). Rural SSDs will be required to deny SNAP benefits to a non-exempt applicant who refuses or fails to comply with SNAP work requirements without good cause. Rural SSDs will also be required to modify local procedures by offering conciliation and an opportunity for SNAP recipients to timely demonstrate compliance with SNAP work requirements, including issuing a written notice to recipients that refuse or fail to comply with SNAP work activity assignments, similar to the conciliation process that is already in place for public assistance. Rural SSDs will be required to inform the recipient of the opportunity to demonstrate compliance with SNAP work requirements within a designated period of time to avoid a SNAP sanction. This proposed regulatory amendment may require rural SSDs to develop additional work assignment opportunities, depending on the number of individuals who elect to demonstrate compliance to avoid a SNAP E&T sanction. Additionally, the proposed amendments will eliminate the durational sanctions for SNAP E&T applicants. Nonexempt SNAP applicants who refuse or fail to comply with SNAP work requirements without good cause will be denied SNAP benefits. Rural SSDs will also be responsible for determining the SNAP eligibility of the remaining

members of a SNAP household, if applicable, in those instances in which a SNAP applicant is denied SNAP benefits for refusing or failing to comply with SNAP work requirements without good cause.

However, notwithstanding the foregoing, OTDA does not anticipate that the proposed amendments will require significant additional SSD staff to implement and administer. It is anticipated that with the issuance of OTDA's guidance documents and client notice changes, rural SSDs will not have significant difficulties implementing these procedural changes.

#### 3. Costs:

OTDA does not anticipate that the proposed amendments will require rural SSDs to hire significant additional staff to implement and administer these changes. It is anticipated that the proposed regulatory amendments will have some small impact on the rest of State administrative costs. These proposed amendments are necessary to render State regulations pertaining to the SNAP E&T program consistent with federal regulations and policy. The proposed amendments will require rural SSDs to deny SNAP benefits to a nonexempt SNAP applicant who refuses or fails to comply with SNAP work requirements without good cause. Rural SSDs will also be required to modify local procedures by offering conciliation and the opportunity to timely demonstrate compliance with SNAP work requirements to SNAP recipients, including issuing a written notice to recipients who refuse or fail to comply with SNAP work activity assignments, similar to the conciliation process already in place for public assistance. Affording SNAP recipients the opportunity to demonstrate compliance with SNAP work requirements prior to the imposition of a SNAP E&T sanction, and thereby avoid such a sanction, may require rural SSDs to provide additional work assignment opportunities, depending on the number of individuals who elect to demonstrate compliance in order to avoid a SNAP E&T sanction. It is estimated that the Statewide costs to SSDs for preparing these notices and processing those cases that demonstrate compliance will be in the range of approximately \$500,000 gross. Based on case type and the SSD's determination consistent with federal requirements, these costs will be supported by a combination of federal and local funds.

#### 4. Minimizing adverse impact:

OTDA does not anticipate that the proposed amendments will have a significant adverse impact on rural SSDs. OTDA will issue policy guidance and provide technical assistance to help rural SSDs implement the proposed amendments and to ensure that local procedures are consistent with OTDA regulations and federal regulations and requirements. Use of the revised conciliation notice should reduce the number of separate notices that rural SSDs need to issue for noncompliance with SNAP work requirements. The only new notice required will be that used for SNAP-only recipients who refuse or fail to comply with SNAP work requirements as assigned by rural SSDs.

#### 5. Rural area participation:

The proposed rule is intended to render State regulations pertaining to SNAP work requirements consistent with federal regulations and requirements for all SSDs. The proposed amendments will afford SNAP recipients the opportunity to demonstrate compliance with SNAP work requirements to avoid a SNAP E&T sanction. SNAP recipients will also be able to present information to support claims of good cause or exemption from SNAP work requirements during the conciliation process, before the issuance of a SNAP E&T sanction notice.

OTDA plans to develop an administrative directive (ADM) explaining the regulatory amendments and addressing their implementation by rural SSDs. All SSDs, including rural SSDs, will have an opportunity to review and comment on the draft version of the ADM. Additionally, OTDA will update its "New York State Temporary Assistance and SNAP Employment Policy Manual" (Policy Manual) to reflect the regulatory amendments. This update will include a detailed "Summary of Changes" setting forth the regulatory sections amended and explaining the revisions in detail. The rural SSDs will be afforded the opportunity to contact OTDA with any questions or concerns regarding the updates to the Policy Manual.

### **Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. The nature and the purpose of the proposed amendments will not have a substantial adverse impact on jobs and employment opportunities in the State. Furthermore, the proposed amendments will not significantly affect the jobs of employees in the social services districts (SSDs).

The proposed amendments will change the consequence that is imposed when a nonexempt applicant refuses or fails to comply with Supplemental Nutrition and Assistance Program (SNAP) Employment and Training (E&T) work requirements without good cause. The proposed amendments will also alter the policy and procedure in place when a SNAP applicant fails or refuses to comply with an assigned work activity without good cause by eliminating the durational nature of any sanction. The proposed amendments will further require SSDs to make changes to local procedures to ensure that recipients who refuse or fail to comply with SNAP work

requirements are informed, in writing, of the opportunity to avoid a SNAP E&T sanction by demonstrating compliance with SNAP work requirements within a designated period of time before the sanction is imposed.

SSD staff will be required to provide a written conciliation notice to SNAP recipients who refuse or fail to comply with SNAP work requirements, similar to the conciliation process currently in place for public assistance. The requirement to provide SNAP recipients the opportunity to demonstrate compliance to avoid a SNAP E&T sanction may require SSDs to develop additional work assignment opportunities, depending on the number of individuals who elect to demonstrate compliance to avoid a SNAP E&T sanction.

However, OTDA does not anticipate that the proposed amendments will require SSDs to hire significant additional staff or to substantially change the duties of existing SSD staff to implement and administer. It is anticipated that with the issuance of OTDA's guidance document and revision of the written conciliation notice currently used in cases of noncompliance with public assistance work requirements, SSD staff should not have any significant difficulty implementing these procedural changes. Consequently, OTDA does not anticipate that the proposed amendments will have any adverse impact on jobs and employment opportunities in the State.