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 Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-45-15-00003-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify positions in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by increasing the number of positions of Research Associate from 1 to 6.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Data, views or arguments may be submitted to: Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.ny.gov

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

Regulatory Impact Statement
A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-45-15-00004-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene under the subheading "Office for People with Developmental Disabilities," by increasing the number of positions of Deputy Commissioner from 5 to 6.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Data, views or arguments may be submitted to: Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.ny.gov

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

Regulatory Impact Statement
A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously

printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-45-15-00005-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Division of Homeland Security and Emergency Services," by increasing the number of positions of Special Assistant from 12 to 13.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Data, views or arguments may be submitted to: Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.ny.gov

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-45-15-00006-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify a position in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Taxation and Finance, by adding thereto the position of Investment Systems Manager (1).

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Data, views or arguments may be submitted to: Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.ny.gov

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-45-15-00007-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office for People with Developmental Disabilities," by increasing the number of positions of Internal Investigator 1 (OPWDD) from 46 to 65.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

Data, views or arguments may be submitted to: Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.ny.gov

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-15-00005-P, Issue of January 7, 2015.

State Commission of Correction

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Manner in Which Significant Correctional Facility Incidents Are Reported to the Commission of Correction

I.D. No. CMC-45-15-00024-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 7022.3, 7022.4, 7406.3, 7406.4 and 7508.2 of Title 9 NYCRR.

Statutory authority: Correction Law, sections 45(6), (6-b), (15) and 47(2)

Subject: Manner in which significant correctional facility incidents are reported to the Commission of Correction.

Purpose: To allow electronic filing of reportable incidents to the Commission of Correction.

Text of proposed rule: Paragraph (1) of subdivision (a) of section 7022.3 of Title 9 is amended to read as follows:

(1) all major disturbances, escapes, inmate group actions, personnel group actions, hostage situations, firearm discharges, natural/civil emergencies, and major maintenance/services disruptions shall be reported [by telephone] immediately upon occurrence or discovery [and all completed report forms required by]*, in a form and manner prescribed by the commission, as set forth in* the commission's Reportable Incident Guidelines for County Correctional Facilities [shall be transmitted by facsimile within 24 hours thereafter]; and

Paragraph (2) of subdivision (a) of section 7022.3 of Title 9 is amended to read as follows:

(2) all other reportable incidents shall be reported [by transmitting all report forms required by] *in a form and manner prescribed by the commission, as set forth in* the commission's Reportable Incident Guidelines for County Correctional Facilities [by facsimile]*,* within 24 hours of occurrence or discovery.

Paragraph (2) of subdivision (a) of section 7022.4 of Title 9 is amended to read as follows:

(2) the commission, within six hours of pronouncement of death, regardless of the time of day or day of week, [by both telephone and report submitted by facsimile] in a form and manner prescribed by the commission's medical review board as described in the commission's Reportable Incident Guidelines for County Correctional Facilities.

Section 7406.3 of Title 9 is amended to read as follows:

(a) As required in section 7406.2 of this Part, whenever a reportable incident occurs at a secure facility, OCFS shall report such incident to the Commission pursuant to the following requirements:

(1) all major disturbances, escapes, resident group actions, personnel group actions, hostage situations, natural/civil emergencies, major maintenance/service disruptions, or any incident during which control at a secure facility is lost or partially lost shall be reported [by telephone] immediately upon occurrence or discovery[, and followed up with a report, reduced to writing] in a form *and manner as* required by the Commission[, and shall be sent to the Commission within 24 hours].

(2) all assaults, sexual assaults, sexual abuse, employee misconduct, communicable reportable disease, contraband, escape attempts, fires, attempted suicides, self-inflicted injuries, serious accidental injuries, or occurrence(s) that disrupt the normal operations of a secure facility or that involve injury to residents or staff resulting in hospital treatment shall be reported, [via telephonic facsimile or electric or digitally transmitted data,] *in a form and manner as required by the commission,* within 24 hours of occurrence or discovery.

[(b) The initial telephone report required pursuant to subdivision (a) of this section shall be made in a form and manner as required by the Commission.]

([c]*b*) OCFS shall provide follow-up reports for specified incidents which may be required by the Commission. Such follow-up reports shall be submitted in writing to the Commission in a form and manner as required by the Commission, as soon as practicable, but no later than 30 days following the initial [telephone] report.

([d]*c*) When additional pertinent facts are discovered about an incident after OCFS has submitted the follow-up report to the Commission, such information shall be forwarded in writing, in a form and manner as required by the Commission, as soon as practicable, but no later than 14 days following discovery.

Subdivision (a) of section 7406.4 of Title 9 is amended to read as follows:

(a) OCFS shall report the death of any resident listed on its official count of secure facility residents to the commission [by telephonic facsimile] within six hours of pronouncement of death, in a form and manner prescribed by the commission.

Subdivision (a) of section 7508.2 of Title 9 is amended to read as follows:

(a) Except as provided in subdivision (b) of this section, reportable incidents shall be reported to the commission [by mail] within 24 hours of occurrence in a form and manner prescribed by the commission.

Text of proposed rule and any required statements and analyses may be obtained from: Deborah Slack-Bean, Senior Attorney, New York Sate Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, NY 12210, (518) 457-7112, email: Deborah.Slack-Bean@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 Commission 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. Similarly, subdivision (6-b) of section 45 of the Correction Law authorizes the Commission to promulgate rules and regulations, in consultation with the Office of Children and Family Services (OCFS), establishing minimum standards for the care, custody, rehabilitation, treatment, supervision, discipline, and other programs for correctional facilities operated by OCFS. Subdivision (2) of section 47 of the Correction Law requires every administrator of a correctional facility to report the death of in an inmate in the manner and form as required by the Commission's Medical Review Board. Finally, 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.

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 efficient and effective monitoring and investigation of serious or potentially problematic incidents and deaths occurring in local correctional facilities and OCFS secure facilities.

3. Needs and benefits:

As currently constructed, sections 7022.3, 7022.4, 7406.3, 7406.4 and 7508.2 of Title 9 NYCRR set forth the manner and schedule by which local correctional facilities and OCFS secure facilities must report to the significant events and incidents to the Commission, such as an inmate death, escape, hostage situation, natural or civil emergency, maintenance or service disruption, or assault. In practice, local correctional facilities report significant incidents and inmate deaths by both telephone and the completion and faxing of a paper form to the Commission. OCFS and the New York City Department of Correction both report telephonically and electronically submit incident data in varying forms. All such reported data is thereafter manually entered by Commission staff into a database accessible only to the Commission.

In partnership with the New York State Office of Information and Technology Services (ITS), the Commission is developing a platform whereby all such incidents will be electronically reported and maintained via the eJusticeNY Integrated Justice Portal. Besides the obvious benefits to SCOC's data collection and management, correctional facilities will have the ability to search an individual inmate's incident history in all adult correctional facilities statewide, providing valuable information to assist in the inmate's risk assessment and classification.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. All such regulated parties currently have access to the eJusticeNY Integrated Justice Portal. Changing the reporting manner from paper form/facsimile to electronic may serve to reduce facility staff time and resources in preparing and transmitting reports.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. As set forth above in subdivision (a), there will be no additional costs to local governments or to OCFS.

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 local correctional facilities and secure facilities operated by OCFS.

5. Local government mandates:
None.
6. Paperwork:
No change is sought to the specific incident information that must be reported, and thus this rule does not require any additional paperwork on regulated parties. Changing the reporting manner from paper form/facsimile to electronic may serve to reduce facility staff time and resources in preparing and transmitting reports.
7. Duplication:
This rule does not duplicate any existing State or Federal requirement.
8. Alternatives:
The alternative, maintaining the current regulations that require local correctional facilities and OCFS secure facilities report significant incidents and deaths by facsimile or varied electronic means, was explored by the Commission. This alternative was rejected upon the Commission's finding that requiring incident reporting via the eJusticeNY Integrated Justice Portal would benefit the Commission's data collection and management, allow correctional facilities to search an individual inmate's incident history in all adult correctional facilities statewide, and serve to reduce facility staff time and resources in preparing and transmitting reports.
9. Federal standards:
There are no applicable minimum standards of the federal government.
10. Compliance schedule:
Each local correctional facility and OCFS secure facility is expected to be able to achieve compliance with the proposed rule immediately.

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 allow local correctional facilities, secure facilities operated by the Office of Children and Family Services, and municipal police agencies to electronically report significant incidents and inmate deaths to the Commission of Correction. 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 allow local correctional facilities, secure facilities operated by the Office of Children and Family Services, and municipal police agencies to electronically report significant incidents and inmate deaths to the Commission of Correction. 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 allow local correctional facilities, secure facilities operated by the Office of Children and Family Services, and municipal police agencies to electronically report significant incidents and inmate deaths to the Commission of Correction. As such, there will be no impact on jobs and employment opportunities.

Education Department

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State Common Core Learning Standards (CCLS)

I.D. No. EDU-45-15-00013-EP
Filing No. 930
Filing Date: 2015-10-27
Effective Date: 2015-10-27

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

Proposed Action: Amendment of section 100.5(g)(1)(i) of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the January 2016 Regents meeting. However, emergency action to adopt the proposed amendment is necessary now for the preservation of the general welfare to ensure that school districts and students are given sufficient notice to prepare for and timely implement in the 2015-2016 school year the provision providing, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by passing either the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations.

It is anticipated that the emergency rule will be presented to the Board of Regents for adoption as a permanent rule at the January 2016 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act for proposed rulemakings.

Subject: New York State Common Core Learning Standards (CCLS).

Purpose: To provide additional opportunities for students who began grade 9 in 2013 to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2016 and June 2016 test administrations.

Text of emergency/proposed rule: Subparagraph (i) of paragraph (1) of subdivision (g) of section 100.5 of the Regulations of the Commissioner is amended, effective October 27, 2015, as follows:

(i) English.

(a) Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation in clause (a)(5)(i)(a) of this section by passing the Regents examination in English language arts (common core) or an approved alternative pursuant to section 100.2(f) of this Part.

(b) Students who first enter grade 9 prior to September 2013 shall meet the English requirement for graduation in clause (a)(5)(i)(a) of this section by:

(1) successfully completing a course in English language arts (common core) and passing the Regents examination in English language arts (common core) or an approved alternative pursuant to section 100.2(f) of this Part; or

(2) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents comprehensive examination in English or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the January 2014, June 2014, August 2014, January 2015, June 2015*,* [and] August 2015*, January 2016 and June 2016* administrations only, students enrolled in English language arts (common core) courses may, at the discretion of the applicable school district, take the Regents comprehensive examination in English in addition to the Regents examination in English language arts (common core), and may meet such English requirement by passing either examination.

(c) . . .

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 24, 2016.

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

Data, views or arguments may be submitted to: Angelica Infante-Green, Deputy Commissioner for P-12 Instructional Support, State Education Building, 2M West, 89 Washington Avenue, Albany, NY 12234, (518) 474-5520, email: NYSEDP12@nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out laws regarding education and the functions and duties conferred on SED by law.

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 305 (1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined 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 the Commissioner with the 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.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Regents relating to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement.

3. NEEDS AND BENEFITS:

At their July 2013 meeting, the Board of Regents adopted by emergency action, effective July 30, 2013, a new Commissioner's Regulation § 100.5(g) to require students who began grade 9 in 2013 to meet diploma requirements by passing the Regents Examination in English Language Arts that is aligned to the New York State P-12 Common Core Learning Standards. Section 100.5(g) was permanently adopted at the October 2013 Regents meeting. Included in that regulation is a provision in § 100.5(g)(1)(i)(b)(2) that allows, at local discretion, students who began grade 9 prior to 2013 who were enrolled in Common Core English courses to take the Regents Comprehensive Examination in English (2005 Learning Standards) in addition to the Regents Examination in ELA (Common Core) and meet the English requirement for graduation by passing either examination. This flexibility was initially limited to the June 2014 and August 2014 test administrations, but was subsequently extended to the January 2014 and January, June and August 2015 test administrations.

The proposed amendment would extend that flexibility to the final two administrations of the Regents Comprehensive Examination in English (2005 Learning Standards) in January 2016 and June 2016. This flexibility would continue to apply only to students who began grade 9 prior to 2013 and have already had access to the Regents Comprehensive Examination in English (2005 Learning Standards).

4. COSTS:

(a) Costs to State government: none.

(b) Costs to local government: none.

(c) Costs to private regulated parties: none.

(d) Costs to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any costs on school districts or charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

6. PAPERWORK:

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

7. DUPLICATION:

The rule does not duplicate existing State or federal requirements.

8. ALTERNATIVES:

There are no significant alternatives to the rule and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA examinations, and does not impose any additional compliance requirements or costs on school districts or charter schools. It is anticipated regulated parties will be able to achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to implement requirements for transitioning to the New York State Common Core English Language Arts (ELA) examinations. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements and higher levels of student achievement, 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 proposed amendment applies to each of the 689 public school districts in the State, and to charter schools that are authorized to issue Regents diplomas with respect to State assessments and high school graduation and diploma requirements. At present, there are 34 charter schools authorized to issue Regents diplomas.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on school districts and charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

4. COMPLIANCE COSTS:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any costs on school districts or charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking

the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on school districts or charter schools. Economic feasibility is addressed in the Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any costs or compliance requirements on school districts or charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the rule have been provided to District Superintendents with the request that they distribute them 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 providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. 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 16. of the Notice of Emergency Adoption and 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 each of the 689 public school districts 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 a population density of 150 per square mile or less. The proposed amendment also applies to charter schools in such areas, to the extent they offer instruction in the high school grades and issue Regents diplomas. At present, there is one charter school located in a rural area that is authorized to issue Regents diplomas.

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

The proposed amendment does not impose any additional compliance requirements on school districts and charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

3. COMPLIANCE COSTS:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any costs on school districts or charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) examinations, and does not impose any costs or compliance requirements on school districts or charter schools. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination. Because the Regents policy upon which the proposed amendment is based applies to all school districts and BOCES in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment.

5. RURAL AREA PARTICIPATION:

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

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 providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. 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 16. of the Notice of Emergency Adoption and 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 requirements for transitioning to the New York State Common Core English Language Arts (ELA) examinations. The proposed amendment is necessary to implement Regents policy to provide, at the local school district's discretion, additional opportunities for students enrolled in Common Core English Language Arts courses, who began grade 9 prior to 2013, to meet diploma requirements by taking the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core) at the January 2016 and June 2016 examination administrations, and meet the English requirement for graduation by passing either examination.

The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the amendment that it will have a positive impact, or 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.

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

School Receivership

I.D. No. EDU-27-15-00008-ERP

Filing No. 932

Filing Date: 2015-10-27

Effective Date: 2015-10-27

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

Action Taken: Addition of section 100.19 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 211-f(15), 215 (not subdivided), 305(1), (2), (20), 308 (not subdivided) and 309 (not subdivided); L. 2015, ch. 56, subpart H, part EE

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: The purpose of the proposed rulemaking is to implement section 211-f of Education Law, as added by Subpart H of Part EE of Chapter 56 of the Laws of 2015, pertain-

ing to school receivership. Section 211-f designates current Priority Schools that have been in the most severe accountability status since the 2006-07 school year as "Persistently Failing Schools" and vests the superintendent of the district with the powers of an independent receiver. The superintendent is given an initial one-year period to use the enhanced authority of a receiver to make demonstrable improvement in student performance at the "Persistently Failing School" or the Commissioner will direct that the school board appoint an independent receiver and submit the appointment for approval by the Commissioner. Failing Schools, schools that have been Priority Schools since the 2012-13 school year, will be given two years under a "superintendent receiver" (i.e., the superintendent of schools of the school district vested with the powers a receiver would have under section 211-f) to improve student performance. Should the school fail to make demonstrable progress in two years then the district will be required to appoint an independent receiver and submit the appointment for approval by the Commissioner. Independent Receivers are appointed for up to three school years and serve under contract with the Commissioner.

The proposed rulemaking adds a new section 100.19 to align the Commissioner's Regulations with Education Law 211-f, and addresses the Regents Reform Agenda and New York State's updated accountability system. Adoption of the proposed amendment is necessary to ensure seamless implementation of the provisions of Education Law § 211-f, and will provide school districts with additional powers to impact improvement in academic achievement for students in the lowest performing schools.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 8, 2015. Since publication of the Notice, the proposed amendment was substantially revised in response to public comment and, as revised, adopted by emergency action at the September 12-13, 2015 Regents meeting, effective September 21, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 7, 2015.

The proposed rule has now been further revised as set forth in the Revised Regulatory Impact Statement submitted herewith. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 30-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(4-a), would be the January 11-12, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be January 27, 2016, the date a Notice of Adoption would be published in the State Register. However, the September emergency rule will expire on November 19, 2015, 90 days after its filing with the Department of State on September 21, 2015.

Emergency action at the October 2015 Regents meeting is necessary for the preservation of the general welfare in order to immediately adopt revisions to the proposed amendment to clarify the timeframe for completion of collective bargaining relating to receivership agreements and to establish procedures for the Commissioner's resolution of unresolved issues regarding receivership agreements, which may be invoked by superintendent receivers at any time, and to otherwise ensure that the emergency rule adopted at the June 2015 Regents meeting, and revised and readopted as an emergency rule at the September 2015 Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule. Under Education Law § 211-f(8), which is currently in effect, superintendent receivers may seek resolution of unresolved collective bargaining issues by the Commissioner, but the statute does not prescribe in detail the procedures that must be followed. The proposed amendment establishes procedures necessary for a superintendent receiver to seek Commissioner's resolution of unresolved collective bargaining issues as contemplated by the statute.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the January 2016 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act for State agency revised rule makings.

Subject: School receivership.

Purpose: To implement Education Law section 211-f, as added by Part EE, Subpart H of Ch. 56 of the Laws of 2015.

Substance of emergency/revised rule: The Commissioner of Education proposes to add a new section 100.19 of the Commissioner's Regulations. The proposed rule was originally adopted as an emergency action at the June 2015 Regents meeting, effective June 23, 2015 and revised and adopted as an emergency action at the September 2015 Regents meeting, effective September 21, 2015. The proposed rule has now been further revised and adopted as an emergency action at the October 2015 Regents meeting, effective October 27, 2015. The following is a summary of the substantive provisions of the emergency revised rule.

Section 100.19(a), Definitions, provides the definitions used in the section, including the definitions of Failing School (Struggling School), Persistently Failing School (Persistently Struggling School), Priority School, School District in Good Standing, School District Superintendent Receiver, Independent Receiver, School District, Community School, Board of Education, Department-approved Intervention Model, School Intervention Plan, School Receiver, Diagnostic Tool for School and District Effectiveness, Consultation and Cooperation, Consultation, Consulting and Day.

§ 100.19(b), Designation of Schools as Failing and Persistently Failing, explains the process by which the Commissioner shall designate schools as Struggling or Persistently Struggling and clarifies that school districts will have the opportunity to present data and relevant information concerning extenuating or extraordinary circumstances faced by the school that should cause it not to be identified as a Struggling or a Persistently Struggling School.

§ 100.19(c), Public Notice and Hearing and Community Engagement, details the process and timeline for notifying parents and the community regarding the Struggling or Persistently Struggling designation, the establishment of a Community Engagement Team, and the role of the Community Engagement Team in the development of recommendations for the identified school. The regulations would require at least one public meeting or hearing annually regarding the status of the school and annual notification to parents of the school's designation and its implications. The regulations also detail the process by which the hearing shall be conducted and notifications made. Additionally, the subdivision specifies that the district superintendent receiver is required to develop a community engagement plan for approval by the Commissioner.

§ 100.19(d), School District Receivership, specifies that the superintendent shall be vested with the powers of the receiver for Persistently Struggling Schools for the 2015-16 school year and with the powers of the receiver for Struggling Schools for the 2015-16 and 2016-17 school years, provided that there is a Department approved intervention model or comprehensive education plan in place for these school years that includes rigorous performance metrics. The school district superintendent receiver shall provide quarterly written reports regarding implementation of the department-approved intervention model or school comprehensive education plan, and such reports, together with a plain-language summary thereof, shall be made publicly available. At the end of the 2015-16 school year, the Commissioner will review (in consultation and collaboration with the district) the performance of the Persistently Struggling School to determine whether the school can continue under the superintendent receivership or whether the district must appoint an independent receiver for the school. Similarly, the Department will review the performance of Struggling Schools after two years to determine whether the schools can continue under the superintendent receivership or whether the district must appoint an independent receiver for the school.

§ 100.19(e), Appointment of an Independent Receiver, details the timeline and process for appointment of an independent receiver for Persistently Struggling and Struggling Schools and the process by which the Commissioner approves and contracts with the independent receiver. The section also details the power of the Commissioner to appoint an independent receiver if the district fails within sixty days to appoint an independent receiver that meets the Commissioner's approval. The subdivision clarifies that districts may appoint independent receivers from a department approved list or provide evidence of qualifications of a receiver not on the approved list. Additionally, the subdivision specifies what happens when the Commissioner must appoint an interim receiver.

§ 100.19(f), School Intervention Plan, describes the timeline and process by which the independent receiver will submit to the Commissioner for approval a school intervention plan and the specific components of that plan, including the metrics that will be used to evaluate plan implementation. Each approved school intervention plan must be submitted within six months of the independent receiver's appointment and this approval is authorized for a period of no more than three years. Each approved school intervention plan must be based on input from stakeholders delineated in the subdivision and a stakeholder engagement plan must be provided to the Commissioner within ten days of the independent receiver entering into a contract with the Commissioner. The school intervention plan must also be based upon recent diagnostic reviews and student achievement data. The independent receiver must provide quarterly reports, and plain-language summaries thereof, regarding the progress of implementing the school intervention plan to the local board of education, the Board of Regents, and the Commissioner. In order to provide additional direction to school districts, the regulations further delineate that in converting a school to a community school, the receiver must follow a particular process and meet minimum program requirements. The subdivision further clarifies that if the independent receiver cannot create an approvable plan, the Commissioner may appoint a new independent receiver.

§ 100.19(g), Powers and Duties of a Receiver, delineates the powers

and duties of a school receiver, and the powers and duties that an independent receiver has in developing and implementing a school intervention plan. The independent receiver is required to convert the school to a community school and to submit an approvable school intervention plan to the Commissioner. The receiver (both the superintendent receiver and the independent receiver) has powers that may be exercised in the areas of school program and curriculum development; staffing, including replacement of teachers and administrators; school budget; expansion of the school day or year; professional development for staff; conversion of the school to a charter school; and requesting changes to the collective bargaining agreement at the identified school in areas that impact implementation of the school intervention plan. This section also describes the power of the receiver (both the superintendent and the independent receiver) to supersede decisions, policies, or local school district regulations that the receiver, in his/her sole judgment, believes impedes implementation of the school intervention plan.

Under the provisions of this subdivision, the receiver must notify the board of education, superintendent, and principal when the receiver is superseding their authority. The receiver must provide a reason for the supersession and an opportunity for the supersession to be appealed, all within a timeline prescribed in the regulations. This subdivision also delineates a similar process by which the receiver reviews and makes changes to the school budget and supersedes employment decisions regarding staff employed in schools operating under receivership.

§ 100.19(h), Annual Evaluation of Schools with an Appointed Independent Receiver, describes how the Commissioner, in collaboration and consultation with the district, will conduct an annual evaluation of each school to determine whether the school is meeting the performance goals and progressing in implementation of the school intervention plan. As a result of this evaluation, the Commissioner may allow the receiver to continue with the approved plan or require the receiver to modify the school intervention plan.

§ 100.19(i), Expiration of School Intervention Plan, describes the process by which the Commissioner evaluates the progress of the school under the receiver's school intervention plan after a three year period. Based on the results of the evaluation, the Commissioner may renew the plan with the independent receiver for not more than three years; terminate the independent receiver and appoint a new receiver; or determine that the school has improved sufficiently to be removed from Failing or Persistently Failing status.

§ 100.19(j), Phase-out and Closure of Failing and Persistently Failing School, states that nothing in these regulations shall prohibit the Commissioner from directing a school district to phase out or close a school, the Board of Regents from revoking the registration of a school, or a district from closing or phasing out a school with the approval of the Commissioner.

§ 100.19(k), regarding the Commissioner's evaluation of a school receivership program, requires the school receiver to provide any reports or other information requested by the Commissioner, in such form and format and according to such timeline as may be prescribed by the Commissioner, in order for the Commissioner to conduct an evaluation of the school receivership program.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 8, 2015, I.D. No. EDU-27-15-00008-EP. The emergency rule will expire December 25, 2015.

Revised rule making(s) were previously published in the State Register on October 7, 2015.

Emergency rule compared with proposed rule: Substantive revisions were made in section 100.19(g)(5).

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@nysed.gov

Data, views or arguments may be submitted to: Charles Szuberla, Acting 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@nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 7, 2015, the proposed rule has been substantially revised as follows:

Section 100.19(g)(5)(iii) has been revised:

- to clarify that collective bargaining shall be completed no later than 30 calendar days following receipt of a written request from the school receiver; and to provide, upon mutual agreement of the parties, for extension of the 30-day period to complete negotiations and reach agreement; and
- to establish procedures for the Commissioner's resolution of unresolved issues regarding the receivership agreement.

Under Education Law § 211-f(8), which is currently in effect, superintendent receivers may seek resolution of unresolved collective bargaining issues by the Commissioner, but the statute does not prescribe in detail the procedures that must be followed. The proposed amendment establishes procedures necessary for a superintendent receiver to seek Commissioner's resolution of unresolved collective bargaining issues as contemplated by the statute.

The above revisions do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 7, 2015, the proposed rule has been substantially revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions do not require any changes to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 7, 2015, the proposed rule has been substantially revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revised proposed rule relates to public school and school district accountability and is necessary to implement and otherwise conform the Commissioner's Regulations to Education Law section 211-f, as added by Part EE, Subpart H of Ch. 56 of the Laws of 2015, by establishing criteria for the appointment of receivers to assist low performing schools to make demonstrable improvement in student performance. The statute designates current Priority Schools that have been in the most severe accountability status since the 2006-07 school year as "Persistently Failing Schools" (identified in the proposed regulation as "Persistently Struggling Schools") and identifies schools that have been identified as Priority since the 2012-13 school year as "Failing Schools" (identified in the proposed regulation as "Struggling Schools") and vests the superintendent of the district with the powers of an independent receiver.

The revised proposed rule applies to public schools that are Struggling or Persistently Struggling and placed into receivership and will not have a substantial adverse impact on jobs or employment opportunities. In accordance with Education Law section 211-f(7)(b) and (c), a school receiver may abolish the positions of all members of the teaching and administrative and supervisory staff assigned to the Struggling or Persistently Struggling School and terminate the employment of any principal assigned to such a school and require staff members to reapply for their positions in the school if they so choose. Although the school receiver may choose not to rehire a maximum of fifty percent of the former staff, it is anticipated that those staff members will be replaced by other individuals and will not cause a net loss in positions at the school.

Furthermore, an apportionment of $75 million in State funds will be available to Persistently Struggling Schools for the implementation of the Receivership process during the 2015-16 and 2016-17 school years. Since school districts are expected to use a portion of this allocation to implement strategies that may require hiring of new staff for these schools, this will result in a net gain of jobs. It is also possible that to meet the requirements of school receivership in Struggling Schools, which are not eligible for the $75 million grant, districts may choose to hire additional staff to implement the provisions of receivership.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Elementary and Secondary Education Act (ESEA) Flexibility and School and School District Accountability

I.D. No. EDU-31-15-00002-A

Filing No. 931

Filing Date: 2015-10-27

Effective Date: 2015-11-10

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

Action taken: Amendment of section 100.18 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided),

207(not subdivided), 210(not subdivided), 211-e(1-5), 211-f(15), 215(not subdivided), 305(1), (2), 309(not subdivided), 3713(1) and (2)

Subject: Elementary and Secondary Education Act (ESEA) Flexibility and school and school district accountability.

Purpose: To implement New York State's approved ESEA Flexibility Waiver Renewal.

Text or summary was published in the August 5, 2015 issue of the Register, I.D. No. EDU-31-15-00002-EP.

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

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@nysed.gov

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Preschool Special Education Programs and Services

I.D. No. EDU-45-15-00014-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 200.4, 200.9, 200.16 and 200.20 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 308(not subdivided), 3214(3), 4401(5), 4402, 4403(3), 4410(3) and (10)

Subject: Preschool special education programs and services.

Purpose: To enact requirements relating to appointment of 1:1 aide by Committee on Special Education (CSE); Special Education Itinerant Services (SEIS); related services; and standards for approved preschool providers.

Public hearing(s) will be held at: 2:00 p.m., November 18, 2015 at ACCES Manhattan District Office, 6th Fl. Conference Rm., 116 W. 32nd St., New York, NY; 2:00 p.m., November 23, 2015 at State Education Bldg., Seminar Rm. 5A/B, 89 Washington Ave., Albany, NY; 2:00 p.m., December 1, 2015 at Monroe 1 BOCES, 15 Linden Park, Rochester, NY.

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

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

Text of proposed rule: 1. Paragraph (3) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective January 27, 2016, to read as follows:

(3) Consideration of special factors. The CSE shall:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a free appropriate public education; [and]

(vi) include a statement in the IEP if, in considering the special factors described in this paragraph, the committee has determined a student needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the student to receive a free appropriate public education*; and*

(vii) for a student whose management needs require a significant degree of individualized attention and intervention, prior to a recommendation of assignment of a one-to-one aide, consider:

(a) the student's individual needs that require additional adult assistance;

(b) the skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;

(c) the specific support (e.g., assistance with personal hygiene) that the one-to-one aide would provide for the student;

(d) other natural supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; changes in scheduling; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);

(e) the extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;

(f) staff ratios in the setting where the student will attend school; and

(g) potential positive benefits and negative impact of assignment of a one-to-one aide.

2. Clauses (c) and (d) of subparagraph (ix) of paragraph (2) of subdivision (f) of section 200.9 of the Regulations of the Commissioner of Education is amended, effective January 27, 2016, as follows:

(c) Rates for the certified special education teacher providing special education itinerant services shall be published as half hour rates and billing by providers to municipalities must be done in half hour blocks of time. Billable time includes time spent providing direct [and/or indirect] special education itinerant services as defined in section 200.16(i)(3)(ii) of this Part in accordance with the student's individualized education program (IEP). The difference between the total number of hours employed in the special education itinerant teacher's standard work week minus the hours of direct [and/or indirect] special education itinerant service hours must be spent on required functions. Such functions include but are not limited to: coordination of service when both special education itinerant services and related services are provided to a student pursuant to section 4410(1)(j) of the Education Law; preparation for and attendance at committee on preschool special education meetings; conferencing with the student's parents; classroom observation; and/or travel for the express purposes of such functions as stated above. For the purpose of this subparagraph, parent conferencing may include parent education for the purpose of enabling parents to perform appropriate follow-up activities at home. Billable time shall not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours; provided that the approved reimbursement methodology, developed by the commissioner and approved by the Director of the Budget, may adjust this billable time threshold. Providers shall maintain adequate records to document direct [and/or indirect] service hours provided as well as time spent on all other activities related to each student served.

(d) Special education itinerant service rates will be calculated so that reimbursable expenditures shall be divided by the product of the number of days in session for which the program operates times the number of direct [and/or indirect] special education itinerant service hours per day times two. In instances where the special education itinerant services are provided in a group session, i.e., two or more students with a disability within the same block of time, the half hour rate must be prorated to each student receiving services. Special education itinerant service rates shall be paid based on the number of half hour units delivered, provided that the total number of units delivered shall not exceed the recommendations for such services in the student's IEP.

3. Subparagraph (ii) of paragraph (3) of subdivision (i) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective January 27, 2016, to read as follows:

(ii) Special education itinerant services as defined in section 4410(1)(k) of Education Law are services provided by a certified special education teacher of an approved program on an itinerant basis at a site determined by the board including but not limited to an approved or licensed prekindergarten or head start program; the student's home; a hospital; a State facility; or a child care location as defined in section 4410 of the Education Law. If the board determines that documented medical or special needs of the preschool student indicate that the student should not be transported to another site, the student shall be entitled to receive special education itinerant services in the preschool student's home. Such services shall be for the purpose of providing specialized individual or group instruction [and/or indirect services] to preschool students with disabilities [Indirect services means consultation provided by a certified special education teacher to] *and to* assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program*; provided that effective until September 1, 2016, a preschool student with a disability may continue to receive indirect special education itinerant services which were recommended in the student's individualized education program.* An early childhood program,

for purposes of this paragraph, means a regular preschool program or day care program approved or licensed by a governmental agency in which a child under the age of five attends. Special education itinerant services shall be provided to a preschool student with a disability for whom such services have been recommended as follows:

(a) ...
(b) ...
(c) ...
(d) ...
(e) ...

(f) Except for extenuating health and safety reasons or when a student needs to receive such services at home because of documented medical or special needs of the preschool student, special education itinerant services shall be provided during the regular school day to assist the student to participate in a regular early childhood program and shall not be provided as individualized or group instruction at the site of the approved provider.

4. Subparagraph (iii) of paragraph (3) if subdivision (i) of section 200.16 is amended, effective January 27, 2016, as follows:

(iii) Special classes shall be provided on a half-day or full-day basis pursuant to section 200.1(p), (q), and (v) of this Part and in accordance with section 200.6(h)(2) and (3) or section 200.9(f)(2)(x) of this Part and shall assure that:

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

(d) such special class services shall include all related services in the students' IEPs provided during the school day.

4. Subdivision (b) of section 200.20 is amended, effective January 27, 2016, as follows:

(b) Preschool programs funded pursuant to section 4410 of the Education Law shall also meet the following additional requirements:

(1) ...
(2) ...
(3) Each approved preschool program shall ensure that:
(i) ...

(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; and

(4) Each approved preschool program shall ensure that an educational director, who is hired on or after September 1, 2016, shall hold a New York State certificate, license or its equivalent in special education, speech and language, psychology, occupational or physical therapy or another related services field as such term is defined in section 200.1(qq) of this Part; early childhood education (nursery, Kindergarten and primary grades); nursery-kindergarten; or elementary education N-6 or K-6 with specialized preparation for teaching in early childhood grades; and, consistent with the requirements of Part 80 of this Title, shall hold New York State certification as a School Building Leader or School District Leader or School Administrator/Supervisor.

(5) Make-up of missed services. Each preschool provider shall ensure it employs substitute teachers for special class and special education itinerant services to provide the student with the IEP recommended frequency and duration of services. Providers shall have policies and procedure, consistent with Department guidelines, to ensure the make-up of missed services occurs, consistent with the duration and location specified in the IEP, within 30 days of the missed session unless there is a documented child-specific reason why the make-up session could not be provided within 30 days.

(6) Program standards for instruction of preschool students with disabilities. Each approved provider shall, as applicable, ensure that preschool students with disabilities receive instruction and positive behavioral supports that are based on peer-reviewed or evidence-based practices and consistent with the standards in this paragraph.

(i) Instructional standards for approved preschool special class programs.

(a) By not later than September 1, 2016, providers shall adopt and implement curricula, aligned with the New York State Prekindergarten Foundation for the Common Core, which ensures continuity with instruction in the early elementary grades; and shall provide early literacy and emergent reading programs based on effective, evidence-based instructional practices, which includes the essential components of:

(1) background knowledge;
(2) phonological awareness;
(3) expressive and receptive language;
(4) vocabulary development; and
(5) phonemic awareness.

(b) The instructional program for preschool students with disabilities shall be based on the ages, interests, strengths and needs of the children.

(c) Procedures shall be implemented to ensure the active engagement of parents and/or guardians in the education of their children. Such procedures shall include support to children and their families for a successful transition into kindergarten.

(ii) Program standards for positive behavioral supports for approved preschool special class programs.

(a) By not later than September 1, 2016, providers shall establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, which shall include:

(1) universal supports for all children through nurturing and responsive relationships and high quality environments;

(2) practices that are targeted social-emotional strategies to prevent problem behaviors; and

(3) practices related to individualized intensive interventions.

(b) Except as provided pursuant to section 201.8 of this Title, no preschool student with a disability may be suspended, expelled or otherwise removed by the provider from an approved preschool special education program or service because of the student's behavior prior to the transfer of the student to another approved program recommended by the committee on preschool special education.

(iii) Progress Monitoring. Approved preschool special education programs shall conduct regular progress monitoring of student achievement data over time to adjust, as appropriate, the student's instructional program and, as necessary, to request meetings of the CPSE to consider changes to the student's individualized education program. The program shall provide regular reports of student progress to the student's parent and committee on preschool special education.

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@nysed.gov

Data, views or arguments may be submitted to: James P. DeLorenzo, Assistant Commissioner P-12, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law (Ed.L.) § 101 continues existence of State Education Department (SED) and charges SED with general management and supervision of public schools and educational work of State.

Ed.L. § 207 grants general rule-making authority to Board of Regents to carry into effect State education laws and policies.

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

Ed.L. § 308 authorizes Commissioner to enforce/give effect to any provision in Education Law or general or special law pertaining to State school system or any rule or direction of Regents.

Ed.L. § 3214 prescribes discipline procedures for all students of compulsory school age.

Ed.L. § 4401 authorizes Commissioner to approve private day and residential programs serving students with disabilities.

Ed.L. § 4401(5) establishes basis for calculating tuition rates.

Ed.L. § 4402 establishes school district duties regarding education of students with disabilities.

Ed.L. § 4403 establishes SED and school district responsibilities regarding special education programs and services to students with disabilities. § 4403(3) authorizes Commissioner to adopt regulations as deemed in their best interests.

Ed.L. § 4410 outlines special education services/programs for preschool children with disabilities. § 4410(3) authorizes Commissioner to adopt regulations.

Ed.L. § 4410(10) authorizes Commissioner to annually determine tuition rates for approved special services or programs provided to preschool children in conformance with methodology established in Ed.L. § 4405(4) and subject to approval of Director of Budget.

2. LEGISLATIVE OBJECTIVES:

Consistent with the above statutory authority, the amendments are necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5.

3. NEEDS AND BENEFITS:

At the April 2015 Regents meeting, SED staff discussed data on outcomes for preschool students with disabilities, including a federal report on suspensions and expulsions of preschool students. SED recommended policy changes to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers.

Consistent with the April discussion, the amendments include the following policy changes to improve outcomes for preschool students with disabilities, ages 3-5:

- amends § 200.4(d)(3) to require Committees on Special Education (CSE) and Committees on Preschool Special Education (CPSE) to make certain considerations prior to determining a student needs a one-to-one aide;
- amends § 200.9(f)(2)(ix)(c) and (d) and § 200.16(i)(3)(ii) to repeal that special education itinerant services (SEIS) includes indirect services, but retains that a SEIS teacher must assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program;
- amends § 200.16(i)(3)(ii) to clarify that, except for extenuating health and safety reasons or when a student needs to receive such services at home based on documented medical or special needs of the preschool student, SEIS must be provided during the regular school day and cannot be provided as individualized or group instruction at the site of the approved provider;
- amends § 200.16(i)(3)(iii) to clarify that special class programs must provide all related services specified in students' individualized education programs (IEPs) during the school day;
- amends § 200.20(b) to require that each approved preschool program:

○ has an appropriately qualified educational director;

○ has a plan and staffing to ensure make up of missed services;

○ provides instruction in the Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;

○ provides instruction based on the ages, interests, strengths and needs of the children;

○ ensures the active engagement of parents and/or guardians in the education of their children;

○ establishes and implements a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;

○ prohibits the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the Committee on Preschool Special Education (CPSE); and

○ conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local governments: None. No additional costs for CSEs and CPSEs to make certain considerations under § 200.4(d)(3) prior to determining a student needs a one-to-one aide, since these considerations would be made at student's initial/annual review IEP meetings.

No additional costs related to provision in § 200.16(i)(3)(ii) and (iii) because State law requires that SEIS be provided on an itinerant basis at the child care location selected by parent and existing regulations require that special class providers implement the IEPs of students admitted to the program, which include related services in the student's IEPs.

(c) Costs to regulated parties: No additional costs to providers related to the repeal of indirect SEIS in § 200.9(f)(2)(ix)(c) and (d). SEIS is recommended by CPSEs and providers are reimbursed on a per session basis for providing SEIS to students.

No additional costs for hiring educational directors who meet the qualifications for education directors of approved preschool programs in § 200.20(b)(4), since these qualifications are consistent with State certification requirements and qualifications for prekindergarten/universal prekindergarten programs.

No additional costs for requiring in § 200.20(b)(5) that providers have a plan and staffing to ensure make-up of missed services. Tuition costs established for such programs include consideration of substitute teachers and other costs necessary to ensure students' IEPs are implemented.

Requiring in § 200.20(b)(6) that approved programs provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs; provide instruction based on the ages, interests, strengths and needs of the children; ensure the active engagement of parents and/or guardians in the education of their children; and establish and implement a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students may require programs to adjust their current instructional and behavioral support systems. It is feasible that providers can adjust their programs to meet these standards without additional professional development. For those seeking professional development/support, SED has resources posted on its website that teachers and others can access at no cost and would not require the providers to incur costs for substitute teachers, and SED is providing through its funded technical assistance networks, professional development at no cost to the providers to assist them to adjust their policies and practices consistent with the standards established. The amendments do not require additional staffing, but may require some approved providers to use existing resources differently to ensure the instructional and behavioral support standards are provided to preschool students with disabilities.

Because providers would continue to be reimbursed for providing special education services, there is no cost anticipated for providers for the proposed prohibition in § 200.20(b)(6)(ii)(b) of the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the CPSE.

No costs for requiring in § 200.20(b)(6)(iii) that preschool special education providers conduct progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs, since this requirement is consistent with existing requirement in Commissioner's Regulation § 200.7(c)(4) that approved programs provide an educational progress report on each student and other data or reports to the referring district or agency.

(d) Costs to SED for implementation and continuing compliance: None.

5. LOCAL GOVERNMENT MANDATES:

The amendments require that each approved preschool program:

- have an appropriately qualified educational director;
- have a plan and staffing to ensure make-up of missed services;
- provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;
- provide instruction based on ages, interests, strengths and needs of children;
- ensure active engagement of parents and/or guardians in education of their children;
- establish and implements program-wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students; and
- prohibit suspension, expulsion or removal of preschool child from special education program/services because of behavior until appropriate transfer of child can be arranged by Committee on Preschool Special Education (CPSE).

The amendments also require that prior to determining a student needs a one-to-one aide, a CSE must consider:

- student's individual needs that require additional adult assistance;
- skills and goals student would need to achieve that will reduce/eliminate need for one-to-one aide;
- specific role (e.g., assistance with personal hygiene) that one-to-one aide would provide for student;
- other natural supports, accommodations and/or services that could support student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; changes in scheduling; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);
- extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) student would need assistance of a one-to-one aide;
- staff ratios in the setting where the student will attend school; and
- potential positive benefits and negative impact of assignment of a one-to-one aide.

In addition, the amendments clarify that:

- except for extenuating health and safety reasons or when a student needs to receive such services at home based on documented medical or special needs of the preschool student, SEIS must be provided during regular school day and cannot be provided as individualized or group instruction at site of approved provider; and
- special class programs must provide all related services specified in students' individualized education programs (IEPs) during the school day.

6. PAPERWORK:

While each approved preschool program must conduct progress monitoring of student achievement data and provide regular reports of students' progress to students' parents and CPSEs, this requirement is not expected to result in additional paperwork because existing § 200.7(c)(4) already requires approved programs to provide an educational progress report on each student and other data or reports to the referring district or agency.

7. DUPLICATION:
The amendment does not duplicate, overlap or conflict with any other State or federal statute or regulation.
8. ALTERNATIVES:
No significant alternatives were considered. The amendments are consistent with State law and federal policy, align with standards established for other early childhood programs; and address State monitoring findings where greater clarity in State regulations would ensure more consistency in appropriate instructional practices for preschool students with disabilities.
9. FEDERAL STANDARDS:
The amendments do 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.
10. COMPLIANCE SCHEDULE:
The amendments would generally become effective on January 27, 2016, with certain requirements delayed for required implementation to provide sufficient time for preschool providers to benefit from professional development offered by SED and to implement the new instructional and behavioral standards, as follows:
- section 200.16(i)(3)(ii) provides that effective until September 1, 2016, a preschool student with a disability may continue to receive indirect special education itinerant services which were recommended in the student's IEP;
- section 200.20(b)(3)(vi) provides that the requirement that approved preschool program providers ensure that educational directors hold certain specified certificates, licenses or certification, as specified in the regulation, shall apply to educational directors hired on or after September 1, 2016;
- section 200.20(b)(5)(i)(a) requires approved preschool special class program providers to adopt and implement curricula aligned with the New York State Prekindergarten Foundation for the Common Core and other instructional standards specified in the regulation by not later than September 1, 2016;
- section 200.20(b)(5)(ii) requires providers to establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, including supports and practices as specified in the regulation, by not later than September 1, 2016.

Regulatory Flexibility Analysis
1. EFFECT OF RULE:
The proposed amendments of §§ 200.4 and 200.16 apply to each of the 695 public school districts in the State.
The proposed amendment of § 200.9 applies to approved providers of Special Education Itinerant Services (SEIS) to students with disabilities, including public school districts, boards of cooperative educational services (BOCES), municipalities, Article 28 hospitals, and private agencies (for-profit or not-for-profit) approved by the Commissioner to provide SEIS.
There are 323 approved SEIS providers. Of that number, 261 are private agencies, 35 are public school districts, 15 are BOCES, 6 are municipalities and 6 are Article 28 hospitals. The Department does not keep data regarding the number of SEIS providers that are small businesses, but of the 246 SEIS providers that submitted financial reports, 93 identified themselves as proprietary, partnership, or for-profit.
There are approximately 217 approved Special Class in an Integrated Setting (SCIS) providers. Of that number, 177 are private agencies, 27 are public school districts, 9 are BOCES, 1 is a municipality, 3 are Article 28 hospitals.
There are approximately 203 approved Special Class (SC) providers. Of that number, 167 are private agencies, 21 are public school districts, 12 are BOCES, 0 are municipalities, 3 are Article 28 hospitals.
The proposed amendment of § 200.20 applies to approved preschool programs for preschool children with disabilities funded pursuant to Education Law § 4410. It is estimated that 115 of such providers are small businesses.
The total number of approved § 4410 providers is approximately 499. Of this number, 379 are private agencies, 83 are public school districts, 20 are BOCES, 8 are municipalities, and 9 are Article 28 hospitals.
2. COMPLIANCE REQUIREMENTS:
The proposed amendment in necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5, and includes the following changes:
- amends § 200.4(d)(3) to require Committees on Special Education (CSE) to make certain considerations prior to determining that a student needs a one-to-one aide;
- amends § 200.9(f)(2)(x)(b) to ensure that not more than the actual revenues received for students without disabilities are used to determine reimbursable costs for special classes in integrated settings (SCIS) programs;
- amends § 200.9(f)(2)(ix)(c) and (d) and § 200.16(i)(3)(ii) to repeal that special education itinerant services (SEIS) includes indirect services but retains that a SEIS teacher must assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program;
- amends § 200.16(i)(3)(ii) to clarify that, except for extenuating health and safety reasons or when a student needs to receive such services at home based on documented medical or special needs of the preschool student, SEIS must be provided during the regular school day and cannot be provided as individualized or group instruction at the site of the approved provider;
- amends § 200.16(i)(3)(iii) to clarify that special class programs must provide all related services specified in students' individualized education programs (IEPs) during the school day;
- amends § 200.20(b) to require that each approved preschool program:
  - ○ has an appropriately qualified educational director;
  - ○ has a plan and staffing to ensure make up of missed services;
  - ○ provides instruction in the Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;
  - ○ provides instruction based on the ages, interests, strengths and needs of the children;
  - ○ ensures the active engagement of parents and/or guardians in the education of their children;
  - ○ establishes and implements a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;
  - ○ prohibits the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the Committee on Preschool Special Education (CPSE); and
  - ○ conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs.

Each approved preschool program shall conduct progress monitoring of student achievement data and provide regular reports of students' progress to the students' parents and to the CPSEs.
3. PROFESSIONAL SERVICES:
The proposed amendment imposes no additional professional service requirements on affected small businesses and local governments.
4. COMPLIANCE COSTS:
The proposed amendments do not impose any costs on school districts. There will be no additional costs for CSEs and CPSEs to make certain considerations under § 200.4(d)(3) prior to determining a student needs a one-to-one aide, since these considerations would be made at student's initial/annual review IEP meetings. There will be no additional costs related to provision in § 200.16(i)(3)(ii) and (iii), because State law already requires that SEIS be provided on an itinerant basis at the child care location selected by parent, and existing regulations already require that special class providers implement the IEPs of students admitted to the program, which include related services in the student's IEPs. The remaining provisions in the proposed amendments are generally applicable to approved SEIS providers and approved preschool programs for preschool children with disabilities funded pursuant to Education Law § 4410, and do not impose any costs on school districts.
5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:
The proposed amendment will not impose any new technological requirements on affected small businesses and local governments. Economic feasibility is addressed above under Compliance Costs.
6. MINIMIZING ADVERSE IMPACT:
At the April 2015 Regents meeting, Department staff discussed data on outcomes for preschool students with disabilities, including a federal report on suspensions and expulsions of preschool students. The Department recommended consideration of policy changes to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers. Consistent with the April 2015 discussion, the proposed amendment is necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5.
7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:
Copies of the rule have been provided to District Superintendents with the request that they distribute them 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.

Rural Area Flexibility Analysis
1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:
The proposed amendment applies to each of the 695 public school

districts, the approximately 323 approved providers of Special Education Itinerant Services (SEIS), and each of the approximately 397 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 a population density of 150 per square mile or less. Of the 323 approved SEIS providers, 149 are located in a county with less than 200,000 inhabitants and 74 are located in a county that has a township with population densities of 150 persons or less per square mile. Of the approximately 397 approved preschool programs funded pursuant to Education Law section 4410, 129 are located in a county with less than 200,000 inhabitants and 90 are located in a county that has a township with population densities of 150 persons or less per square mile.

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

The proposed amendment is necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5, and includes the following policy changes:

- amends section 200.4(d)(3) to require Committees on Special Education (CSE) to make certain considerations prior to determining that a student needs a one-to-one aide;
- amends section 200.9(f)(2)(x)(b) to ensure that not more than the actual revenues received for students without disabilities are used to determine reimbursable costs for special classes in integrated settings (SCIS) programs;
- amends section 200.9(f)(2)(ix)(c) and (d) and section 200.16(i)(3)(ii) to repeal that special education itinerant services (SEIS) includes indirect services but retains that a SEIS teacher must assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program;
- amends section 200.16(i)(3)(ii) to clarify that, except for extenuating health and safety reasons or when a student needs to receive such services at home based on documented medical or special needs of the preschool student, SEIS must be provided during the regular school day and cannot be provided as individualized or group instruction at the site of the approved provider;
- amends section 200.16(i)(3)(iii) to clarify that special class programs must provide all related services specified in students' individualized education programs (IEPs) during the school day;
- amends section 200.20(b) to require that each approved preschool program:

○ has an appropriately qualified educational director;

○ has a plan and staffing to ensure make up of missed services;

○ provides instruction in the Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;

○ provides instruction based on the ages, interests, strengths and needs of the children;

○ ensures the active engagement of parents and/or guardians in the education of their children;

○ establishes and implements a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;

○ prohibits the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the Committee on Preschool Special Education (CPSE); and

○ conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs.

Each approved preschool program shall conduct progress monitoring of student achievement data and provide regular reports of students' progress to the students' parents and to the CPSEs.

3. COMPLIANCE COSTS:

The proposed amendments do not impose any costs on school districts in rural areas. There will be no additional costs for CSEs and CPSEs to make certain considerations under § 200.4(d)(3) prior to determining a student needs a one-to-one aide, since these considerations would be made at student's initial/annual review IEP meetings. There will be no additional costs related to provision in § 200.16(i)(3)(ii) and (iii), because State law already requires that SEIS be provided on an itinerant basis at the child care location selected by parent, and existing regulations already require that special class providers implement the IEPs of students admitted to the program, which include related services in the student's IEPs. The remaining provisions in the proposed amendments are generally applicable to approved SEIS providers and approved preschool programs for preschool children with disabilities funded pursuant to Education Law section 4410, and do not impose any costs on school districts in rural areas.

There will be no additional costs to providers related to the repeal of indirect SEIS in § 200.9(f)(2)(ix)(c) and (d). SEIS is recommended by CPSEs and providers are reimbursed on a per session basis for providing SEIS to students.

There will be no additional costs for hiring educational directors who meet the qualifications for education directors of approved preschool programs in § 200.20(b)(4), since these qualifications are consistent with State certification requirements and qualifications for prekindergarten/universal prekindergarten programs.

There will be no additional costs for requiring in § 200.20(b)(5) that providers have a plan and staffing to ensure make-up of missed services. Tuition costs established for such programs include consideration of substitute teachers and other costs necessary to ensure students' IEPs are implemented.

Requiring in § 200.20(b)(6) that approved programs provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs; provide instruction based on the ages, interests, strengths and needs of the children; ensure the active engagement of parents and/or guardians in the education of their children; and establish and implement a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students may require programs to adjust their current instructional and behavioral support systems. It is feasible that providers can adjust their programs to meet these standards without additional professional development. For those seeking professional development/support, SED has resources posted on its website that teachers and others can access at no cost and would not require the providers to incur costs for substitute teachers, and SED is providing through its funded technical assistance networks, professional development at no cost to the providers to assist them to adjust their policies and practices consistent with the standards established. The amendments do not require additional staffing, but may require some approved providers to use existing resources differently to ensure the instructional and behavioral support standards are provided to preschool students with disabilities.

Because providers would continue to be reimbursed for providing special education services, there is no cost anticipated for providers for the proposed prohibition in § 200.20(b)(6)(ii)(b) of the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the CPSE.

There will be no costs for requiring in § 200.20(b)(6)(iii) that preschool special education providers conduct progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs, since this requirement is consistent with existing requirement in Commissioner's Regulation § 200.7(c)(4) that approved programs provide an educational progress report on each student and other data or reports to the referring district or agency.

4. MINIMIZING ADVERSE IMPACT:

At the April 2015 Regents meeting, Department staff discussed data on outcomes for preschool students with disabilities, including a federal report on suspensions and expulsions of preschool students. The Department recommended consideration of policy changes to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers. Consistent with the April 2015 discussion, the proposed amendment is necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5.

Because the statute and Regents policy upon which the proposed amendment is based applies to all SEIS providers in the State, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt providers in rural areas from coverage by the proposed amendment.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment in necessary to implement Regents policy changes to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers. The proposed amendment will not have an adverse impact on jobs and employment opportunities in New York State. Because it is evident from the nature of the proposed amendment that it will not adversely 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

Continuing Education Requirements for Licensed Marriage and Family Therapists

I.D. No. EDU-45-15-00015-P

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

Proposed Action: Addition of section 79-10.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a) and 8412; L. 2013, ch. 486; L. 2014, ch. 15

Subject: Continuing education requirements for Licensed Marriage and Family Therapists.

Purpose: Implement mandatory continuing education requirements, establish standards for acceptable education and approval of providers.

Substance of proposed rule (Full text is posted at the following State website:www.regents.nysed.gov/meetings/2015/): The Commissioner of Education proposes to add a new section 79-10.8 to the Regulations of the Commissioner of Education, relating to mandatory continuing education for licensed marriage and family therapists ("LMFT"). The following is a summary of the substance of the proposed regulation:

A new section 79-10.8 is added to the regulations of the Commissioner of Education establishing continuing education requirements for LMFTs.

Subdivision (a) of section 79-10.8 defines the terms acceptable accrediting agency, higher education institution, and psychotherapy institute.

Subdivision (b) of section 79-10.8 establishes the applicability of the continuing education requirements and exemptions from, and adjustments to, the requirements.

Paragraph (1) of subdivision (b) of section 79-10.8 states that each LMFT, who is required to register with the New York State Education Department ("Department") to practice in New York State ("State"), must comply with the mandatory continuing education requirements prescribed in subdivision (c).

Subparagraph (i) of paragraph (2) of subdivision (b) of section 79-10.8 provides an exemption from the requirement for a licensee who is in the triennial registration period during which he or she is first licensed to practice in the State; or a licensee who is not engaged in marriage and family therapy practice, as evidenced by not being registered to practice in the State, except as otherwise prescribed in subdivision (e) of section 79-10.8.

Subparagraph (ii) of paragraph (2) of subdivision (b) of section 79-10.8 allows the Department to adjust the requirement for the licensee who documents good cause that prevents compliance, such as poor health or a specific physical or mental disability, or extended active duty with the Armed Forces of the United States, or other good cause beyond the licensee's control, in the judgment of the Department.

Subdivision (c) of section 79-10.8 establishes the mandatory continuing education requirement. Subparagraph (i) of paragraph (1) of subdivision (c) of section 79-10.8 requires at least 36 hours of continuing education acceptable to the Department for each triennial registration period. Any licensee whose first registration following January 1, 2017, is less than three years from that date will be required to complete one hour of acceptable continuing education per month beginning January 1, 2017 up to the first registration date thereafter. Such continuing education must be completed during the period beginning January 1, 2017 and ending before the first day of the new registration period.

Subparagraph (ii) of paragraph (1) of subdivision (c) of section 79-10.8 sets the continuing education requirement during each registration period of less than three years as one hour for each month in the registration period.

Paragraph (2) of subdivision (c) of section 79-10.8 defines continuing education that is acceptable to the Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of paragraph (2) of subdivision (c) of section 79-10.8 and be the types of learning activities prescribed in subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-10.8, and is subject to the prohibitions contained in subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-10.8.

Subparagraph (i) of paragraph (2) of subdivision (c) of section 79-10.8 defines acceptable continuing education subjects as contributing to professional marriage and family therapy practice. Subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-10.8 defines the types of learning activities. Clause (a) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-10.8 requires that acceptable courses of learning and other education activities must be taken from a provider who has been approved by the Department, on the basis of an application and fee pursuant to subdivision (i) of section 79-10.8. Formal courses of learning include, but are not limited to, university and college credit and non-credit courses, and professional development programs and technical sessions related to the practice of marriage and family therapy. Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-10.8 defines other acceptable education activities. Clause (c) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-10.8 allows the Department, in its discretion and as needed to contribute to the health and welfare of the public, to require the completion of continuing education courses in specific subjects to fulfill this mandatory continuing education requirement.

Subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-10.8 states that any continuing education designed for the sole purpose of personal development, marketing, business practices, and maximizing profits for the marriage and family therapy practice of an LMFT will not be considered by the Department as acceptable continuing education, nor will the supervision of a licensee, permit holder, student or intern be considered by the Department as acceptable continuing education.

Subdivision (d) of section 79-10.8 provides that at each re-registration, the LMFT must certify to the Department his or her compliance with the continuing education requirements or that he or she is subject to an exemption or adjustment of the requirements. Paragraph (1) of subdivision (d) of section 79-10.8 prohibits a licensee who has not satisfied the continuing education requirement from practicing until the requirements have been met and a registration certificate issued by the Department, except where a licensee has been issued a conditional registration, as provided for in subdivision (f) of section 79-10.8. Paragraph (2) of subdivision (d) of section 79-10.8 prohibits the transfer of continuing education hours completed during one registration period to the subsequent registration period.

Subdivision (e) of section 79-10.8 prescribes the requirements for a licensee returning to practice as an LMFT after a lapse in practice, as evidenced by not being registered to practice in New York State. A licensee whose first registration date after a lapse in practice occurs less than three years from January 1, 2017 will be required to meet the requirements in paragraph (1) of subdivision (e) of section 79-10.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-10.8, a licensee returning to practice, who has not practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (2) of subdivision (e) of section 79-10.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-10.8, a licensee returning to practice, who has practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (3) of subdivision (e) of section 79-10.8.

Paragraph (1) of subdivision (f) of section 79-10.8 authorizes the Department to issue a conditional registration to an LMFT who attests to or admits to noncompliance with the continuing education requirement, provided that the licensee meets the requirements of the paragraph. Paragraph (2) of subdivision (f) of section 79-10.8 states that the duration of a conditional registration will not exceed one year and will not be renewed or extended.

Subdivision (g) of section 79-10.8 requires the LMFT to maintain or ensure access by the Department to records of completed continuing education as specified in that subdivision.

Subdivision (h) of section 79-10.8 provides for the measurement of continuing education study, specifically, that a minimum of 50 minutes of study will equal one hour of continuing education credit and that continuing education credit for other educational activities will be awarded as prescribed by the Department.

Subdivision (i) of section 79-10.8 establishes the requirements for Department approval of continuing education providers.

Paragraph (1) of subdivision (i) of section 79-10.8 states that an entity or individual seeking Department approval as a provider of continuing education to LMFTs must submit the fee prescribed in subdivision (j) of section 79-10.8 and meet the requirements of paragraphs (2) and (3) of subdivision (i) of section 79-10.8.

Paragraph (2) of subdivision (i) of section 79-10.8 identifies an entity or individual eligible to apply to be a provider of continuing education to include, but not be limited to: (1) a higher education institution that offers programs that are registered pursuant to Part 52 of the Regulations of the Commissioner of Education as leading to licensure as an LMFT or a higher education institution that is accredited by an acceptable accrediting agency and that offers graduate coursework that is directly related to the enhancement of marriage and family therapy practice, skills and knowledge; (2) a psychotherapy institute, as defined in paragraph (3) of subdivision (a) of section 79-10.8 that offers coursework that is directly related to the enhancement of marriage and family therapy practice, skills and knowledge; (3) a national marriage and family therapist organization or other professional organization; (4) a New York State marriage and family therapist organization; (5) a national organization of jurisdictional boards of marriage and family therapy; (6) an entity operated under an operating

certificate appropriately issued in accordance with articles sixteen, thirty-one or thirty-two of the Mental Hygiene Law; (7) an entity, hospital or health facility as defined in section 2801 of the Public Health Law; or (8) an individual with expertise to provide continuing education to New York State licensed marriage and family therapists.

Paragraph (3) of subdivision (i) of section 79-10.8 establishes the standards for the Department's review of applications from prospective continuing education providers. Prospective continuing education providers must: (1) offer coursework in one or more of the subjects prescribed as acceptable continuing education; (2) be an organized entity or individual, as defined in paragraph (2) of subdivision (i) of section 79-10.8, or another entity that employs LMFTs and possesses the expertise to offer courses/educational activities; or an individual with expertise to provide continuing education to New York State licensed marriage and family therapists; or an organization desiring to provide continuing education to New York State licensed marriage and family therapists; or an organization that proposes to offer courses of learning or self-study programs to licensed marriage and family therapists; or an organized educational entity with expertise in marriage and family therapy education and practice; and that meets the requirements of subdivision (i) of section 79-10.8; (3) provide instructor(s) who are qualified to teach the courses; (4) have a method to assess the learning of participants and describe such method; and (5) maintain records for at least six years from the date of completion of coursework, which includes the information listed in paragraph (3) of subdivision (i) of section 79-10.8.

Subparagraph (iii) of paragraph (3) of subdivision (i) of section 79-10.8 states that providers that meet the requirements of paragraph (3) of subdivision (i) of section 79-10.8 will be approved for a three-year term. Subparagraph (iv) of paragraph (3) of subdivision (i) of section 79-10.8 allows the Department to conduct site visits or request information from an approved provider to ensure compliance. Subparagraph (v) of paragraph (3) of subdivision (i) of section 79-10.8 states that a determination by the Department that an approved provider is not meeting the requirements will result in the denial or termination of the provider's approved status. Subparagraph (vi) of paragraph (3) of subdivision (i) of section 79-10.8 requires an instructor who engages in the practice of marriage and family therapy to be appropriately licensed or authorized under the Education Law, when the instruction occurs in the State.

Subdivision (j) of section 79-10.8 establishes fees authorized by the statute. Paragraph (1) of subdivision (j) of section 79-10.8 establishes a $45 mandatory continuing education fee to be paid by each licensee, in addition to the registration fees required by sections 6507-a and 8403 of the Education Law. Paragraph (2) of subdivision (j) of section 79-10.8 establishes a fee to be paid by a licensee applying for a conditional registration, pursuant to subdivision (f) of section 79-10.8, that is the same as and in addition to any applicable fee for the triennial registration, in addition to the $45 mandatory continuing education fee. Paragraph (3) of subdivision (j) of section 79-10.8 establishes an application fee of $900 to be paid by an organization or individual requesting the issuance of a permit from the Department to become an approved provider of a formal continuing education program. A fee of $900 must accompany an application for a three-year renewal of this permit.

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@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@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.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department ("Department") to determine and set fees for certifications and permits.

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.

Paragraph (a) of subdivision (1) of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, requires licensed marriage and family therapists to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to this requirement for licensees with conditional registration certificates.

Paragraph (b) of subdivision (1) of section 8412 of the Education Law allows licensed marriage and family therapists to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed. It also authorizes the Department to adjust the requirement in certain cases.

Paragraph (c) of subdivision (1) of section 8412 of the Education Law, provides an exemption from the continuing education requirement for licensees not engaged in the practice of licensed marriage and family therapy and directs the Department to establish continuing education requirements for licensees reentering the profession.

Subdivision (2) of section 8412 of the Education Law provides that a licensed marriage and family therapist must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a prorated formula for licensees whose first registration date follows the January 1, 2017 effective date and occurs less than three years from such effective date. A maximum of twelve hours in a thirty-six month registration period may be self-study under the law.

Paragraph (a) of subdivision (3) of section 8412 of the Education Law authorizes the Department to issue conditional registrations for licensed marriage and family therapists who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration in addition to the fee for triennial registration.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law defines acceptable continuing education as formal courses of learning and educational activities which contribute to professional practice in licensed marriage and family therapy and which meet the standards prescribed in the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires that continuing education courses must be taken from a provider who has been approved by the Department, based upon an application and fee, pursuant to Regulations of the Commissioner of Education. This subdivision also authorizes the Department to require the completion of continuing education courses in specific subjects to fulfill the continuing education requirement, as needed to contribute to the health and welfare of the public.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires licensed marriage and family therapists to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the Department.

Paragraph (c) of subdivision (3) of section 8412 of the Education Law authorizes the Department to charge licensed marriage and family therapists a mandatory continuing education fee.

Section 2 of Chapter 486 of the Laws of 2013 provides that the new law shall take effect January 1, 2017, and was amended by Chapter 15 of the Laws of 2014 to authorize the Department to immediately add, amend, and/or repeal any rule or regulation necessary to timely implement the new law requiring the completion of continuing education by licensed marriage and family therapists.

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the intent of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which amended Article 163 of the Education Law by adding a new section 8412, which requires the completion of continuing education by licensed marriage and family therapists and establishes standards for such continuing education. Specifically, the proposed rule establishes appropriate standards for what constitutes acceptable continuing education, continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of continuing education providers for licensed marriage and family therapists and recordkeeping requirements applicable to said approved providers.

3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to ensure continued competency by practicing licensed marriage and family therapists by establishing continuing education requirements that must be completed in order to be registered to practice in New York State and to establish requirements for the approval of providers of such continuing education. The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which is effective January 1, 2017.

As required by statute, the proposed rule is also needed to establish continuing education requirements when there is a lapse in practice, and requirements for licensees under conditional registration. In addition, the proposed rule is needed to establish fees for both the mandatory continuing education for each licensed marriage and family therapist, and the Department's review of providers of courses of learning or educational activities, in order to defray the cost of such review.

4. COSTS:

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

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

(c) Cost to private regulated parties. As authorized by Education Law section 8412(3)(c), the proposed rule includes a mandatory continuing education fee for licensed marriage and family therapists at each triennial registration; this mandatory continuing education fee is set at $45. Statutory provisions also require that licensed marriage and family therapists complete a prescribed number of hours of acceptable continuing education. The proposed rule establishes a $900 fee for the Department's review of prospective continuing education providers for approval to offer continuing education in the form of courses of learning or educational activities for a three-year term.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of section 8412 of the Education Law relating to mandatory continuing education requirements for licensed marriage and family therapists. It does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires each licensee to maintain, or ensure access by the Department to, a record of completed continuing education for six years, which includes: the type of educational activity if an educational activity, the title of the course if a course, the subject of the continuing education, the number of hours completed, the provider's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, and the date and location of the continuing education. In addition, the proposed rule requires providers of continuing education, approved by the Department, to maintain records for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed marriage and family therapists in the course if a course, a record of participation of licensed marriage and family therapists in the self-instructional coursework, if self-instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course.

7. DUPLICATION:

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 and is necessary to implement Chapter 486 of 2013 as amended by Chapter 15 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to conform the regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards for the continuing education of licensed marriage and family therapists, 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 regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. Licensed marriage and family therapists must comply with the continuing education requirements on the effective date of the authorizing statute, January 1, 2017. The statute and proposed rule establish a phase-in period during which the licensee will be required to complete less than the full 36 hours of continuing education based upon a proration formula. It is anticipated that licensees will be able to comply with the proposed rule by the effective date so that no additional period of time will be necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 486 of the Laws of 2013, as amended by Chapter 15 of the Laws of 2014, which establishes mandatory continuing education requirements for licensed marriage and family therapists registered to practice in New York State. This continuing education will be offered by providers approved by the State Education Department ("Department"), some of which may be small businesses. The Department does not know the exact number of providers that will be small businesses, but estimates that number based on its experience with similar requirements in the profession of public accountancy as set forth in the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and providers of such continuing education must be approved by the Department, after a Department review. In accounting, about 800 providers of continuing education are approved by the Department. There are almost 60 times fewer licensed marriage and family therapists (893) as there are individuals licensed in public accountancy (53,567) in this State. Using these numbers, the Department calculates that there will be a need for about 13 providers of continuing education for licensed marriage and family therapists. Of these, based upon a survey of the providers in accounting, the Department estimates that about 75 percent or 10 will be small businesses.

The proposed rule does not distinguish between the Department's review of small business entities that seek to provide continuing education to licensed marriage and family therapists and the Department's review of any other entity that seeks to offer such coursework and/or programs.

2. COMPLIANCE REQUIREMENTS:

There are compliance requirements for providers seeking approval to offer continuing education to licensed marriage and family therapists. An entity or individual must submit an application for advance approval as a provider at least 90 days prior to the date of commencement of the continuing education coursework and/or program for review by the Department. The applicant must document in the application: curricular areas of offerings; its organizational status as an educational entity or expertise in the professional area; the qualifications of course instructors; methods for assessing the learning of participants; and recordkeeping procedures. Approved applicants will be permitted to offer continuing education to licensed marriage and family therapists for a three-year term and must apply for renewal of their permit every three years.

3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed rule. The regular staff of small businesses will be able to complete the application needed for the review by the Department.

4. COMPLIANCE COSTS:

An organization or an individual seeking approval as a provider of continuing education to licensed marriage and family therapists through a Department review would be required to pay the Department a fee of $900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's or individual's application. Therefore, the annualized cost is $300.

The Department estimates that it would require a staff member or individual to spend about eight hours to complete the application. Based on an hourly rate of $37 per hour (including fringe benefits), the Department estimates that the cost of completing the application to be $296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be approximately $98.

An approved provider of continuing education to licensed marriage and family therapists would charge fees to those licensees who participate in its approved learning activities which would generate revenue for the provider. Although the fees would vary based on the type and form of the approved learning activities, in a majority of, if not all, cases, the compliance costs would be more than offset by fees paid to an approved provider by those licensees who participate in its approved learning activities.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for provider review by the Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Mental Health Practitioners, many of whom have experience in a small business environment, provided input in the development of the proposed rule. In addition, staff of the Department worked with the statewide and national professional associations and councils that represent licensed marriage and family therapists by disseminating information concerning the proposed regulation to these organizations and seeking their input. These organizations include members who own and operate small businesses.

(b) Local Governments:

The proposed rule establishes continuing education requirements for licensed marriage and family therapists and standards for providers of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local governments. Because it is evident from the nature of the proposed rule that it will not adversely affect local governments, no affirmative steps were needed to ascertain that fact and none were taken. Ac-

cordingly, a regulatory flexibility analysis for 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 licensed marriage and family therapists in New York State. The proposed rule implements the provisions of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, that, effective January 1, 2017, require each licensed marriage and family therapist to complete 36 hours of continuing education during each three-year registration period. It also establishes standards for both acceptable continuing education to meet this statutory requirement and the State Education Department's ("Department") approval of continuing education providers.

The proposed rule will apply to licensed marriage and family therapists 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. All 893 licensed marriage and family therapists, who are registered by the State Education Department to practice in New York State, will be subject to the requirements of the proposed rule. Of these, 221 licensed marriage and family therapists (24.7%) report that their permanent address of record is in a rural county of the State.

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

As required by section 8412 of the Education Law, the proposed rule will require licensed marriage and family therapists, including those that reside or work in rural areas, to complete 36 hours of acceptable continuing education to be registered to practice in New York State. The proposed rule defines acceptable continuing education subjects and other types of educational activities that the Department will accept to satisfy the statutorily mandated continuing education requirements. The proposed rule requires licensees to certify that they have met the requirements upon applying for renewal of registration to practice in New York State. The proposed rule requires each licensee to maintain prescribed information concerning completed acceptable continuing education for six years from the date of completion of said education.

The proposed rule also establishes standards for the Department's approval of prospective continuing education providers desiring to offer acceptable continuing education in the form of courses of learning and/or self-study programs, including providers, who may be located in rural areas. The proposed rule requires such approved providers to maintain specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework and/or programs.

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

3. COSTS:

The proposed rule implements provisions in the statute that authorize the Department to establish a continuing education fee on each licensed marriage and family therapist and a fee for the Department review and approval of entities or individuals seeking to become an approved provider of continuing education for a three-year term. These fees are set at $45 and $900 respectively, consistent with the fees charged in other professions.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements and clarifies the continuing education requirements for licensed marriage and family therapists found in section 8412 of the Education Law. 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 licensed marriage and family therapists, regardless of their geographic location, to help ensure a uniform standard of continuing competency across the State.

The Department has also determined that uniform standards for the Department's review of providers are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of licensed marriage and family therapy. Included in this group was the State Board for Mental Health Practitioners and professional associations representing the marriage and family therapy profession. These groups have members who live or work 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 Chapter 486 of the Laws of 2013 as amended by Chapter 15 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 State Education Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

Section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, effective January 1, 2017, and amended by Chapter 15 of the Laws of 2014, establishes mandatory continuing education requirements for licensed marriage and family therapists registered to practice in New York State. The proposed rule implements the requirement of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, that each licensed marriage and family therapist complete 36 hours of continuing education during each three-year registration period and establishes standards for both acceptable continuing education to meet this statutory requirement and the Department's approval of continuing education providers.

Because, the proposed regulation implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing a continuing education requirement for licensed marriage and family therapists is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform with the requirements of the statute. In any event, similar statutory continuing education requirements were established for individuals licensed as physical therapists in 2009 and licensed massage therapists in 2012, and the Department is not aware that those requirements significantly affected jobs or employment opportunities in those professions. In addition, the statutory continuing education requirement for licensed marriage and family therapists may increase job and employment opportunities for prospective approved continuing education providers and their current and potential employees.

Therefore, 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 job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Continuing Education Requirements for Licensed Creative Arts Therapists

I.D. No. EDU-45-15-00016-P

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

Proposed Action: Addition of section 79-11.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a) and 8412; L. 2013, ch. 486; L. 2014, ch. 15

Subject: Continuing education requirements for Licensed Creative Arts Therapists.

Purpose: Implement mandatory continuing education requirements, establish standards for acceptable education and approval of providers.

Substance of proposed rule (Full text is posted at the following State website:www.regents.nysed.gov/meetings/2015/): The Commissioner of Education proposes to add a new section 79-11.8 to the Regulations of the Commissioner of Education, relating to mandatory continuing education for licensed creative arts therapists ("LCAT"). The following is a summary of the substance of the proposed regulation:

A new section 79-11.8 is added to the regulations of the Commissioner of Education establishing continuing education requirements for LCATs.

Subdivision (a) of section 79-11.8 defines the terms acceptable accrediting agency, higher education institution, and psychotherapy institute.

Subdivision (b) of section 79-11.8 establishes the applicability of the continuing education requirements and exemptions from, and adjustments to, the requirements.

Paragraph (1) of subdivision (b) of section 79-11.8 states that each LCAT, who is required to register with the New York State Education Department ("Department") to practice in New York State ("State"), must comply with the mandatory continuing education requirements prescribed in subdivision (c).

Subparagraph (i) of paragraph (2) of subdivision (b) of section 79-11.8 provides an exemption from the requirement for a licensee who is in the triennial registration period during which he or she is first licensed to practice in the State; or a licensee who is not engaged in creative arts therapy practice, as evidenced by not being registered to practice in the State, except as otherwise prescribed in subdivision (e) of section 79-11.8.

Subparagraph (ii) of paragraph (2) of subdivision (b) of section 79-11.8 allows the Department to adjust the requirement for the licensee who documents good cause that prevents compliance, such as poor health or a specific physical or mental disability, or extended active duty with the Armed Forces of the United States, or other good cause beyond the licensee's control, in the judgment of the Department.

Subdivision (c) of section 79-11.8 establishes the mandatory continuing education requirement. Subparagraph (i) of paragraph (1) of subdivision (c) of section 79-11.8 requires at least 36 hours of continuing education acceptable to the Department for each triennial registration period. Any licensee whose first registration following January 1, 2017, is less than three years from that date will be required to complete one hour of acceptable continuing education per month beginning January 1, 2017 up to the first registration date thereafter. Such continuing education must be completed during the period beginning January 1, 2017 and ending before the first day of the new registration period.

Subparagraph (ii) of paragraph (1) of subdivision (c) of section 79-11.8 sets the continuing education requirement during each registration period of less than three years as one hour for each month in the registration period.

Paragraph (2) of subdivision (c) of section 79-11.8 defines continuing education that is acceptable to the Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of paragraph (2) of subdivision (c) of section 79-11.8 and be the types of learning activities prescribed in subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-11.8, and is subject to the prohibitions contained in subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-11.8.

Subparagraph (i) of paragraph (2) of subdivision (c) of section 79-11.8 defines acceptable continuing education subjects as contributing to professional creative arts therapy practice. Subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-11.8 defines the types of learning activities. Clause (a) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-11.8 requires that acceptable courses of learning and other education activities must be taken from a provider who has been approved by the Department, on the basis of an application and fee pursuant to subdivision (i) of section 79-11.8. Formal courses of learning include, but are not limited to, university and college credit and non-credit courses, and professional development programs and technical sessions related to the practice of creative arts therapy. Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-11.8 defines other acceptable education activities. Clause (c) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-11.8 allows the Department, in its discretion and as needed to contribute to the health and welfare of the public, to require the completion of continuing education courses in specific subjects to fulfill this mandatory continuing education requirement.

Subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-11.8 states that any continuing education designed for the sole purpose of personal development, marketing, business practices, and maximizing profits for the creative arts therapy practice of an LCAT will not be considered by the Department as acceptable continuing education, nor will the supervision of a licensee, permit holder, student or intern be considered as acceptable continuing education by the Department.

Subdivision (d) of section 79-11.8 provides that at each re-registration, the LCAT must certify to the Department his or her compliance with the continuing education requirements or that he or she is subject to an exemption or adjustment of the requirements. Paragraph (1) of subdivision (d) of section 79-11.8 prohibits a licensee who has not satisfied the continuing education requirement from practicing until the requirements have been met and a registration certificate issued by the Department, except where a licensee has been issued a conditional registration, as provided for in subdivision (f) of section 79-11.8. Paragraph (2) of subdivision (d) of section 79-11.8 prohibits the transfer of continuing education hours completed during one registration period to the subsequent registration period.

Subdivision (e) of section 79-11.8 prescribes the requirements for a licensee returning to practice as an LCAT after a lapse in practice, as evidenced by not being registered to practice in New York State. A licensee whose first registration date after a lapse in practice occurs less than three years from January 1, 2017 will be required to meet the requirements in paragraph (1) of subdivision (e) of section 79-11.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-11.8, a licensee returning to practice, who has not practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (2) of subdivision (e) of section 79-11.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-11.8, a licensee returning to practice, who has practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (3) of subdivision (e) of section 79-11.8.

Paragraph (1) of subdivision (f) of section 79-11.8 authorizes the Department to issue a conditional registration to an LCAT who attests to or admits to noncompliance with the continuing education requirement, provided that the licensee meets the requirements of the paragraph. Paragraph (2) of subdivision (f) of section 79-11.8 states that the duration of a conditional registration will not exceed one year and will not be renewed or extended.

Subdivision (g) of section 79-11.8 requires the LCAT to maintain or ensure access by the Department to records of completed continuing education as specified in that subdivision.

Subdivision (h) of section 79-11.8 provides for the measurement of continuing education study, specifically, that a minimum of 50 minutes of study will equal one hour of continuing education credit and that continuing education credit for other educational activities will be awarded as prescribed by the Department.

Subdivision (i) of section 79-11.8 establishes the requirements for Department approval of continuing education providers.

Paragraph (1) of subdivision (i) of section 79-11.8 states that an entity or individual seeking Department approval as a provider of continuing education to LCATs must submit the fee prescribed in subdivision (j) of section 79-11.8 and meet the requirements of paragraphs (2) and (3) of subdivision (i) of section 79-11.8.

Paragraph (2) of subdivision (i) of section 79-11.8 identifies an entity or individual eligible to apply to be a provider of continuing education to include, but not be limited to: (1) a higher education institution that offers programs that are registered pursuant to Part 52 of the Regulations of the Commissioner of Education as leading to licensure as an LCAT or a higher education institution that is accredited by an acceptable accrediting agency and that offers graduate coursework that is directly related to the enhancement of creative arts therapy practice, skills and knowledge; (2) a psychotherapy institute, as defined in paragraph (3) of subdivision (a) of section 79-11.8 that offers coursework that is directly related to the enhancement of creative arts therapy practice, skills and knowledge; (3) a national creative arts therapist organization or other professional organization; (4) a New York State creative arts therapist organization; (5) a national organization of jurisdictional boards of creative arts therapy; (6) an entity operated under an operating certificate appropriately issued in accordance with articles sixteen, thirty-one or thirty-two of the Mental Hygiene Law; (7) an entity, hospital or health facility as defined in section 2801 of the Public Health Law; or (8) an individual with expertise to provide continuing education to New York State licensed creative arts therapists.

Paragraph (3) of subdivision (i) of section 79-11.8 establishes the standards for the Department's review of applications from prospective continuing education providers. Prospective continuing education providers must: (1) offer coursework in one or more of the subjects prescribed as acceptable continuing education; (2) be an organized entity or individual, as defined in paragraph (2) of subdivision (i) of section 79-11.8, or another entity that employs LCATs and possesses the expertise to offer courses/educational activities; or an individual with expertise to provide continuing education to New York State licensed creative arts therapists; or an organization desiring to provide continuing education to New York State licensed creative arts therapists; or an organization that proposes to offer courses of learning or self-study programs to licensed creative arts therapists; or an organized educational entity with expertise in creative arts therapy education and practice; and that meets the requirements of subdivision (i) of section 79-11.8; (3) provide instructor(s) who are qualified to teach the courses; (4) have a method to assess the learning of participants and describe such method; and (5) maintain records for at least six years from the date of completion of coursework, which includes the information listed in paragraph (3) of subdivision (i) of section 79-11.8.

Subparagraph (iii) of paragraph (3) of subdivision (i) of section 79-11.8 states that providers that meet the requirements of paragraph (3) of subdivision (i) of section 79-11.8 will be approved for a three-year term. Subparagraph (iv) of paragraph (3) of subdivision (i) of section 79-11.8 allows the Department to conduct site visits or request information from an approved provider to ensure compliance. Subparagraph (v) of paragraph (3) of subdivision (i) of section 79-11.8 states that a determination by the Department that an approved provider is not meeting the requirements will result in the denial or termination of the provider's approved status. Subparagraph (vi) of paragraph (3) of subdivision (i) of section 79-11.8 requires an instructor who engages in the practice of creative arts therapy to be appropriately licensed or authorized under the Education Law, when the instruction occurs in the State.

Subdivision (j) of section 79-11.8 establishes fees authorized by the statute. Paragraph (1) of subdivision (j) of section 79-11.8 establishes a

$45 mandatory continuing education fee to be paid by each licensee, in addition to the registration fees required by sections 6507-a and 8404 of the Education Law. Paragraph (2) of subdivision (j) of section 79-11.8 establishes a fee to be paid by a licensee applying for a conditional registration, pursuant to subdivision (f) of section 79-11.8, that is the same as and in addition to any applicable fee for the triennial registration, in addition to the $45 mandatory continuing education fee. Paragraph (3) of subdivision (j) of section 79-11.8 establishes an application fee of $900 to be paid by an organization or individual requesting the issuance of a permit from the Department to become an approved provider of a formal continuing education program. A fee of $900 must accompany an application for a three-year renewal of this permit.

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@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@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.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department ("Department") to determine and set fees for certifications and permits.

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.

Paragraph (a) of subdivision (1) of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, requires licensed creative arts therapists to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to this requirement for licensees with conditional registration certificates.

Paragraph (b) of subdivision (1) of section 8412 of the Education Law allows licensed creative arts therapists to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed. It also authorizes the Department to adjust the requirement in certain cases.

Paragraph (c) of subdivision (1) of section 8412 of the Education Law, provides an exemption from the continuing education requirement for licensees not engaged in the practice of licensed creative arts therapy and directs the Department to establish continuing education requirements for licensees reentering the profession.

Subdivision (2) of section 8412 of the Education Law provides that a licensed creative arts therapist must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a prorated formula for licensees whose first registration date follows the January 1, 2017 effective date and occurs less than three years from such effective date. A maximum of twelve hours in a thirty-six month registration period may be self-study under the law.

Paragraph (a) of subdivision (3) of section 8412 of the Education Law authorizes the Department to issue conditional registrations for licensed creative arts therapists who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration in addition to the fee for triennial registration.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law defines acceptable continuing education as formal courses of learning and educational activities which contribute to professional practice in licensed creative arts therapy and which meet the standards prescribed in the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires that continuing education courses must be taken from a provider who has been approved by the Department, based upon an application and fee, pursuant to Regulations of the Commissioner of Education. This subdivision further authorizes the Department to require the completion of continuing education courses in specific subjects to fulfill the continuing education requirement, as needed to contribute to the health and welfare of the public.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires licensed creative arts therapists to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the Department.

Paragraph (c) of subdivision (3) of section 8412 of the Education Law authorizes the Department to charge licensed creative arts therapists a mandatory continuing education fee.

Section 2 of Chapter 486 of the Laws of 2013 provides that the new law shall take effect January 1, 2017, and was amended by Chapter 15 of the Laws of 2014, to authorize the Department to immediately add, amend, and/or repeal any rule or regulation necessary to timely implement the new law requiring the completion of continuing education by licensed creative arts therapists.

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the intent of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which amended Article 163 of the Education Law by adding a new section 8412, which requires the completion of continuing education by licensed creative arts therapists and establishes standards for such continuing education. Specifically, the proposed rule establishes appropriate standards for what constitutes acceptable continuing education, continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of continuing education providers for licensed creative arts therapists and recordkeeping requirements applicable to said approved providers.

3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to ensure continued competency by practicing licensed creative arts therapists by establishing continuing education requirements that must be completed in order to be registered to practice in New York State and to establish requirements for the approval of providers of such continuing education. The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which is effective January 1, 2017.

As required by statute, the proposed rule is also needed to establish continuing education requirements when there is a lapse in practice, and requirements for licensees under conditional registration. In addition, the proposed rule is needed to establish fees for both the mandatory continuing education for each licensed creative arts therapist, and the Department's review of providers of courses of learning or educational activities, in order to defray the cost of such review.

4. COSTS:

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

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

(c) Cost to private regulated parties. As authorized by Education Law section 8412(3)(c), the proposed rule includes a mandatory continuing education fee for licensed creative arts therapists at each triennial registration; this mandatory continuing education fee is set at $45. Statutory provisions also require that licensed creative arts therapists complete a prescribed number of hours of acceptable continuing education. The proposed rule establishes a $900 fee for the Department's review of prospective continuing education providers for approval to offer continuing education in the form of courses of learning or educational activities for a three-year term.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of section 8412 of the Education Law relating to mandatory continuing education requirements for licensed creative arts therapists. It does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires each licensee to maintain, or ensure access by the Department to, a record of completed continuing education for six years, which includes: the type of educational activity if an educational activity, the title of the course if a course, the subject of the continuing education, the number of hours completed, the provider's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, the program for a juried show or performance, and the date and location of the continuing education. In addition, the proposed rule requires providers of continuing education, approved by the Department, to maintain records for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed creative arts therapists in the course if a course, a record of participation of licensed creative arts therapists in the self-instructional coursework, if self-

instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course.

7. DUPLICATION:

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 and is necessary to implement Chapter 486 of 2013 as amended by Chapter 15 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to conform the regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards for the continuing education of licensed creative arts therapists, 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 regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. Licensed creative arts therapists must comply with the continuing education requirements on the effective date of the authorizing statute, January 1, 2017. The statute and proposed rule establish a phase-in period during which the licensee will be required to complete less than the full 36 hours of continuing education based upon a proration formula. It is anticipated that licensees will be able to comply with the proposed rule by the effective date so that no additional period of time will be necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which establishes mandatory continuing education requirements for licensed creative arts therapists registered to practice in New York State. This continuing education will be offered by providers approved by the State Education Department ("Department"), some of which may be small businesses. The Department does not know the exact number of providers that will be small businesses, but estimates that number based on its experience with similar requirements in the profession of public accountancy as set forth in the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and providers of such continuing education must be approved by the Department, after a Department review. In accounting, about 800 providers of continuing education are approved by the Department. There are approximately 40 times fewer licensed creative arts therapists (1,381) as there are individuals licensed in public accountancy (53,567) in this State. Using these numbers, the Department calculates that there will be a need for about 20 providers of continuing education for licensed creative arts therapists. Of these, based upon a survey of the providers in accounting, the Department estimates that about 75 percent or 15 will be small businesses.

The proposed rule does not distinguish the Department's review of small business entities that seek to provide continuing education to licensed creative arts therapists from the Department's review of any other entity that seeks to offer such coursework and/or programs.

2. COMPLIANCE REQUIREMENTS:

There are compliance requirements for providers seeking approval to offer continuing education to licensed creative arts therapists. An entity or individual must submit an application for advance approval as a provider at least 90 days prior to the date of commencement of the continuing education coursework and/or program for review by the Department. The applicant must document in the application: curricular areas of offerings; its organizational status as an educational entity or expertise in the professional area; the qualifications of course instructors; methods for assessing the learning of participants; and recordkeeping procedures. Approved applicants will be permitted to offer continuing education to licensed creative arts therapists for a three-year term and must apply for renewal of their permit every three years.

3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed rule. The regular staff of small businesses will be able to complete the application needed for the review by the Department.

4. COMPLIANCE COSTS:

An organization or an individual seeking approval as a provider of continuing education to licensed creative arts therapists through a Department review would be required to pay the Department a fee of $900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's or individual's application. Therefore, the annualized cost is $300.

The Department estimates that it would require a staff member or an individual to spend about eight hours to complete the application. Based on an hourly rate of $37 per hour (including fringe benefits), the Department estimates that the cost of completing the application to be $296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be approximately $98.

An approved provider of continuing education to licensed creative arts therapists would charge fees to those licensees who participate in its approved learning activities, which would generate revenue for the provider. Although the fees would vary based on the type and form of the approved learning activities, in a majority of, if not all, cases, the compliance costs would be more than offset by fees paid to an approved provider by those licensees who participate in its approved learning activities.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for provider review by the Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Mental Health Practitioners, many of whom have experience in a small business environment, provided input in the development of the proposed rule. In addition, staff of the Department worked with the statewide and national professional associations and councils that represent licensed creative arts therapists by disseminating information concerning the proposed regulation to these organizations and seeking their input. These organizations include members who own and operate small businesses.

(b) Local Governments:

The proposed rule establishes continuing education requirements for licensed creative arts therapists and standards for providers of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local governments. Because it is evident from the nature of the proposed rule that it will not adversely affect local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for 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 licensed creative arts therapists in New York State. The proposed rule implements the provisions of Education Law § 8412, as added by Chapter 486 of the Laws of 2013 and amended by Chapter 15 of the Laws of 2014 that, effective January 1, 2017, require each licensed creative arts therapist to complete 36 hours of continuing education during each three-year registration period. It also establishes standards for both acceptable continuing education to meet this statutory requirement and the State Education Department's ("Department") approval of continuing education providers.

The proposed rule will apply to licensed creative arts therapists 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. All 1,381 licensed creative arts therapists, who are registered by the State Education Department to practice in New York State, will be subject to the requirements of the proposed rule. Of these, 213 licensed creative arts therapists (15.4%) report that their permanent address of record is in a rural county of the State.

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

As required by Education Law § 8412, the proposed rule will require licensed creative arts therapists, including those that reside or work in rural areas, to complete 36 hours of acceptable continuing education in order to be registered to practice in New York State. The proposed rule defines acceptable continuing education subjects and other types of educational activities that the Department will accept to satisfy the statutorily mandated continuing education requirements. The proposed rule requires licensees to certify that they have met the requirements upon applying for renewal of registration to practice in New York State. The proposed rule requires each licensee to maintain prescribed information concerning completed acceptable continuing education for six years from the date of completion of said education.

The proposed rule also establishes standards for the Department's approval of prospective continuing education providers desiring to offer acceptable continuing education in the form of courses of learning and/or self-study programs, including providers, who may be located in rural areas. The proposed rule requires such approved providers to maintain

specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework and/or programs.

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

3. COSTS:

The proposed rule implements provisions in the statute that authorize the Department to establish a continuing education fee on each licensed creative arts therapist and a fee for the Department review and approval of entities or individuals seeking to become an approved provider of continuing education for a three-year term. These fees are set at $45 and $900 respectively, consistent with the fees charged in other professions.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements and clarifies the continuing education requirements for licensed creative arts therapists found in Education Law § 8412. 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 licensed creative arts therapists, regardless of their geographic location, to help ensure a uniform standard of continuing competency across the State.

The Department has also determined that uniform standards for the Department's review of providers are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of licensed creative arts therapy. Included in this group was the State Board for Mental Health Practitioners and professional associations representing the creative arts therapy profession. These groups have members who live or work 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 Chapter 486 of the Laws of 2013 as amended by Chapter 15 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 State Education Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

Section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, effective January 1, 2017, and amended by Chapter 15 of the Laws of 2014, establishes mandatory continuing education requirements for licensed creative arts therapists registered to practice in New York State. The proposed rule implements the requirement of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, that each licensed creative arts therapist complete 36 hours of continuing education during each three-year registration period and establishes standards for both acceptable continuing education to meet this statutory requirement and the Department's approval of continuing education providers.

Because, the proposed regulation implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing a continuing education requirement for licensed creative arts therapists is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform with the requirements of the statute. In any event, similar statutory continuing education requirements were established for individuals licensed as physical therapists in 2009 and licensed massage therapists in 2012, and the Department is not aware that those requirements significantly affected jobs or employment opportunities in those professions. In addition, the statutory continuing education requirement for licensed creative arts therapists may increase job and employment opportunities for prospective approved continuing education providers and their current and potential employees.

Therefore, 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 job and employment opportunities, or only have a positive impact, 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

Continuing Education Requirements for Licensed Mental Health Counselors

I.D. No. EDU-45-15-00017-P

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

Proposed Action: Addition of section 79-9.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a) and 8412; L. 2013, ch. 486; L. 2014, ch. 15

Subject: Continuing education requirements for Licensed Mental Health Counselors.

Purpose: Implement mandatory continuing education requirements, establish standards for acceptable education and approval of providers.

Substance of proposed rule (Full text is posted at the following State website:www.regents.nysed.gov/meetings/2015/): The Commissioner of Education proposes to add a new section 79-9.8 to the Regulations of the Commissioner of Education, relating to mandatory continuing education for licensed mental health counselors ("LMHC"). The following is a summary of the substance of the proposed regulation:

A new section 79-9.8 is added to the regulations of the Commissioner of Education establishing continuing education requirements for LMHCs.

Subdivision (a) of section 79-9.8 defines the terms acceptable accrediting agency, higher education institution, and psychotherapy institute.

Subdivision (b) of section 79-9.8 establishes the applicability of the continuing education requirements and exemptions from, and adjustments to, the requirements.

Paragraph (1) of subdivision (b) of section 79-9.8 states that each LMHC, who is required to register with the New York State Education Department ("Department") to practice in New York State ("State"), must comply with the mandatory continuing education requirements prescribed in subdivision (c).

Subparagraph (i) of paragraph (2) of subdivision (b) of section 79-9.8 provides an exemption from the requirement for a licensee who is in the triennial registration period during which he or she is first licensed to practice in the State; or a licensee who is not engaged in mental health counseling practice, as evidenced by not being registered to practice in the State, except as otherwise prescribed in subdivision (e) of section 79-9.8.

Subparagraph (ii) of paragraph (2) of subdivision (b) of section 79-9.8 allows the Department to adjust the requirement for the licensee who documents good cause that prevents compliance, such as poor health or a specific physical or mental disability, or extended active duty with the Armed Forces of the United States, or other good cause beyond the licensee's control, in the judgment of the Department.

Subdivision (c) of section 79-9.8 establishes the mandatory continuing education requirement. Subparagraph (i) of paragraph (1) of subdivision (c) of section 79-9.8 requires at least 36 hours of continuing education acceptable to the Department for each triennial registration period. Any licensee whose first registration following January 1, 2017, is less than three years from that date will be required to complete one hour of acceptable continuing education per month beginning January 1, 2017 up to the first registration date thereafter. Such continuing education must be completed during the period beginning January 1, 2017 and ending before the first day of the new registration period.

Subparagraph (ii) of paragraph (1) of subdivision (c) of section 79-9.8 sets the continuing education requirement during each registration period of less than three years as one hour for each month in the registration period.

Paragraph (2) of subdivision (c) of section 79-9.8 defines continuing education that is acceptable to the Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of paragraph (2) of subdivision (c) of section 79-9.8 and be the types of learning activities prescribed in subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-9.8, and is subject to the prohibitions contained in subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-9.8.

Subparagraph (i) of paragraph (2) of subdivision (c) of section 79-9.8 defines acceptable continuing education subjects as contributing to professional mental health counseling practice. Subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-9.8 defines the types of learning activities. Clause (a) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-9.8 requires that acceptable courses of learning and other education activities must be taken from a provider who has been approved by the Department, on the basis of an application and fee pursuant to subdivision (i) of section 79-9.8. Formal courses of learning include, but

are not limited to, university and college credit and non-credit courses, and professional development programs and technical sessions related to the practice of mental health counseling. Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-9.8 defines other acceptable education activities. Clause (c) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-9.8 allows the Department, in its discretion and as needed to contribute to the health and welfare of the public, to require the completion of continuing education courses in specific subjects to fulfill this mandatory continuing education requirement.

Subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-9.8 states that any continuing education designed for the sole purpose of personal development, marketing, business practices, and maximizing profits for the mental health counseling practice of an LMHC will not be considered by the Department as acceptable continuing education, nor will the supervision of a licensee, permit holder, student or intern be considered by the Department as acceptable continuing education.

Subdivision (d) of section 79-9.8 provides that at each re-registration, the LMHC must certify to the Department his or her compliance with the continuing education requirements or that he or she is subject to an exemption or adjustment of the requirements. Paragraph (1) of subdivision (d) of section 79-9.8 prohibits a licensee who has not satisfied the continuing education requirement from practicing until the requirements have been met and a registration certificate issued by the Department, except where a licensee has been issued a conditional registration, as provided for in subdivision (f) of section 79-9.8. Paragraph (2) of subdivision (d) of section 79-9.8 prohibits the transfer of continuing education hours completed during one registration period to the subsequent registration period.

Subdivision (e) of section 79-9.8 prescribes the requirements for a licensee returning to practice as an LMHC after a lapse in practice, as evidenced by not being registered to practice in New York State. A licensee whose first registration date after a lapse in practice occurs less than three years from January 1, 2017 will be required to meet the requirements in paragraph (1) of subdivision (e) of section 79-9.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-9.8, a licensee returning to practice, who has not practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (2) of subdivision (e) of section 79-9.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-9.8 a licensee returning to practice, who has practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (3) of subdivision (e) of section 79-9.8.

Paragraph (1) of subdivision (f) of section 79-9.8 authorizes the Department to issue a conditional registration to an LMHC who attests to or admits to noncompliance with the continuing education requirement, provided that the licensee meets the requirements of the paragraph. Paragraph (2) of subdivision (f) of section 79-9.8 states that the duration of a conditional registration will not exceed one year and will not be renewed or extended.

Subdivision (g) of section 79-9.8 requires the LMHC to maintain or ensure access by the Department to records of completed continuing education as specified in that subdivision.

Subdivision (h) of section 79-9.8 provides for the measurement of continuing education study, specifically, that a minimum of 50 minutes of study will equal one hour of continuing education credit and that continuing education credit for other educational activities will be awarded as prescribed by the Department.

Subdivision (i) of section 79-9.8 establishes the requirements for Department approval of continuing education providers.

Paragraph (1) of subdivision (i) of section 79-9.8 states that an entity or individual seeking Department approval as a provider of continuing education to LMHCs must submit the fee prescribed in subdivision (j) of section 79-9.8 and meet the requirements of paragraphs (2) and (3) of subdivision (i) of section 79-9.8.

Paragraph (2) of subdivision (i) of section 79-9.8 identifies an entity or individual eligible to apply to be a provider of continuing education to include, but not be limited to: (1) a higher education institution that offers programs that are registered pursuant to Part 52 of the Regulations of the Commissioner of Education as leading to licensure as an LMHC or a higher education institution that is accredited by an acceptable accrediting agency and that offers graduate coursework that is directly related to the enhancement of mental health counseling practice, skills and knowledge; (2) a psychotherapy institute, as defined in paragraph (3) of subdivision (a) of section 79-9.8 that offers coursework that is directly related to the enhancement of mental health counseling practice, skills and knowledge; (3) a national mental health counselor organization or other professional organization; (4) a New York State mental health counselor organization; (5) a national organization of jurisdictional boards of mental health counseling; (6) an entity operated under an operating certificate appropriately issued in accordance with articles sixteen, thirty-one or thirty-two of the Mental Hygiene Law; (7) an entity, hospital or health facility as defined in section 2801 of the Public Health Law; or (8) an individual with expertise to provide continuing education to New York State licensed mental health counselors.

Paragraph (3) of subdivision (i) of section 79-9.8 establishes the standards for the Department's review of applications from prospective continuing education providers. Prospective continuing education providers must: (1) offer coursework in one or more of the subjects prescribed as acceptable continuing education; (2) be an organized entity or individual, as defined in paragraph (2) of subdivision (i) of section 79-9.8, or be another entity that employs LMHCs and possesses the expertise to offer courses/educational activities; or an individual with expertise to provide continuing education to New York State licensed mental health counselors; or an organization desiring to provide continuing education to New York State licensed mental health counselors; or an organization that proposes to offer courses of learning or self-study programs to licensed mental health counselors; or an organized educational entity with expertise in mental health counseling education and practice; and that meets the requirements of subdivision (i) of section 79-9.8; (3) provide instructor(s) who are qualified to teach the courses; (4) have a method to assess the learning of participants and describe such method; and (5) maintain records for at least six years from the date of completion of coursework, which includes the information listed in paragraph (3) of subdivision (i) of section 79-9.8.

Subparagraph (iii) of paragraph (3) of subdivision (i) of section 79-9.8 states that providers that meet the requirements of paragraph (3) of subdivision (i) of section 79-9.8 will be approved for a three-year term. Subparagraph (iv) of paragraph (3) of subdivision (i) of section 79-9.8 allows the Department to conduct site visits or request information from an approved provider to ensure compliance. Subparagraph (v) of paragraph (3) of subdivision (i) of section 79-9.8 states that a determination by the Department that an approved provider is not meeting the requirements will result in the denial or termination of the provider's approved status. Subparagraph (vi) of paragraph (3) of subdivision (i) of section 79-9.8 requires an instructor who engages in the practice of mental health counseling to be appropriately licensed or authorized under the Education Law, when the instruction occurs in the State.

Subdivision (j) of section 79-9.8 establishes fees authorized by the statute. Paragraph (1) of subdivision (j) of section 79-9.8 establishes a $45 mandatory continuing education fee to be paid by each licensee, in addition to the registration fees required by sections 6507-a and 8402 of the Education Law. Paragraph (2) of subdivision (j) of section 79-9.8 establishes a fee to be paid by a licensee applying for a conditional registration, pursuant to subdivision (f) of section 79-9.8, that is the same as and in addition to any applicable fee for the triennial registration, in addition to the $45 mandatory continuing education fee. Paragraph (3) of subdivision (j) of section 79-9.8 establishes an application fee of $900 to be paid by an organization or individual requesting the issuance of a permit from the Department to become an approved provider of a formal continuing education program. A fee of $900 must accompany an application for a three-year renewal of this permit.

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@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@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.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department ("Department") to determine and set fees for certifications and permits.

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.

Paragraph (a) of subdivision (1) of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, requires licensed mental health counselors to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to this requirement for licensees with conditional registration certificates.

Paragraph (b) of subdivision (1) of section 8412 of the Education Law allows licensed mental health counselors to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed. It also authorizes the Department to adjust the requirement in certain cases.

Paragraph (c) of subdivision (1) of section 8412 of the Education Law, provides an exemption from the continuing education requirement for licensees not engaged in the practice of licensed mental health counseling and directs the Department to establish continuing education requirements for licensees reentering the profession.

Subdivision (2) of section 8412 of the Education Law provides that a licensed mental health counselor must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a prorated formula for licensees whose first registration date follows the January 1, 2017 effective date and occurs less than three years from such effective date. A maximum of twelve hours in a thirty-six month registration period may be self-study under the law.

Paragraph (a) of subdivision (3) of section 8412 of the Education Law authorizes the Department to issue conditional registrations for licensed mental health counselors who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration in addition to the fee for triennial registration.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law defines acceptable continuing education as formal courses of learning and educational activities which contribute to professional practice in licensed mental health counseling and which meet the standards prescribed in the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires that continuing education courses must be taken from a provider who has been approved by the Department, based upon an application and fee, pursuant to Regulations of the Commissioner of Education. This subdivision also authorizes the Department to require the completion of continuing education courses in specific subjects to fulfill the continuing education requirement, as needed to contribute to the health and welfare of the public.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires licensed mental health counselors to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the Department.

Paragraph (c) of subdivision (3) of section 8412 of the Education Law authorizes the Department to charge licensed mental health counselors a mandatory continuing education fee.

Section (2) of Chapter 486 of the Laws of 2013 provides that the new law shall take effect January 1, 2017, and was amended by Chapter 15 of the Laws of 2014 to authorize the Department to immediately add, amend, and/or repeal any rule or regulation necessary to timely implement the new law requiring the completion of continuing education by licensed mental health counselors.

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the intent of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which amended Article 163 of the Education Law by adding a new section 8412, which requires the completion of continuing education by licensed mental health counselors and establishes standards for such continuing education. Specifically, the proposed rule establishes appropriate standards for what constitutes acceptable continuing education, continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of continuing education providers for licensed mental health counselors and recordkeeping requirements applicable to said approved providers.

3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to ensure continued competency by practicing licensed mental health counselors by establishing continuing education requirements that must be completed in order to be registered to practice in New York State and to establish requirements for the approval of providers of such continuing education. The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which is effective January 1, 2017.

As required by statute, the proposed rule is also needed to establish continuing education requirements when there is a lapse in practice, and requirements for licensees under conditional registration. In addition, the proposed rule is needed to establish fees for both the mandatory continuing education for each licensed mental health counselor, and the Department's review of providers of courses of learning or educational activities, in order to defray the cost of such review.

4. COSTS:

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

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

(c) Cost to private regulated parties. As authorized by Education Law section 8412(3)(c), the proposed rule includes a mandatory continuing education fee for licensed mental health counselors at each triennial registration; this mandatory continuing education fee is set at $45. Statutory provisions also require that licensed mental health counselors complete a prescribed number of hours of acceptable continuing education. The proposed rule establishes a $900 fee for the Department's review of prospective continuing education providers for approval to offer continuing education in the form of courses of learning or educational activities for a three-year term.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of section 8412 of the Education Law relating to mandatory continuing education requirements for licensed mental health counselors. It does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires each licensee to maintain, or ensure access by the Department to, a record of completed continuing education for six years, which includes: the type of educational activity if an educational activity, the title of the course if a course, the subject of the continuing education, the number of hours completed, the provider's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, and the date and location of the continuing education. In addition, the proposed rule requires providers of continuing education, approved by the Department, to maintain records for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed mental health counselors in the course if a course, a record of participation of licensed mental health counselors in the self-instructional coursework, if self-instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course.

7. DUPLICATION:

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 and is necessary to implement Chapter 486 of 2013 as amended by Chapter 15 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to conform the regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

Since, there are no applicable federal standards for the continuing education of licensed mental health counselors 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 regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. Licensed mental health counselors must comply with the continuing education requirements on the effective date of the authorizing statute, January 1, 2017. The statute and proposed rule establish a phase-in period during which the licensee will be required to complete less than the full 36 hours of continuing education based upon a proration formula. It is anticipated that licensees will be able to comply with the proposed rule by the effective date so that no additional period of time will be necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 486 of the Laws of 2013, as amended by Chapter 15 of the Laws of 2014, which establishes mandatory continuing education requirements for licensed mental health counselors registered to practice in New York State. This continuing education will be offered by providers approved by the State Education Department ("Department"), some of which may be small businesses. The Department does not know the exact number of providers that will be small businesses, but estimates that number based on its experience with similar requirements in the profession of public accountancy as set forth in the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and providers of such continuing education must be approved by the Department, after a Department review. In accounting, about 800 providers of continuing education are approved by the Department. There are about one-ninth as many licensed mental health counselors (5,324) as there are individuals licensed in public accountancy (53,567) in this State. Using these numbers, the Department calculates that there will be a need for about 79 providers of continuing education for licensed mental health counselors. Of these, based upon a survey of the providers in accounting, the Department estimates that about 75 percent or 59 will be small businesses.

The proposed rule does not distinguish the Department's review of small business entities that seek to provide continuing education to licensed mental health counselors and the Department's review of any other entity that seeks to offer such coursework and/or programs.

2. COMPLIANCE REQUIREMENTS:

There are compliance requirements for providers seeking approval to offer continuing education to licensed mental health counselors. An entity or individual must submit an application for advance approval as a provider at least 90 days prior to the date of commencement of the continuing education coursework and/or program for review by the Department. The applicant must document in the application: curricular areas of offerings; its organizational status as an educational entity or expertise in the professional area; the qualifications of course instructors; methods for assessing the learning of participants; and recordkeeping procedures. Approved applicants will be permitted to offer continuing education to licensed mental health counselors for a three-year term and must apply for renewal of their permit every three years.

3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed rule. The regular staff of small businesses will be able to complete the application needed for the review by the Department.

4. COMPLIANCE COSTS:

An organization or an individual seeking approval as a provider of continuing education to licensed mental health counselors through a Department review would be required to pay the Department a fee of $900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's or individual's application. Therefore, the annualized cost is $300.

The Department estimates that it would require a staff member or an individual to spend about eight hours to complete the application. Based on an hourly rate of $37 per hour (including fringe benefits), the Department estimates that the cost of completing the application to be $296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be approximately $98.

An approved provider of continuing education to licensed mental health counselors would charge fees to those licensees who participate in its approved learning activities which would generate revenue for the provider. Although the fees would vary based on the type and form of the approved learning activities, in a majority of, if not all, cases, the compliance costs would be more than offset by fees paid to an approved provider by those licensees who participate in its approved learning activities.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for provider review by the Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Mental Health Practitioners, many of whom have experience in a small business environment, provided input in the development of the proposed rule. In addition, staff of the Department worked with the statewide and national professional associations and councils that represent licensed mental health counselors by disseminating information concerning the proposed regulation to these organizations and seeking their input. These organizations include members who own and operate small businesses.

(b) Local Governments:

The proposed rule establishes continuing education requirements for licensed mental health counselors and standards for providers of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local governments. Because it is evident from the nature of the proposed rule that it will not adversely affect local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for 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 licensed mental health counselors in New York State. The proposed rule implements the provisions of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, as amended by Chapter 15 of the Laws of 2014 that, effective January 1, 2017, require each licensed mental health counselor to complete 36 hours of continuing education during each three-year registration period. It also establishes standards for both acceptable continuing education to meet this statutory requirement and the State Education Department's ("Department") approval of continuing education providers.

The proposed rule will apply to licensed mental health counselors 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. All 5,324 licensed mental health counselors who are registered by the State Education Department to practice in New York State will be subject to the requirements of the proposed rule. Of these, 1,119 licensed mental health counselors (21.0%) report that their permanent address of record is in a rural county of the State.

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

As required by section 8412 of the Education Law, the proposed rule will require licensed mental health counselors, including those that reside or work in rural areas, to complete 36 hours of acceptable continuing education to be registered to practice in New York State. The proposed rule defines acceptable continuing education subjects and other types of educational activities that the Department will accept to satisfy the statutorily mandated continuing education requirements. The proposed rule requires licensees to certify that they have met the requirements upon applying for renewal of registration to practice in New York State. The proposed rule requires each licensee to maintain prescribed information concerning completed acceptable continuing education for six years from the date of completion of said education.

The proposed rule also establishes standards for the Department's approval of prospective continuing education providers desiring to offer acceptable continuing education in the form of courses of learning and/or self-study programs, including providers, who may be located in rural areas. The proposed rule requires such approved providers to maintain specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework and/or programs.

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

3. COSTS:

The proposed rule implements provisions in the statute that authorize the Department to establish a continuing education fee on each licensed mental health counselor and a fee for the Department review and approval of entities or individuals seeking to become an approved provider of continuing education for a three-year term. These fees are set at $45 and $900 respectively, consistent with the fees charged in other professions.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements and clarifies the continuing education requirements for licensed mental health counselors found in section 8412 of the Education Law. 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 licensed mental health counselors, regardless of their geographic location, to help ensure a uniform standard of continuing competency across the State.

The Department has also determined that uniform standards for the Department's review of providers are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of licensed mental health counseling. Included in this group was the State Board for Mental Health Practitioners and professional associations representing the mental health counseling profession. These groups have members who live or work 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 Chapter 486 of the Laws of 2013 as amended by Chapter 15 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 State Education Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

Section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, effective January 1, 2017, and amended by Chapter 15 of the Laws of 2014, establishes mandatory continuing education requirements for licensed mental health counselors registered to practice in New York State. The proposed rule implements the requirement of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, that each licensed mental health counselor complete 36 hours of continuing education during each three-year registration period and establishes standards for both acceptable continuing education to meet this statutory requirement and the Department's approval of continuing education providers.

Because, the proposed regulation implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing a continuing education requirement for licensed mental health counselors is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform with the requirements of the statute. In any event, similar statutory continuing education requirements were established for individuals licensed as physical therapists in 2009 and licensed massage therapists in 2012, and the Department is not aware that those requirements significantly affected jobs or employment opportunities in those professions. In addition, the statutory continuing education requirement for licensed mental health counselors may increase job and employment opportunities for prospective approved continuing education providers and their current and potential employees.

Therefore, 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 job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Continuing Education Requirements for Licensed Psychoanalysts

I.D. No. EDU-45-15-00018-P

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

Proposed Action: Addition of section 79-12.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a), 8412; L. 2013, ch. 486; L. 2014, ch. 15

Subject: Continuing education requirements for Licensed Psychoanalysts.

Purpose: Implement mandatory continuing education requirements, establish standards for acceptable education and approval of providers.

Substance of proposed rule (Full text is posted at the following State website:www.regents.nysed.gov/meetings/2015/): The Commissioner of Education proposes to add a new section 79-12.8 to the Regulations of the Commissioner of Education, relating to mandatory continuing education for licensed psychoanalysts. The following is a summary of the substance of the proposed regulation:

A new section 79-12.8 is added to the regulations of the Commissioner of Education establishing continuing education requirements for licensed psychoanalysts.

Subdivision (a) of section 79-12.8 defines the terms acceptable accrediting agency, higher education institution, and psychotherapy institute.

Subdivision (b) of section 79-12.8 establishes the applicability of the continuing education requirements and exemptions from, and adjustments to, the requirements.

Paragraph (1) of subdivision (b) of section 79-12.8 states that each licensed psychoanalyst, who is required to register with the New York State Education Department ("Department") to practice in New York State ("State"), must comply with the mandatory continuing education requirements prescribed in subdivision (c).

Subparagraph (i) of paragraph (2) of subdivision (b) of section 79-12.8 provides an exemption from the requirement for a licensee who is in the triennial registration period during which he or she is first licensed to practice in the State; or a licensee who is not engaged in psychoanalysis practice, as evidenced by not being registered to practice in the State, except as otherwise prescribed in subdivision (e) of section 79-12.8.

Subparagraph (ii) of paragraph (2) of subdivision (b) of section 79-12.8 allows the Department to adjust the requirement for the licensee who documents good cause that prevents compliance, such as poor health or a specific physical or mental disability, or extended active duty with the Armed Forces of the United States, or other good cause beyond the licensee's control, in the judgment of the Department.

Subdivision (c) of section 79-12.8 establishes the mandatory continuing education requirement. Subparagraph (i) of paragraph (1) of subdivision (c) of section 79-12.8 requires at least 36 hours of continuing education acceptable to the Department for each triennial registration period. Any licensee whose first registration following January 1, 2017, is less than three years from that date will be required to complete one hour of acceptable continuing education per month beginning January 1, 2017 up to the first registration date thereafter. Such continuing education must be completed during the period beginning January 1, 2017 and ending before the first day of the new registration period.

Subparagraph (ii) of paragraph (1) of subdivision (c) of section 79-12.8 sets the continuing education requirement during each registration period of less than three years as one hour for each month in the registration period.

Paragraph (2) of subdivision (c) of section 79-12.8 defines continuing education that is acceptable to the Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of paragraph (2) of subdivision (c) of section 79-12.8 and be the types of learning activities prescribed in subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-12.8, and is subject to the prohibitions contained in subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-12.8.

Subparagraph (i) of paragraph (2) of subdivision (c) of section 79-12.8 defines acceptable continuing education subjects as contributing to professional psychoanalysis practice. Subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-12.8 defines the types of learning activities. Clause (a) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-12.8 requires that acceptable courses of learning and other education activities must be taken from a provider who has been approved by the Department, on the basis of an application and fee pursuant to subdivision (i) of section 79-12.8. Formal courses of learning include, but are not limited to, university and college credit and non-credit courses, and professional development programs and technical sessions related to the practice of psychoanalysis. Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-12.8 defines other acceptable education activities. Clause (c) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 79-12.8 allows the Department, in its discretion and as needed to contribute to the health and welfare of the public, to require the completion of continuing education courses in specific subjects to fulfill this mandatory continuing education requirement.

Subparagraph (iii) of paragraph (2) of subdivision (c) of section 79-12.8 states that any continuing education designed for the sole purpose of personal development, marketing, business practices, and maximizing profits for the psychoanalysis practice of a licensed psychoanalyst will not be considered by the Department as acceptable continuing education, nor will the supervision of a licensee, permit holder, student or intern be considered as acceptable continuing education by the Department.

Subdivision (d) of section 79-12.8 provides that at each re-registration, the licensed psychoanalyst must certify to the Department his or her compliance with the continuing education requirements or that he or she is subject to an exemption or adjustment of the requirements. Paragraph (1) of subdivision (d) of section 79-12.8 prohibits a licensee who has not satisfied the continuing education requirement from practicing until the requirements have been met and a registration certificate issued by the Department, except where a licensee has been issued a conditional registration, as provided for in subdivision (f) of section 79-12.8. Paragraph (2) of subdivision (d) of section 79-12.8 prohibits the transfer of continuing education hours completed during one registration period to the subsequent registration period.

Subdivision (e) of section 79-12.8 prescribes the requirements for a licensee returning to practice as a licensed psychoanalyst after a lapse in practice, as evidenced by not being registered to practice in New York State. A licensee whose first registration date after a lapse in practice occurs less than three years from January 1, 2017 will be required to meet the requirements in paragraph (1) of subdivision (e) of section 79-12.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-12.8, a licensee returning to practice, who has not practiced lawfully in another jurisdiction throughout the lapse period must complete the requirements in paragraph (2) of subdivision (e) of section 79-12.8. Except as prescribed in paragraph (1) of subdivision (e) of section 79-12.8 a licensee returning to practice, who has practiced lawfully in another jurisdiction

throughout the lapse period must complete the requirements in paragraph (3) of subdivision (e) of section 79-12.8.

Paragraph (1) of subdivision (f) of section 79-12.8 authorizes the Department to issue a conditional registration to a licensed psychoanalyst who attests to or admits to noncompliance with the continuing education requirement, provided that the licensee meets the requirements of the paragraph. Paragraph (2) of subdivision (f) of section 79-12.8 states that the duration of a conditional registration will not exceed one year and will not be renewed or extended.

Subdivision (g) of section 79-12.8 requires the licensed psychoanalyst to maintain or ensure access by the Department to records of completed continuing education as specified in that subdivision.

Subdivision (h) of section 79-12.8 provides for the measurement of continuing education study, specifically, that a minimum of 50 minutes of study will equal one hour of continuing education credit and that continuing education credit for other educational activities will be awarded as prescribed by the Department.

Subdivision (i) of section 79-12.8 establishes the requirements for Department approval of continuing education providers.

Paragraph (1) of subdivision (i) of section 79-12.8 states that an entity or individual seeking Department approval as a provider of continuing education to licensed psychoanalysts must submit the fee prescribed in subdivision (j) of section 79-12.8 and meet the requirements of paragraphs (2) and (3) of subdivision (i) of section 79-12.8.

Paragraph (2) of subdivision (i) of section 79-12.8 identifies an entity or individual eligible to apply to be a provider of continuing education to include, but not be limited to: (1) a higher education institution that offers programs that are registered pursuant to Part 52 of the Regulations of the Commissioner of Education as leading to licensure as a licensed psychoanalyst or a higher education institution that is accredited by an acceptable accrediting agency and that offers graduate coursework that is directly related to the enhancement of psychoanalysis practice, skills and knowledge; (2) a psychotherapy institute, as defined in paragraph (3) of subdivision (a) of section 79-12.8, that is registered pursuant to Part 52 of the Regulations of the Commissioner of Education as leading to licensure as a licensed psychoanalyst or an institute that offers coursework that is directly related to the enhancement of psychoanalysis practice, skills and knowledge; (3) a national psychoanalyst organization or other professional organization; (4) a New York State psychoanalyst organization; (5) a national organization of jurisdictional boards of psychoanalysis; (6) an entity operated under an operating certificate appropriately issued in accordance with articles sixteen, thirty-one or thirty-two of the Mental Hygiene Law; (7) an entity, hospital or health facility as defined in section 2801 of the Public Health Law; or (8) an individual with expertise to provide continuing education to New York State licensed psychoanalysts.

Paragraph (3) of subdivision (i) of section 79-12.8 establishes the standards for the Department's review of applications from prospective continuing education providers. Prospective continuing education providers must: (1) offer coursework in one or more of the subjects prescribed as acceptable continuing education; (2) be an organized entity or individual, as defined in paragraph (2) of subdivision (i) of section 79-12.8, or another entity that employs licensed psychoanalysts and possesses the expertise to offer courses/educational activities; or an individual with expertise to provide continuing education to New York State licensed psychoanalysts; or an organization desiring to provide continuing education to New York State licensed psychoanalysts; or an organization that proposes to offer courses of learning or self-study programs to licensed psychoanalysts; or an organized educational entity with expertise in psychoanalytic education and practice; and that meets the requirements of subdivision (i) of section 79-12.8; (3) provide instructor(s) who are qualified to teach the courses; (4) have a method to assess the learning of participants and describe such method; and (5) maintain records for at least six years from the date of completion of coursework, which includes the information listed in paragraph (3) of subdivision (i) of section 79-12.8.

Subparagraph (iii) of paragraph (3) of subdivision (i) of section 79-12.8 states that providers that meet the requirements of paragraph (3) of subdivision (i) of section 79-12.8 will be approved for a three-year term. Subparagraph (iv) of paragraph (3) of subdivision (i) of section 79-12.8 allows the Department to conduct site visits or request information from an approved provider to ensure compliance. Subparagraph (v) of paragraph (3) of subdivision (i) of section 79-12.8 states that a determination by the Department that an approved provider is not meeting the requirements will result in the denial or termination of the provider's approved status. Subparagraph (vi) of paragraph (3) of subdivision (i) of section 79-12.8 requires an instructor who engages in the practice of psychoanalysis to be appropriately licensed or authorized under the Education Law, when the instruction occurs in the State.

Subdivision (j) of section 79-12.8 establishes fees authorized by the statute. Paragraph (1) of subdivision (j) of section 79-12.8 establishes a $45 mandatory continuing education fee to be paid by each licensee, in addition to the registration fees required by sections 6507-a and 8405 of the Education Law. Paragraph (2) of subdivision (j) of section 79-12.8 establishes a fee to be paid by a licensee applying for a conditional registration, pursuant to subdivision (f) of section 79-12.8, that is the same as and in addition to any applicable fee for the triennial registration, in addition to the $45 mandatory continuing education fee. Paragraph (3) of subdivision (j) of section 79-12.8 establishes an application fee of $900 to be paid by an organization or individual requesting the issuance of a permit from the Department to become an approved provider of a formal continuing education program. A fee of $900 must accompany an application for a three-year renewal of this permit.

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@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@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.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department ("Department") to determine and set fees for certifications and permits.

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.

Paragraph (a) of subdivision (1) of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, requires licensed psychoanalysts to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to this requirement for licensees with conditional registration certificates.

Paragraph (b) of subdivision (1) of section 8412 of the Education Law allows licensed psychoanalysts to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed. It also authorizes the Department to adjust the requirement in certain cases.

Paragraph (c) of subdivision (1) of section 8412 of the Education Law, provides an exemption from the continuing education requirement for licensees not engaged in the practice of licensed psychoanalysis and directs the Department to establish continuing education requirements for licensees reentering the profession.

Subdivision (2) of section 8412 of the Education Law provides that a licensed psychoanalyst must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a prorated formula for licensees whose first registration date follows the January 1, 2017 effective date and occurs less than three years from such effective date. A maximum of twelve hours in a thirty-six month registration period may be self-study under the law.

Paragraph (a) of subdivision (3) of section 8412 of the Education Law authorizes the Department to issue conditional registrations for licensed psychoanalysts who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration in addition to the fee for triennial registration.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law defines acceptable continuing education as formal courses of learning and educational activities which contribute to professional practice in licensed psychoanalysis and which meet the standards prescribed in the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires that continuing education courses must be taken from a provider who has been approved by the Department, based upon an application and fee, pursuant to Regulations of the Commissioner of Education. This subdivision also authorizes the Department to require the completion of continuing education courses in specific subjects to fulfill the continuing education requirement, as needed to contribute to the health and welfare of the public.

Paragraph (b) of subdivision (3) of section 8412 of the Education Law also requires licensed psychoanalysts to maintain adequate documentation

of compliance with the continuing education requirements and provide such documentation at the request of the Department.

Paragraph (c) of subdivision (3) of section 8412 of the Education Law authorizes the Department to charge licensed psychoanalysts a mandatory continuing education fee.

Section (2) of Chapter 486 of the Laws of 2013 provides that the new law shall take effect January 1, 2017, and was amended by Chapter 15 of the Laws of 2014 to authorize the Department to immediately add, amend, and/or repeal any rule or regulation necessary to timely implement the new law requiring the completion of continuing education by licensed psychoanalysts.

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the intent of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which amended Article 163 of the Education Law by adding a new section 8412, which requires the completion of continuing education by licensed psychoanalysts and establishes standards for such continuing education. Specifically, the proposed rule establishes appropriate standards for what constitutes acceptable continuing education, continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of continuing education providers for licensed psychoanalysts and recordkeeping requirements applicable to said approved providers.

3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to ensure continued competency by practicing licensed psychoanalysts by establishing continuing education requirements that must be completed in order to be registered to practice in New York State and to establish requirements for the approval of providers of such continuing education. The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, which is effective January 1, 2017.

As required by statute, the proposed rule is also needed to establish continuing education requirements when there is a lapse in practice, and requirements for licensees under conditional registration. In addition, the proposed rule is needed to establish fees for both the mandatory continuing education for each licensed psychoanalyst and the Department's review of providers of courses of learning or educational activities in order to defray the cost of such review.

4. COSTS:

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

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

(c) Cost to private regulated parties. As authorized by Education Law section 8412(3)(c), the proposed rule includes a mandatory continuing education fee for licensed psychoanalysts at each triennial registration; this mandatory continuing education fee is set at $45. Statutory provisions also require that licensed psychoanalysts complete a prescribed number of hours of acceptable continuing education. The proposed rule establishes a $900 fee for the Department's review of prospective continuing education providers for approval to offer continuing education in the form of courses of learning or educational activities for a three-year term.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of section 8412 of the Education Law relating to mandatory continuing education requirements for licensed psychoanalysts. It does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires each licensee to maintain, or ensure access by the Department to, a record of completed continuing education for six years, which includes: the type of educational activity if an educational activity, the title of the course if a course, the subject of the continuing education, the number of hours completed, the provider's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, and the date and location of the continuing education. In addition, the proposed rule requires providers of continuing education, approved by the Department, to maintain records for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed psychoanalysts in the course if a course, a record of participation of licensed psychoanalysts in the self-instructional coursework, if self-instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course.

7. DUPLICATION:

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 and is necessary to implement Chapter 486 of 2013 as amended by Chapter 15 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to conform the regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards for the continuing education of licensed psychoanalysts 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 regulations of the Commissioner of Education to Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014. Licensed psychoanalysts must comply with the continuing education requirements on the effective date of the authorizing statute, January 1, 2017. The statute and proposed rule establish a phase-in period during which the licensee will be required to complete less than the full 36 hours of continuing education based upon a proration formula. It is anticipated that licensees will be able to comply with the proposed rule by the effective date so that no additional period of time will be necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 486 of the Laws of 2013, as amended by Chapter 15 of the Laws of 2014, which establishes mandatory continuing education requirements for licensed psychoanalysts registered to practice in New York State. This continuing education will be offered by providers approved by the State Education Department ("Department"), some of which may be small businesses. The Department does not know the exact number of providers that will be small businesses, but estimates that number based on its experience with similar requirements in the profession of public accountancy as set forth in the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and providers of such continuing education must be approved by the Department, after a Department review. In accounting, about 800 providers of continuing education are approved by the Department. There are approximately 80 times fewer licensed psychoanalysts (661) as there are individuals licensed in public accountancy (53,567) in this State. Using these numbers, the Department calculates that there will be a need for about 10 providers of continuing education for licensed psychoanalysts. Of these, based upon a survey of the providers in accounting, the Department estimates that about 75 percent or 7 will be small businesses.

The proposed rule does not distinguish between the Department's review of small business entities that seek to provide continuing education to licensed psychoanalysts and the Department's review of any other entity that seeks to offer such coursework and/or programs.

2. COMPLIANCE REQUIREMENTS:

There are compliance requirements for providers seeking approval to offer continuing education to licensed psychoanalysts. An entity or individual must submit an application for advance approval as a provider at least 90 days prior to the date of commencement of the continuing education coursework and/or program for review by the Department. The applicant must document in the application: curricular areas of offerings; its organizational status as an educational entity or expertise in the professional area; the qualifications of course instructors; methods for assessing the learning of participants; and recordkeeping procedures. Approved applicants will be permitted to offer continuing education to licensed psychoanalysts for a three-year term and must apply for renewal of their permit every three years.

3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed rule. The regular staff of small businesses will be able to complete the application needed for the review by the Department.

4. COMPLIANCE COSTS:

An organization or an individual seeking approval as a provider of continuing education to licensed psychoanalysts through a Department review would be required to pay the Department a fee of $900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's or individual's application. Therefore, the annualized cost is $300.

The Department estimates that it would require a staff member or an individual to spend about eight hours to complete the application. Based on

an hourly rate of $37 per hour (including fringe benefits), the Department estimates that the cost of completing the application to be $296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be approximately $98.

An approved provider of continuing education to licensed psychoanalysts would charge fees to those licensees who participate in its approved learning activities which would generate revenue for the provider. Although the fees would vary based on the type and form of the approved learning activities, in a majority of, if not all, cases, the compliance costs would be more than offset by fees paid to an approved provider by those licensees who participate in its approved learning activities.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for provider review by the Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Mental Health Practitioners, many of whom have experience in a small business environment, provided input in the development of the proposed rule. In addition, staff of the Department worked with the statewide and national professional associations and councils that represent licensed psychoanalysts by disseminating information concerning the proposed regulation to these organizations and seeking their input. These organizations include members who own and operate small businesses.

(b) Local Governments:

The proposed rule establishes continuing education requirements for licensed psychoanalysts and standards for providers of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local governments. Because it is evident from the nature of the proposed rule that it will not adversely affect local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for 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 licensed psychoanalysts in New York State. The proposed rule implements the provisions of section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013 and amended by Chapter 15 of the Laws of 2014 that, effective January 1, 2017, require each licensed psychoanalyst to complete 36 hours of continuing education during each three-year registration period. It also establishes standards for both acceptable continuing education to meet this statutory requirement and the State Education Department's ("Department") approval of continuing education providers.

The proposed rule will apply to licensed psychoanalysts 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. All 661 licensed psychoanalysts who are registered by the State Education Department to practice in New York State will be subject to the requirements of the proposed rule. Of these, 17 licensed psychoanalysts (2.6%) report that their permanent address of record is in a rural county of the State.

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

As required by section 8412 of the Education Law, the proposed rule will require licensed psychoanalysts, including those that reside or work in rural areas, to complete 36 hours of acceptable continuing education to be registered to practice in New York State. The proposed rule defines acceptable continuing education subjects and other types of educational activities that the Department will accept to satisfy the statutorily mandated continuing education requirements. The proposed rule requires licensees to certify that they have met the requirements upon applying for renewal of registration to practice in New York State. The proposed rule requires each licensee to maintain prescribed information concerning completed acceptable continuing education for six years from the date of completion of said education.

The proposed rule also establishes standards for the Department's approval of prospective continuing education providers desiring to offer acceptable continuing education in the form of courses of learning and/or self-study programs, including providers, who may be located in rural areas. The proposed rule requires such approved providers to maintain specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework and/or programs.

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

3. COSTS:

The proposed rule implements provisions in the statute that authorize the Department to establish a continuing education fee on each licensed psychoanalyst and a fee for the Department review and approval of entities or individuals seeking to become an approved provider of continuing education for a three-year term. These fees are set at $45 and $900 respectively, consistent with the fees charged in other professions.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements and clarifies the continuing education requirements for licensed psychoanalysts found in section 8412 of the Education Law. 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 licensed psychoanalysts, regardless of their geographic location, to help ensure a uniform standard of continuing competency across the State.

The Department has also determined that uniform standards for the Department's review of providers are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of licensed psychoanalysis. Included in this group was the State Board for Mental Health Practitioners and professional associations representing the psychoanalysis profession. These groups have members who live or work 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 Chapter 486 of the Laws of 2013 as amended by Chapter 15 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 State Education Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

Section 8412 of the Education Law, as added by Chapter 486 of the Laws of 2013, effective January 1, 2017, and amended by Chapter 15 of the Laws of 2014, establishes mandatory continuing education requirements for licensed psychoanalysts registered to practice in New York State. The proposed rule implements the requirement of Chapter 486 of the Laws of 2013 as amended by Chapter 15 of the Laws of 2014, that each licensed psychoanalyst complete 36 hours of continuing education during each three-year registration period and establishes standards for both acceptable continuing education to meet this statutory requirement and the Department's approval of continuing education providers.

Because, the proposed regulation implements specific statutory requirements and directives, any impact on jobs and employment opportunities created by establishing a continuing education requirement for licensed psychoanalysts is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform with the requirements of the statute. In any event, similar statutory continuing education requirements were established for individuals licensed as physical therapists in 2009 and licensed massage therapists in 2012, and the Department is not aware that those requirements significantly affected jobs or employment opportunities in those professions. In addition, the statutory continuing education requirement for licensed psychoanalysts may increase job and employment opportunities for prospective approved continuing education providers and their current and potential employees.

Therefore, 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 job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

State Board of Elections

NOTICE OF ADOPTION

State Board of Elections Civil Enforcement Hearing Procedure

I.D. No. SBE-32-15-00003-A
Filing No. 925
Filing Date: 2015-10-23
Effective Date: 2015-11-10

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

Action taken: Addition of Part 6218 to Title 9 NYCRR.

Statutory authority: Election Law, sections 3-102(1), (17) and 3-104(8)

Subject: State Board of Elections Civil Enforcement Hearing Procedure.

Purpose: To provide a fair process of civil enforcement that ensures due process of law in all administrative adjudicatory proceedings.

Substance of final rule: The proposed rulemaking adds a new Part 6218 to Subtitle V of Title 9 of the NYCRR. The new Part provides for a civil enforcement hearing process as required by Election Law section 3-104(5). Section 6218.01 reflects the intent of the section to provide for a fair and efficient process of civil enforcement. Section 6218.02 provides for hearing officers, including the manner of selection and the qualifications and obligations. Section 6218.03 provides for commencement of Election Law 3-104 administrative proceedings and various requisites related thereto. Section 6218.04 provides for the conduct of adjudicatory proceedings and various related matters. Section 6218.05 provides for the scope and time of settlement of civil enforcement matters and matters related thereto. Section 6218.06 provides for the manner of making written statements under penalties of perjury. Section 6218.07 provides that strict rules of evidence do not apply to administrative proceedings under this Part. Section 6218.08 provides for service of rules and other materials in accordance with law. Section 6218.09 provides that every party or witness is entitled to counsel at their own expense. Section 6218.10 provides a process for adjournments in proceedings. Section 6218.11 provides for discovery and subpoenas. Section 6218.12 provides time periods, including a general rule that proceedings under this Part should be concluded within ninety days of a hearing or other specified event.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 6218.04(e).

Text of rule and any required statements and analyses may be obtained from: Brian L. Quail, Esq., State Board of Elections, 40 North Pearl Street, Suite 5, Albany, New York 12207, (518) 474-2063, email: brian.quail@elections.ny.gov

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

The only change between the rule as published and adopted is the correction of a statutory reference in proposed 6218.04(e). The proposed rule made reference to section 301 of the State Administrative Procedures Act. The correct reference was to section 307. This technical correction was made by the State Board at adoption, and the correction did not change the meaning of the Part nor any portion of the State Board's prior assessments of the proposed rule making.

Initial Review of Rule

As a rule that does not require a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement, will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The State Board of Elections received only one comment, an email from a staff member of the New York State Assembly identifying an incorrect citation in proposed 6218.04(e). The reference in proposed 6218.04(e) to section 301 of the State Administrative Procedures Act should have referred to section 307. This technical correction was made accordingly in the Part duly adopted by the State Board.

Areas in Which Comments Resulted in Non-Substantial Revsions to Regulations:

The reference in proposed 6218.04(e) to section 301 of the State Administrative Procedures Act should have referred to section 307, and this change was made in the version adopted by the State Board.

Comments Which Did Not Go to Substance of Proposed Regulations:

No comments other than the one described above were received.

NOTICE OF ADOPTION

Administration of Oaths, Examination of Witnesses and Issuance of Subpoenas for the Purpose of Conducting Investigations

I.D. No. SBE-32-15-00024-A
Filing No. 926
Filing Date: 2015-10-23
Effective Date: 2015-11-10

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

Action taken: Repeal of section 6203.1; and addition of section 6203.1 to Title 9 NYCRR.

Statutory authority: Election Law, sections 3-102(1), (17) and 3-104(8)

Subject: Administration of oaths, examination of witnesses and issuance of subpoenas for the purpose of conducting investigations.

Purpose: To update Part 6203 of 9 NYCRR as a result of Laws of 2014, chapter 55, part H, subpart B.

Text or summary was published in the August 12, 2015 issue of the Register, I.D. No. SBE-32-15-00024-P.

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

Text of rule and any required statements and analyses may be obtained from: Brian L. Quail, Esq., State Board of Elections, 40 North Pearl Street, Suite 5, Albany, New York 12207, (518) 474-2063, email: brian.quail@elections.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Science-Based State Sea-Level Rise Projections

I.D. No. ENV-45-15-00028-P

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

Proposed Action: Addition of Part 490 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, section 3-0319

Subject: Science-based State sea-level rise projections.

Purpose: To establish a common source of sea-level rise projections for consideration in relevant programs and decision-making.

Text of proposed rule: *Part 490 Projected Sea-Level Rise*

490.1 Purpose

This Part establishes science-based projections of sea-level rise for New York State's tidal coast.

490.2 Applicability

This Part applies to consideration of sea-level rise by the Department, other State agencies, and applicants for relevant permits and approvals in the context of programs specified in the Community Risk and Resiliency Act.

490.3 Definitions

For the purposes of this Part, the following definitions apply:

(a) '2020s'. The years 2020 through 2029.

(b) '2050s'. The years 2050 through 2059.

(c) '2080s'. The years 2080 through 2089.

(d) 'Baseline level'. The average level of the surface of marine or tidal water over the years 2000 through 2004.

(e) 'ClimAID model outputs'. Projections based on the outputs of global climate models, downscaled to New York, and additional information,

including information to account for anticipated changes in the rates of ice melt that cannot yet be more rigorously included in quantitative models.

(f) 'Community Risk and Resiliency Act'. Chapter 355 of the Laws of 2014.

(g) 'Department'. The New York State Department of Environmental Conservation.

(h) 'High-medium projection'. The amount of sea-level rise that is unlikely (the 75th percentile of ClimAID model outputs) to be exceeded by the specified time interval.

(i) 'High projection'. The amount of sea-level rise that is very unlikely (the 90th percentile of ClimAID model outputs) to be exceeded by the specified time interval.

(j) 'Long Island Region'. The marine coast of Nassau and Suffolk counties.

(k) 'Lower Hudson-New York City Region'. The main stem of the Hudson River, south from the mouth of Rondout Creek at Kingston, New York, and the marine coast of the five boroughs of New York City and the Long Island Sound in Westchester County.

(l) 'Low-medium projection'. The amount of sea-level rise that is likely (the 25th percentile of ClimAID model outputs) to be exceeded by the specified time interval.

(m) 'Low projection'. The amount of sea-level rise that is very likely (the 10th percentile of ClimAID model outputs) to be exceeded by the specified time interval.

(n) 'Medium projection'. The amount of sea-level rise that is about as likely as not (the mean of the 25th and 75th percentiles of ClimAID model outputs) to be exceeded by the specified time interval.

(o) 'Mid-Hudson Region'. The main stem of the Hudson River, from the federal dam at Troy to the mouth of Rondout Creek at Kingston, New York.

(p) 'Sea-level rise'. The increase in the average level of the surface of marine or tidal water for the specified geographic region.

490.4 Projections

The tables in subdivisions (a), (b), and (c) of this section establish projected sea-level rise for the specified geographic region relative to the baseline level.

(a) Mid-Hudson Region

Time Interval	*Low Projection*	*Low-Medium Projection*	*Medium Projection*	*High-Medium Projection*	*High Projection*
2020s	*1 inch*	*3 inches*	*5 inches*	*7 inches*	*9 inches*
2050s	*5 inches*	*9 inches*	*14 inches*	*19 inches*	*27 inches*
2080s	*10 inches*	*14 inches*	*25 inches*	*36 inches*	*54 inches*
2100	*11 inches*	*18 inches*	*32 inches*	*46 inches*	*71 inches*

(b) New York City/Lower Hudson Region

Time Interval	*Low Projection*	*Low-Medium Projection*	*Medium Projection*	*High-Medium Projection*	*High Projection*
2020s	*2 inches*	*4 inches*	*6 inches*	*8 inches*	*10 inches*
2050s	*8 inches*	*11 inches*	*16 inches*	*21 inches*	*30 inches*
2080s	*13 inches*	*18 inches*	*29 inches*	*39 inches*	*58 inches*
2100	*15 inches*	*22 inches*	*36 inches*	*50 inches*	*75 inches*

(c) Long Island Region

Time Interval	*Low Projection*	*Low-Medium Projection*	*Medium Projection*	*High-Medium Projection*	*High Projection*
2020s	*2 inches*	*4 inches*	*6 inches*	*8 inches*	*10 inches*
2050s	*8 inches*	*11 inches*	*16 inches*	*21 inches*	*30 inches*
2080s	*13 inches*	*18 inches*	*29 inches*	*39 inches*	*58 inches*
2100	*15 inches*	*21 inches*	*34 inches*	*47 inches*	*72 inches*

Text of proposed rule and any required statements and analyses may be obtained from: Mark Lowery, NYSDEC, Office of Climate Change, 625 Broadway, Albany, NY 12233-3251, (518) 402-8448, email: mark.lowery@dec.ny.gov

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

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

Additional matter required by statute: Pursuant to Article 8 of the Environmental Conservation Law (the State Environmental Quality Review Act), a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

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

Summary of Regulatory Impact Statement

INTRODUCTION

On September 22, 2014, Governor Cuomo signed into law the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014 (CRRA). CRRA is intended to ensure that decisions regarding certain State permits and expenditures consider climate risk, including sea-level rise. Among other things, CRRA requires the Department of Environmental Conservation (Department) to adopt regulations establishing science-based State sea-level rise projections. Therefore, the Department is proposing to establish a new 6 NYCRR Part 490, Projected Sea-level Rise (Part 490). Part 490 will establish projections of sea-level rise in three specified geographic regions over various time intervals, but will not impose any requirements on any entity.

STATUTORY AUTHORITY

The statutory authority to promulgate Part 490 is found in Environmental Conservation Law (ECL) § 3-0319, which was added by CRRA. ECL § 3-0319 requires the Department to adopt regulations establishing science-based State sea-level rise projections by January 1, 2016. The promulgation of Part 490 by the Department will fulfill this statutory requirement.

LEGISLATIVE OBJECTIVES

CRRA was enacted with the purpose of ensuring that decisions regarding certain state permits, regulations, and expenditures include consideration of the effects of climate risk, including sea-level rise, and extreme weather events. Part 490 will implement one component of this objective by providing a common source of sea-level rise projections for consideration within these programs

NEEDS and BENEFITS

CRRA enumerates several permitting, regulatory and funding programs in which the applicants, the Department, or other relevant State agencies shall be required to consider future climate risk, including sea-level rise. Adoption of Part 490 will help to ensure that sea-level rise projections are incorporated into these decision-making processes in a consistent, transparent manner and will contribute to regulatory certainty.

Stakeholder Outreach

The Department conducted outreach to stakeholders in several fora prior to proposing Part 490. This outreach included interaction with the authors of various reports regarding sea-level rise in order to gain understanding of the most current and applicable science. For example, the Department held a teleconference with the authors of two reports on March 6, 2015. Moreover, the Department held individual discussions with certain particularly interested stakeholders, such as the City of New York on June 1, 2015. In addition, the Department's stakeholder outreach included five public informational and listening sessions, at which Department staff presented background on CRRA and the scientific information the Department considered in developing Part 490. These meetings were advertised through Departmental press release and in the Department's Environmental Notice Bulletin, and were held on June 23-25 at locations in Albany, New York City, and Nassau and Suffolk Counties. At these meetings, the Department received input from stakeholders on Part 490.

Summary of Projection Format

Based in part on this input, the Department proposes to adopt five projections for each of three regions of the State. The three regions of the State are Long Island, New York City and the Lower Hudson River upstream to Kingston, and the Mid-Hudson River from Kingston upstream to the federal dam at Troy. These three regions exhibit small differences in relative sea-level rise due to local conditions. The five projections for these three regions are low, low-medium, medium, high-medium and high. These qualitative terms refer to the rate of rise, not to ultimate water levels, as warming of the Earth system has already resulted in a long-term commitment of at least six feet of global sea-level rise (Strauss, 2013[1]). In other words, while there is some uncertainty regarding the precise rate at which sea level will rise, there is relative certainty that global sea level will ultimately rise at least six feet over current levels. Finally, each of these projections is presented for four different time periods: the 2020s, 2050s, and 2080s, and the year 2100.

ClimAID Report

The Department's proposed sea-level rise projections in Part 490 are based on sea-level rise projections included in Horton et al. (2014[2]), prepared for the New York State Energy Research and Development Authority, also known as the ClimAID report. ClimAID's projections are based on the outputs of more than 20 global climate models, downscaled to New York, using the Intergovernmental Panel on Climate Change's (IPCC) Representative Concentration Pathways (RCP) 4.5 and 8.5 as inputs. RCP 4.5 describes a scenario in which global greenhouse gas emissions increase only slightly before declining around the year 2040, leading to a stabilization of atmospheric greenhouse gas concentrations shortly after the year 2100. RCP 8.5 assumes no significant global emission-reduction policies are implemented and emissions increase, leading to higher atmospheric greenhouse gas concentrations.

ClimAID's projections also incorporate additional information, e.g., expert judgment, to account for anticipated changes in rates of ice melt that cannot yet be more rigorously included in quantitative models. The methods used by Horton et al. (2014[3]) are identical to those used to generate sea-level rise projections for the New York City Panel on Climate Change (NPCC) and are described in more detail in Horton et al. (2015[4]) and NPCC (2015[5]).

The Department is basing its proposed low, low-medium, high-medium and high projections for the three regions on the 10th, 25th, 75th and 90th percentiles of ClimAID model outputs, respectively. The medium projection represents the 50th percentile of ClimAID's model outputs, calculated as the average of the 25th- and 75th-percentile outputs. Stakeholders suggested that the Department add a 50th-percentile projection as many New York City agencies are using the 50th-percentile projection in their operational planning.

Comparison of ClimAID Report to Other Reports

As required by ECL § 3-0319, the Department considered various sources of information in proposing to adopt projections in Part 490 based on the ClimAID report. This includes projections prepared for the National Climate Assessment and the New York State Resiliency Institute for Storms and Emergencies (RISE).

The Department has considered numerous factors in proposing to base Part 490 on the ClimAID projections rather than on more conservative, less protective projections based primarily on process modeling. First, adoption of projections based on the ClimAID report ensures that regulators, planners and others have access to projections developed specifically for New York State and accounting for regional and local factors not considered in development of global sea-level rise projections. Second, the ClimAID research was conducted by the same research team that provided the NPCC projections, using the same methodologies, which have been peer reviewed and published in established scientific journals. Third, ClimAID provides projections for the entire tidal coast of the state, including the Hudson River upstream to the federal dam in Troy, rather than just Long Island and New York City. Fourth, New York City has already adopted the NPCC/ClimAID projections for its planning purposes; a State regulation based on alternative projections could create confusion among the public, planners and regulated community.

Finally, the proposed projection distribution (low, low-medium, medium, high-medium and high) constitutes a range suitable for risk-based planning and review of projects of varying projected life times and criticality. Although unlikely to occur in the more immediate future, the inclusion of higher sea-level rise projections in Part 490 allows for decision makers to consider the possibility in the context of the programs specified by CRRA.

Perhaps most importantly, the question for decision makers is not if a critical sea level will be reached, but when. Strauss (2013[6]) calculated that historic greenhouse gas emissions have already committed the globe to a mean sea-level rise of 6.2 feet over current levels. Even more conservative projections of rates of sea-level rise indicate sea-level rise of approximately six feet within the next 150 years. Thus, a full range of projections in Part 490 that includes higher values is appropriate to allow for consideration of a level of sea-level rise that will likely occur at some point, even if the timing of such occurrence is uncertain.

COSTS

Part 490 will not impose any costs on any entity because the regulation consists only of sea-level rise projections and does not impose any standards or compliance obligations. Therefore, there are no costs associated with Part 490. Likewise, the regulation will also not impose any additional costs on the Department or local government entities.

LOCAL GOVERNMENT MANDATES

Part 490 will not create any mandates for local governments, including any additional recordkeeping, reporting, or other requirements.

PAPERWORK

No additional record keeping, reporting, or other requirements will be imposed under this rulemaking.

DUPLICATION

This proposal does not duplicate, overlap, or conflict with any other federal or State regulations or statutes.

ALTERNATIVES

Alternatives to this proposal include: (1) No action, or not establishing Part 490, (2) basing the adopted projections on other scientific reports, and (3) using an alternative projection format.

1) No Action - Not establishing Part 490 is not an available alternative because ECL § 3-0319 requires the Department to adopt a regulation establishing science-based State sea-level rise projections.

2) Other Reports – The Department considered basing its proposed projections on several alternative scientific reports other than the ClimAID report, including Parris et al., (2012[7]), completed for the National Climate Assessment, and Zhang et al., (2014[8]), prepared for RISE. The Department also reviewed and considered information contained in reports of the Intergovernmental Panel on Climate Change (Church et al., 2013[9]), New York State Sea Level Rise Task Force[10] and the New York City Panel on Climate Change.[11] The Department rejected basing the projections in Part 490 on any of these other reports because, among other reasons, the ClimAID report covers the entire tidal coast of the State, accounts for local and regional variations in sea-level rise, and incorporates the possibility of rapid ice melt.

3) Other Formats – The Department considered using a different projection format in Part 490, such as different geographic regions or time intervals. The Department is proposing Part 490 in a format that includes five projections for each of three geographic regions based on stakeholder input and because it is consistent with the format of the ClimAID report.

FEDERAL STANDARDS

There are no federal rules or other legal requirements relevant to Part 490. Therefore, this proposal does not result in the imposition of requirements that exceed any minimum standards of the federal government for the same or similar subject areas.

COMPLIANCE SCHEDULE

There is no compliance schedule required by the establishment of Part 490 because the rule does not impose any compliance obligations on any entity.

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[1] Strauss, B. 2013. Rapid accumulation of committed sea-level rise from global warming. Proc. Natl. Acad. Sci. USA. doi: 10.1073/pnas.1312464110

[2] Horton, R., D. Bader, C. Rosenzweig, A. DeGaetano, and W. Solecki. 2014. Climate Change in New York State: Updating the 2011 ClimAID Climate Risk Information. New York State Energy Research and Development Authority (NYSERDA), Albany, New York.

[3] Horton et al., 2014. Op. cit.

[4] Horton, R., C. Little, V. Gornitz, D. Bader and M. Oppenheimer. 2015. New York City Panel on Climate Change 2015 Report: Sea level rise and coastal storms. Ann. New York Acad. Sci. 1336:36-44. doi:10.1111/nyas.12593

[5] NPCC 2015: Appendix IIB. Sea level observations and projections: Methods and Analyses. Ann. N.Y. Acad. Sci. 1336(1):116-150. doi:10.1111/nyas.12593

[6] Strauss. 2013. Op. cit.

[7] Parris, A., P. Bromirski, V. Burkett, D. Cayan, M. Culver, J. Hall, R. Horton, K. Knuuti, R. Moss, J. Obeysekera, A. Sallenger, and J. Weiss. 2012. Global Sea Level Rise Scenarios for the US National Climate Assessment. NOAA Tech Memo OAR CPO-1. 37 pp.

[8] Zhang, Minghua, Henry Bokuniewicz, Wuyin Lin, Sung???Gheel Jang, and Ping Liu, 2014: Climate Risk Report for Nassau and Suffolk, New York State Resilience Institute for Storms and Emergencies (NYS RISE), NYS RISE Technical Report TR???0???14???01, 49 pp.

[9] Church, J.A. 2013. Chap. 13: Sea level change, in climate change 2013: The Physical Science Basis, edited by T.F. Stocker, D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y.xia, V. Bex, and P. Midgley, pp 1137-1216. Cambridge Univ. Press, Cambridge, U.K.

[10] New York State Sea Level Rise Task Force: Report to the Legislature. 2010. New York State Department of Environmental Conservation. 103 pp.

[11] Horton et al. 2015. Op. cit.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required for Part 490. The Department is proposing this rulemaking to provide a common source of sea-level rise projections for consideration within programs specified by the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014. Because the proposed rule will not impose any requirements on any entity, no small business or local governments will be directly affected by the rule.

Rural Area Flexibility Analysis
A Rural Area Flexibility Analysis is not required for Part 490. The Department is proposing this rulemaking to provide a common source of sea-level rise projections for consideration within programs specified by the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014. Because the proposed rule will not impose any requirements on any entity, it will not create any new or additional effect on rural communities.

Job Impact Statement
A Job Impact Statement is not required for Part 490. The Department is proposing this rulemaking to provide a common source of sea-level rise projections for consideration within programs specified by the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014. Because the proposed rule will not impose any requirements on any entity, it will not have any effect on jobs or employment opportunities.

New York State Gaming Commission

NOTICE OF ADOPTION

Video Lottery Gaming Facility Closing Hours

I.D. No. SGC-35-15-00001-A
Filing No. 929
Filing Date: 2015-10-27
Effective Date: 2015-11-10

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

Action taken: Amendment of section 5118.9 of Title 9 NYCRR.

Statutory authority: Tax Law, section 1617-a(b); Racing Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1) and (19)

Subject: Video lottery gaming facility closing hours.

Purpose: To remove the 4:00 a.m. restriction, which is now superseded by new subdivision (b) of Section 1617-a of the Tax Law.

Text or summary was published in the September 2, 2015 issue of the Register, I.D. No. SGC-35-15-00001-P.

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

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

Initial Review of Rule
As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 5th year after the year in which this rule is being adopted

Assessment of Public Comment
The agency received no public comment.

Department of Health

NOTICE OF ADOPTION

Audited Financial Statements for Managed Care Organizations

I.D. No. HLT-42-14-00001-A
Filing No. 921
Filing Date: 2015-10-21
Effective Date: 2015-11-10

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

Action taken: Amendment of section 98-1.16(c); and addition of Subpart 98-3 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 4403(2) and (f)(7)

Subject: Audited Financial Statements for Managed Care Organizations.

Purpose: To extend audit and reporting standards to all managed care organizations (MCOs), including PHSPs, HIV SNPs and MLTCPs.

Substance of final rule: The purpose of the amendments is to extend audit and reporting standards to all managed care organizations (MCOs) certified under Article 44 of the Public Health Law. The amendments will apply to MCOs (Prepaid Health Services Plans, HIV Special Needs Plans and Managed Long Term Care Plans) (PHSPs, HIV SNPs and MLTCPs) that were not included under the Department of Financial Services Regulation 118. This will ensure that all MCOs authorized to operate under Article 44 must adhere to the same financial reporting requirements and standards in the filing of audited financial statements.

The proposed regulation is closely patterned upon 11 NYCRR 89 (Regulation 118) adopted by the Department of Financial Services and the National Association of Insurance Commissioners model audit rule (''NAIC model'') that reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model imposes additional rules patterned on the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (''SOX''), and is similar to Regulation 118 and the proposed amendments to Part 98.

The proposal adds provisions to Part 98 regarding the following:

- Designation of CPA.
- Qualifications of CPA.
- Consolidated or combined audits.
- Scope of audit and report of CPA.
- Notification of adverse financial condition.
- Communication of internal control related matters noted in an audit.
- CPA's letter of qualifications.
- Availability and maintenance of CPA work papers.
- Requirements for audit committees.
- Conduct of MCO in connection with the preparation of required reports and documents.
- Management's report of internal control over financial reporting.
- Effective date and special rules.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 98-3.4(a), 98-3.5(c)(2) and 98-3.16(a)(1).

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

Revised Regulatory Impact Statement
Statutory Authority:
Sections 4403(2), 4403-f(7) of the Public Health Law. These sections establish the Commissioner's authority to promulgate regulations governing the operations of managed care organizations (MCOs), including the preparation and filing of audited financial statements.

Public Health Law section 4403(2) states the Commissioner may adopt and amend rules and regulations pursuant to the state administrative procedures act to effectuate the purposes and provisions of Article 44.

Public Health Law section 4403-f(7) states the Commissioner shall promulgate regulations to implement this section and to ensure the quality, appropriateness and cost-effectiveness of the services provided by managed long term care plans.

Legislative Objectives:
10 NYCRR 98 was extensively amended in 2005 to further implement the provisions of Article 44 of the Public Health Law. The proposed amendment to section 98-1.16(c) and the promulgation of the new section 98-3 adds new provisions consistent with the provisions of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (''SOX'') and 11 NYCRR 89.

Needs and Benefits:
SOX imposes a comprehensive regime of audits and internal management controls and reports designed to ensure greater transparency and accountability.

The proposed regulation is closely patterned upon 11 NYCRR 89 (Regulation 118) adopted by the Department of Financial Services (DFS), formerly the NYS Department of Insurance, and the National Association of Insurance Commissioners model regulation (''NAIC model'') that reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model imposes additional rules patterned on SOX and is similar to Regulation 118 and the proposed amendments to Part 98. For example, the NAIC model, Regulation 118 and the proposed amendments to Part 98 all require the regulated insurer to forbid its certified independent public accountant (CPA) from entering into an agreement of indemnity or release from liability.

The proposed amendments will apply to managed care organizations (MCOs), such as PHSPs, HIV SNPs and MLTCPs, that were not included under Regulation 118. This will ensure that all MCOs authorized to oper-

ate under Article 44 must adhere to the same financial reporting requirements and standards.

The proposed amendments, once adopted, will ensure that regulated companies engage in best practices related to auditor independence, corporate governance and internal controls over financial reporting.

Costs:

This regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Health Department. Costs to be incurred by the parties affected differ depending upon the size of the company and whether that company is publicly held and thus already required to comply with SOX. Companies regulated by SOX will incur few additional costs. Compliance cost estimates received by DFS from a cross-section of affected companies that are not subject to SOX are most often estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the cost is estimated to be about $25,000.

Local Government Mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

Paperwork:

Paperwork associated with filings to the commissioner should be minimal. The paperwork associated with the audit and controls regime required by the proposed regulation should also be minimal.

Duplication:

The proposal does not duplicate any existing federal, state, or local regulations.

Alternatives:

In developing Regulation 118, the DFS obtained industry input and hued to the model regulation developed by the National Association of Insurance Commissioners (the ''NAIC model'') to implement SOX to the extent possible. However, the model has been modified as necessary to comply with New York statutes and regulations. The proposed regulation also restricts its application only to those entities over which the Health Department has jurisdiction unlike the NAIC model, which also contains rules that apply to CPAs.

Several comments received by DFS noted the compliance difficulties faced by foreign companies and United States branches of alien insurers, specifically with respect to the roles to be performed by persons not residing in the United States and for the reporting requirements to be imposed upon an integrated enterprise containing insurers in New York as well as entities with no nexus to New York. In response, the DFS modified Regulation 118, as reflected in the proposed amendments to part 98, to provide detailed rules as to whether members of management may attest to filings, and to establish limited exceptions available only to these entities, in addition to the provision that permits a waiver of any provision of the regulation upon evidence of financial or organizational hardship.

Another commenter objected to restrictions on using the same CPA for SOX audit work and tax return preparation for more than a five-year period for small companies. The exemption from any provision of the proposed regulation available upon proof of financial or organization hardship now addresses this comment.

Several comments noted that a company may be required to file both SOX reports and the reports required by the NAIC model as adopted by the various states. Companies want to avoid making duplicative filings to those required by the state of domicile. The proposed regulation contemplates accepting the domiciliary state filings as New York filings to the extent that they are substantially similar to those required by the proposed regulation.

Several comments noted differences between the NAIC model and the proposed regulation on filing deadlines, exceptions and the rules governing confidentiality of work papers. Different dates or deadlines are due to restrictions in New York law that require modification to the NAIC model. Certain automatic exclusions from the NAIC model could not be included in the proposed regulation to the extent that they conflict with New York law. Finally, the confidentiality of commercial information, including work papers, obtained by state and local government is already subject in New York to a comprehensive regime of rules, exceptions and requirements, and thus did not need to be addressed in the proposed regulation.

Federal Standards:

The federal rules under SOX are extensive. The provisions in the proposed regulation are similar to the comparable federal provisions. The regulation does not conflict with any federal rules.

Compliance Schedule:

The regulation would apply beginning with the reporting period ending December 31, 2015. The initial audited financial statements completed under this regulation would be the 2015 annual statements due April 1, 2016.

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

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

Assessment of Public Comment

The public comment period for this regulation ended on December 8, 2014. The Department received 4 comments.

One comment was submitted by Hinman Straub, P.C. on behalf of a prepaid health services plan (PHSP) in Western New York that offers Medicaid Managed Care (MMC), Family Health Plus (FHP) and CHP programs. The comment was a request to revise the regulation to allow PHSPs to file financial reports using either statutory accounting principles (SAP) or generally accepted accounting principles (GAAP).

The Model Audit Rule that was submitted for comment provided for PHSPs, MLTCs and HIV SNPs submitting their audited financial statements on a SAP basis. The proposed rule would clarify that PHSPs, MLTCs, and HIV SNPs may submit the audited financial statement in accordance with GAAP, as long as a reconciliation to SAP is also included, in order to align the Model Audit Rule with DFS Regulation 118.

Another comment was from the Health Plan Association (HPA), and it stated that PHSPs, HIV SNPs and MLTCs would need an additional year to come into compliance with the Proposed Regulation. In addition, the comment indicated that the Proposed Regulation did not apply the same standards to financial reports as DFS Regulation 118, therefore the financial reports HMOs file with DFS might not comply with this proposed regulation. The comment requested that Section 98-3.4 of the Proposed Regulation be revised to allow MCOs to file audited financial statements in accordance with GAAP, in conformance with Insurance Regulation 118. Also, the comment requested that Section 98-3.15 of the Proposed Regulation be amended to clarify that the $500 million premium threshold be based on December 31st of the prior year, for purposes of the requirement of preparing a report of the MCO's internal control over financial reporting.

The Proposed Regulation had been discussed for several years with the MCOs and the health plan associations, which has provided adequate time for implementation. As previously indicated, the proposed rule is being clarified to allow PHSPs, MLTCs, and HIV SNPs to submit the audited financial statement in accordance with GAAP, with a reconciliation to SAP, in order to align with DFS Regulation 118. The intent of the internal control over financial reporting requirement is based on MCO premiums for prior year ending December 31st. For example, at year end 12/31/2015, the MCO will be required to file the internal control over financial report if total premium reached $500 million for 2014 as required in the regulation.

Another comment, from Greenberg Traurig, expressed concern that the reporting requirements for HMOs under the Proposed Model Audit Rule Regulation (Proposed 10 NYCRR 98-3) and under DFS Regulation 118 are not the same.

As indicated above, the proposed rule is being clarified to allow PHSPs, MLTCs, and HIV SNPs to submit the audited financial statement in accordance with GAAP, with a reconciliation to SAP, to align with DFS Regulation 118.

A comment from the State Assembly (Richard Gottfried & Kenneth Zebrowski) pointed out that the Proposed Regulation would result in a financial and organizational hardship for PHSPs, HIV SNPs and MLTCs. In addition, the comment requested that the Proposed Regulation be amended to include clarification as provided in a recent DFS Amendment, which requires that whenever a CPA is dismissed or resigns, the MCO must submit a letter within 15 business days "stating whether there were any disagreements at the decision-making level with the former CPA within the previous 2 years."

While the Department understands that there will be a cost to plans in implementing the Proposed Regulation, the Department wants to have consistent financial reporting requirements for all plans. The regulation has been clarified in accordance with DFS Regulation 118 which clarifies when the MCO needs to submit a letter to DOH regarding when a CPA is dismissed or resigns.

Division of Homeland Security and Emergency Services

EMERGENCY RULE MAKING

Registration of Manufacturers, Distributors, Wholesalers, Various Retailers of Sparkling Devices

I.D. No. HES-32-15-00002-E
Filing No. 927
Filing Date: 2015-10-23
Effective Date: 2015-10-23

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

Action taken: Addition of Part 225 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 156(20) and 156-h; L. 2014, ch. 477

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

Specific reasons underlying the finding of necessity: Executive Law section 156-h requires that the Office of Fire Prevention and Control promulgate rules regarding registration of manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers of sparkling devices. Registration is required prior to the legal sale of such sparkling devices. This rule includes the registration processes, fees and reporting requirements. Accordingly, this rule must be adopted on an emergency basis in order to ensure that such procedures are in effect to assure the public's safety and general welfare.

Subject: Registration of manufacturers, distributors, wholesalers, various retailers of sparkling devices.

Purpose: Establish the registration process, fees and reporting requirements related to sparkling devices.

Substance of emergency rule: Part 225 Sparkling Devices

Section 225.1 Definitions

Establishes definitions of sparkling devices according to new statutory language. Establishes that "Sparkling Devices" are consumer fireworks for the purpose of the Uniform Fire Prevention and Building Code and National Fire Protection Association standard 1124 (2006).

Section 225.2 Registration

Requires every manufacturer, distributor, wholesaler, specialty retailer, or permanent retailer of sparkling devices to annually register with the Office of Fire Prevention and Control. Requires temporary (seasonal) retailers to register with the Office of Fire Prevention and Control each selling season. Establishes the registration process and related documentation required as part of the registration package.

Section 225.3 Fees

Establishes application fees; the revenue of which goes to the Office of Fire Prevention and Control to be used for firefighter safety and training programs as well as for the registration process, consistent with Executive Law § 156-h. A manufacturer, distributor, or wholesaler must pay an annual registration fee of $5,000; a specialty retailer must pay an annual registration fee of $2,500; a permanent retailer must pay an annual registration fee of $200 for each location; and a temporary seasonal retailer must pay a registration fee of $250 per season for each location.

Section 225.4 Certification

The Office of Fire Prevention and Control is responsible to issue a certification valid for one year to manufacturers, distributors, and wholesalers. Certificates issued to temporary seasonal retailers will be valid for 30 days before through 30 days after the dates of the selling season specified in General Business Law § 392-j. Non-compliance with any of the requirements set forth may result in a revocation of the certificate of registration, as determined by the Office of Fire Prevention and Control. Revocation shall remain in effect until the manufacturer, distributor, wholesaler, specialty retailer, permanent retailer, or temporary seasonal retailer provides evidence of compliance acceptable to the Office of Fire Prevention and Control.

Section 225.5 Records and Reports

Manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers shall maintain, and make available to the Office of Fire Prevention and Control, records regarding the name and quantity of any sparkling devices produced in, imported to, exported from, or sold in New York. Establishes the Office of Fire Prevention and Control's authority to inspect to assure compliance with the terms of registration/certification.

Section 225.6 Reporting of incidents

Requires manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers to report basic information regarding incidents of fires or explosions, including accidental discharge of sparkling devices that occur on premises, to the Office of Fire Prevention and Control within 24 hours if no injury or death; or within 1 hour, or as soon as practicable if injury or death is involved. The Office of Fire Prevention and Control is responsible to share information with local code enforcement officials, as appropriate.

Section 225.7 General Requirements

Requires posting of documentation in each location of business, to include: copy of the Office of Fire Prevention and Control certification for such location; the list, as most recently published by the New York State Police, of counties and cities that have opted by local law to legalize the use of sparkling devices; a copy of any Federal Permit(s) (if applicable); a copy of the Insurance Certificate; and a copy of a sparkling device safety pamphlet produced by the Office of Fire Prevention and Control.

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. HES-32-15-00002-EP, Issue of August 12, 2015. The emergency rule will expire December 21, 2015.

Text of rule and any required statements and analyses may be obtained from: Elisha S. Tomko, Division of Homeland Security and Emergency Services, 1220 Washington Avenue, State Office Campus, Bldg. 7A, Albany, NY, (518) 474-6746, email: elisha.tomko@dhses.ny.gov

Regulatory Impact Statement

1. Statutory Authority

Section 156(20) of the Executive Law authorizes the Office of Fire Prevention and Control ("OFPC") to register the manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers of sparkling devices who wish to do business in New York State. Section 156-h of the Executive Law requires that the OFPC promulgate rules regarding registration of manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers of sparkling devices.

2. Legislative Objectives

The legislative objective behind section 156(20) and section 156-h is to assure that the proper processes are in place prior to the sale of sparkling devices. Registration with the OFPC is required prior to the sale of such sparkling devices, pursuant to General Business Law 392-j.

3. Needs and Benefits

Section 156-h of the Executive Law requires that the OFPC promulgate rules regarding registration of manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers of sparkling devices, to include the registration process and requirements, fees and reporting requirements.

4. Costs

The rule establishes application fees, consistent with section 156-h of the Executive Law. A manufacturer, distributor, or wholesaler must pay an annual registration fee of $5,000; A specialty retailer must pay an annual registration fee of $2,500; a permanent retailer must pay an annual registration fee of $200 for each location; and a temporary seasonal retailer must pay a registration fee of $250 per season to the OFPC for each location.

The cost to the OFPC for the implementation of the rule is approximately $850,000 per year for administration, inspection and investigative costs. Section 156-h requires that revenue generated from registration fee payments must be used for firefighter safety and training programs as well as for the registration process.

In developing its cost estimates associated with the implementation and execution of the registration, inspection and investigation aspects of this new responsibility, the OFPC consulted with state fire marshal offices in other states that have recently legalized sparkling devices and/or consumer fireworks in an effort to learn what their work load experiences have been. OFPC extrapolated the data and applied it to its specific costs (i.e., personnel and equipment).

There will be no costs to local governments for the implementation of this rule.

5. Local Government Mandates

This rule will not impose any program, service, duty or responsibility upon local governments. This rule regulates the manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers of sparkling devices.

6. Paperwork

The OFPC will be required to develop and make available registration

forms, certification forms, and a sparkling device safety pamphlet. Manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers shall maintain, and make available to the OFPC, records regarding the name and quantity of any sparkling devices produced in, imported to, exported from, or sold in this State. Retailers will be required to post documentation in each location of business, to include: copy of the OFPC certification for such location; the list, as most recently published by the New York State Police, of counties and cities that have opted by local law to legalize the use of sparkling devices; copy of any Federal Permit(s) (if applicable); copy of the Insurance Certificate; and copy of a sparkling device safety pamphlet produced by the OFPC.

7. Duplication

At the time of this rule making, no rules or other legal requirements of the state or federal government exist which duplicate, overlap, or conflict with the rule.

8. Alternatives

The OFPC does not have statutory authority to consider any alternative other than to adopt a rule addressing these issues.

9. Federal Standards

Any person importing, manufacturing for commercial use, dealing in, transporting or causing to be transported, or otherwise receiving certain fireworks must obtain an ATF Federal explosives license or permit for the specific activity. Federal explosives licensees and permittees must comply with all applicable regulations under 27 CFR, Part 555. Any person manufacturing consumer fireworks for commercial use must obtain a Federal explosives manufacturers license. This rule does not exceed or conflict with such requirements.

10. Compliance Schedule

Manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers of sparkling devices can comply with the requirements of the rule once a city or county opts to legalize the sale and use of sparkling devices.

Regulatory Flexibility Analysis

1. Effect of rule

The rule does not affect local governments. The rule affects small businesses, including manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers of sparkling devices.

2. Compliance requirements

This rule does not impose any reporting, recordkeeping or other affirmative acts on local governments.

Small business manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers will be required to meet registration requirements and maintain, and make available to the Office of Fire Prevention and Control ("OFPC"), records regarding the name and quantity of any sparkling devices produced in, imported to, exported from, or sold in New York. Small business specialty retailers, permanent retailers, and temporary seasonal retailers will be required to post documentation in each location of business, to include: a copy of the Office of Fire Prevention and Control certification for such location; the list, as most recently published by the New York State Police, of counties and cities that have opted by local law to legalize the use of sparkling devices; a copy of any Federal Permit(s) (if applicable); a copy of the Insurance Certificate; and a copy of a sparkling device safety pamphlet produced by the Office of Fire Prevention and Control.

Small business manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers also need to report to the Office of Fire Prevention and Control, any fire or explosion that results in injury or death within one hour of its occurrence or as soon as practicable.

3. Professional services

Neither locals governments or small business affected by this rule will require professional services in order to comply with the rule.

4. Compliance costs

There would be no initial capital costs associated with compliance with the rule. The annual costs for continuing compliance are the required fees: a manufacturer, distributor, wholesaler must pay an annual registration fee of $5,000; Specialty retailer must pay an annual registration fee of $2,500; Permanent retailer must pay an annual registration fee of $200 for each location; and Temporary seasonal retailer must pay a registration fee of $250 per season to the Office of Fire Prevention and Control for each location.

5. Economic and technological feasibility

The rule sets forth the registration and reporting requirements for small business manufacturers, distributers, wholesalers, and retailers of sparkling devices, both of which are economically and technologically feasible.

6. Minimizing adverse impact

The rule establishes the registration process for including manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers of sparkling devices. The fees contained in the rule are created by statute;; therefore, the rule does not impose any adverse economic impact and no alternatives were considered.

7. Small business and local government participation

Small business and local government did not participate in the emergency rulemaking process. Small business and local governments, through their respective associations, will be able to participate in the proposed rulemaking process.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas

The rule would apply to counties and cities, outside of New York City, that opted to legalize the sale and use of sparkling devices, including those located in rural areas as that term is defined in section 102(10) of the State Administrative Procedure Act ("SAPA").

2. Reporting, recordkeeping and other compliance requirements; and professional services

This rule making will not impose any reporting, recordkeeping or other affirmative acts on local governments in rural areas.

In counties and cities, in rural areas, that opt to legalize the sale and use of sparkling devices, manufacturers, distributors, wholesalers, specialty retailers, permanent retailers, and temporary seasonal retailers will be required to meet registration requirements and maintain, and make available to the Office of Fire Prevention and Control ("OFPC"), records regarding the name and quantity of any sparkling devices produced in, imported to, exported from, or sold in New York. Specialty retailers, permanent retailers and temporary seasonal retailers will be required to post documentation in each location of business, to include: copy of the Office of Fire Prevention and Control certification for such location; the list, as most recently published by the New York State Police, of counties and cities that have opted by local law to legalize the use of sparkling devices; copy of any Federal Permit(s) (if applicable); copy of the Insurance Certificate; and copy of a sparkling device safety pamphlet produced by the Office of Fire Prevention and Control.

Manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers also need to report to the Office of Fire Prevention and Control, any fire or explosion that results in injury or death within one hour of its occurrence or as soon as practicable.

In rural areas, professional services are not required to comply with the rule.

3. Costs

In rural areas, there would be no initial capital costs associated with compliance with the rule. The annual costs for continuing compliance are the required fees: a manufacturer, distributor, wholesaler must pay an annual registration fee of $5,000; Specialty retailer must pay an annual registration fee of $2,500; Permanent retailer must pay an annual registration fee of $200 for each location; and Temporary seasonal retailer must pay a registration fee of $250 per season to the Office of Fire Prevention and Control for each location.

4. Minimizing adverse impact

The rule establishes the registration process for including manufacturers, distributors, wholesalers, specialty retailers, permanent retailers and temporary seasonal retailers of sparkling devices. The fees, contained in the rule, are created by statute and therefore, the rule does not impose any adverse economic impact and no alternatives were considered.

5. Rural area participation

Representatives of rural areas did not participate in this emergency rulemaking process. Businesses and local governments, in rural areas, through their respective associations, will be able to participate in the proposed rulemaking process.

Job Impact Statement

1. Nature of impact

The nature of the impact that the rule will have on jobs and employment opportunities is expected to be minimal based on the seasonal/limited selling season of June first and July fifth and December twenty-sixth through January second of each year.

2. Categories and numbers affected

The rule may result in part-time seasonal/temporary retail jobs in those counties and cities that have opted to legalize the sale and use of sparkling devices during the limited selling season of June first and July fifth and December twenty-sixth through January second of each year.

3. Regions of adverse impact

The minimal impact that the rule will have on jobs and employment opportunities will not result in a disproportionate impact on any region of the State.

4. Minimizing adverse impact

The rule would not have any adverse impact on existing jobs.

Assessment of Public Comment

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

Public Service Commission

NOTICE OF ADOPTION

Use of the SATEC EM133 Electric Submeter

I.D. No. PSC-39-14-00014-A
Filing Date: 2015-10-22
Effective Date: 2015-10-22

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

Action taken: On 10/15/15, the PSC adopted an order approving Satec Inc.'s (Satec) petition to use the SATEC EM133 electric submeter for residential submetering applications in New York State.

Statutory authority: Public Service Law, section 67(1)

Subject: Use of the SATEC EM133 electric submeter.

Purpose: To approve the use of the SATEC EM133 electric submeter.

Substance of final rule: The Commission, on October 15, 2015, adopted an order approving the petition of Satec Inc. to use the SATEC EM133 electric submeter with solid core High Accuracy Current Sensors for residential submetering applications in New York State, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(14-E-0409SA1)

NOTICE OF ADOPTION

Waiver of 150-Day Provision of the Policy Statement

I.D. No. PSC-25-15-00009-A
Filing Date: 2015-10-21
Effective Date: 2015-10-21

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

Action taken: On 10/15/15, the PSC adopted an order granting St. Lawrence Gas Company, Inc. (St. Lawrence) a waiver of the 150-day provision set forth in the Commission's Statement of Policy on Test Periods in Rate Proceedings (Policy Statement).

Statutory authority: Public Service Law, sections 66, 89-c and 92

Subject: Waiver of 150-day provision of the Policy Statement.

Purpose: To grant St. Lawrence a waiver from the 150-day provision of the Policy Statement.

Substance of final rule: The Commission, on October 15, 2015, adopted an order granting St. Lawrence Gas Company, Inc. a waiver of the 150-day provision set forth in the Commission's Statement of Policy on Test Periods in Rate Proceedings, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(15-G-0313SA1)

NOTICE OF ADOPTION

Bloomingburg's Initial Tariff Schedule and Waiver of Rate Setting Authority

I.D. No. PSC-27-15-00016-A
Filing Date: 2015-10-22
Effective Date: 2015-10-22

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

Action taken: On 10/15/15, the PSC adopted an order approving Bloomingburg Water Transportation Company, Inc.'s (Bloomingburg) initial tariff schedule, P.S.C. No. 1—Water, to become effective on November 1, 2015, and granting a waiver.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), (4), 89-c(1), (10), 89-e(2) and 89-h

Subject: Bloomingburg's initial tariff schedule and waiver of rate setting authority.

Purpose: To approve Bloomingburg's initial tariff schedule and waiver of rate setting authority.

Substance of final rule: The Commission, on October 15, 2015, adopted an order approving Bloomingburg Water Transportation Company, Inc.'s initial electronic tariff schedule, P.S.C. No. 1 – Water, to become effective on November 1, 2015, and granted a waiver of the Commission's rate setting authority, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(15-W-0363SA1)

NOTICE OF ADOPTION

NYAW's RAC/PTR Filing

I.D. No. PSC-33-15-00010-A
Filing Date: 2015-10-21
Effective Date: 2015-10-21

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

Action taken: On 10/15/15, the PSC adopted an order authorizing New York American Water Company, Inc. (NYAW) to offset its current Revenue, Production Costs and Property Tax Reconciliation (RAC/PTR) filing.

Statutory authority: Public Service Law, sections 89-b and 89-c

Subject: NYAW's RAC/PTR filing.

Purpose: To authorize NYAW to offset its RAC/PTR filing.

Substance of final rule: The Commission, on October 15, 2015, adopted an order authorizing New York American Water Company, Inc. to use $4,251,139 of its New York State income tax regulatory liability to offset its current Revenue, Production Costs and Property Tax Reconciliation filing, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(15-W-0437SA1)

NOTICE OF ADOPTION

NYAW's RAC/PTR Filing

I.D. No. PSC-33-15-00011-A
Filing Date: 2015-10-21
Effective Date: 2015-10-21

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

Action taken: On 10/15/15, the PSC adopted an order authorizing New York American Water Company, Inc. (NYAW) to offset and defer portions of its Revenue, Production Costs and Property Tax Reconciliation (RAC/PTR) filing.

Statutory authority: Public Service Law, sections 89-b and 89-c

Subject: NYAW's RAC/PTR filing.

Purpose: To authorize NYAW to offset and defer portions of its RAC/PTR filing.

Substance of final rule: The Commission, on October 15, 2015, adopted an order authorizing New York American Water Company, Inc. to use $310,490 in regulatory liabilities to offset and to defer $262,630 of excess property taxes from its current Revenue, Production Costs and Property Tax Reconciliation filing, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(15-W-0436SA1)

NOTICE OF ADOPTION

Fillmore's SIP Mechanism

I.D. No. PSC-34-15-00018-A
Filing Date: 2015-10-21
Effective Date: 2015-10-21

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

Action taken: On 10/15/15, the PSC adopted an order authorizing Fillmore Gas Company, Inc. (Fillmore) to modify the System Improvement Plan (SIP) mechanism to allow for the recovery of carrying costs associated with gas expansion.

Statutory authority: Public Service Law, sections 65, 66(1), (2) and (e)

Subject: Fillmore's SIP mechanism.

Purpose: To authorize modifications to Fillmore's SIP mechanism.

Substance of final rule: The Commission, on October 15, 2015, adopted an order authorizing Fillmore Gas Company, Inc. to modify the System Improvement Plan mechanism and directed the company to file Surcharge Statement No. 3, to allow for the recovery of carrying costs associated with gas expansion, 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: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@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.

(15-G-0404SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Notice of Intent to Submeter Electricity

I.D. No. PSC-45-15-00010-P

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

Proposed Action: The Public Service Commission is considering the Notice of Intent filed by One Vandam Condominium, to submeter electricity at 180 Avenue of the Americas, New York, New York.

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

Subject: Notice of Intent to submeter electricity.

Purpose: To consider the request of One Vandam Condominium to submeter electricity at 180 Avenue of the Americas, New York, New York.

Substance of proposed rule: On October 7, 2015, One Vandam Condominium submitted a Notice of Intent to Submeter Electricity at 180 Avenue of the Americas, New York, New York. The Public Service Commission is considering whether to approve, deny or modify, in whole or part, the request for authorization to submeter and to take other actions necessary to address the Notice of Intent.

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: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@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.

(15-E-0594SP1)

Department of State

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of State publishes a new notice of proposed rule making in the NYS *Register*.

Minimum Standards for Code Enforcement Training

I.D. No.	Proposed	Expiration Date
DOS-41-14-00001-P	October 15, 2014	October 20, 2015

State University of New York

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

To Name a New Street Under Construction on the Stony Brook Medical Center

I.D. No. SUN-45-15-00001-P

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

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

Statutory authority: Education Law, section 360(1)

Subject: To name a new street under construction on the Stony Brook Medical Center.

Purpose: To more clearly define traffic patterns at the Medical Center of Stony Brook University.

Substance of proposed rule (Full text is posted at the following State website:www.stonybrook.edu): The proposed changes to 8 NYCRR 584 reflect a new street name and identification of roadway markings on that street located at the Medical Center on the campus of the State University of New York at Stony Brook.

The changes will also further identify newly restricted parking areas and signage to clearly define the roadway's direction and clarification of enforcement responsibility.

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

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

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

Regulatory Impact Statement

1. Statutory Authority: Education Law § 360(1)

2. Legislative Objectives: To provide for safety and convenience of students, faculty, employees and visitors to and on the property, roads, streets and highways under the supervision and control of the State University of New York through the regulation and enforcement of vehicular and pedestrian traffic, parking and signage.

3. Needs and Benefits: Changes in traffic and parking patterns and control designations on the State University campuses are designed to enable the campus community, visitors and emergency vehicles to traverse the campuses more safely and more efficiently.

4. Costs: None.

5. Local Government Mandates: None.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: None.

9. Federal Standards: There are no related Federal standards.

10. Compliance Schedule: The campus will notify those affected as soon as the rule is effective. Compliance should be immediate.

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses identification of a new street and street markings to identify roadway restrictions on that street at the State University of New York at Stony Brook's Medical Center.

Office of Temporary and Disability Assistance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Burden of Proof at Fair Hearings Challenging Interim Assistance Reimbursement (IAR) Amounts

I.D. No. TDA-45-15-00011-P

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

Proposed Action: Amendment of section 358-5.9(a) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 22(8) and 95; L. 2012, ch. 41

Subject: Burden of proof at fair hearings challenging Interim Assistance Reimbursement (IAR) amounts.

Purpose: Clarify existing State regulations relative to fair hearings and render them consistent with New York State court precedents.

Text of proposed rule: Subdivision (a) of § 358-5.9 is amended to read as follows:

(a) *Burden of Proof.*

(1) Appellant. At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, [food stamp] *supplemental nutrition assistance program (SNAP)* benefits or services[;], or an exemption from work activity requirements, the appellant must establish that the *social services* agency's denial of assistance or benefits was not correct, or that the appellant is eligible for a greater amount of assistance or benefits, or is exempt from work requirements pursuant to Part 385 of this Title.

(2) Social Services Agency. Except[,] where otherwise established by law or regulation, [in fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services] *at a fair hearing*, the social services agency must establish that its actions were correct[.] *regarding:*

(i) the source of funding and the amount deducted from the initial payment of supplemental security income as reimbursement of public assistance; or

(ii) the discontinuance, reduction, or suspension of public assistance, medical assistance, or SNAP benefits or services.

Text of proposed rule and any required statements and analyses may be obtained from: Richard P. Rhodes, Jr., Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243, (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:

§ 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

§ 22 of the SSL, entitled "Appeals and fair hearings; judicial review," provides that applicants or recipients of public assistance may request an appeal to OTDA for certain decisions of the social services districts. Additionally, subparagraph 8 of this section authorizes OTDA to promulgate regulations, not inconsistent with State or federal Law, as may be necessary to implement the fair hearings provisions.

Chapter 41 of the Laws of 2012 amended § 95 of the SSL to change the name of the Food Stamp Program to the "Supplemental Nutrition Assistance Program" ("SNAP").

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations, and policies necessary to provide a fair hearing to persons entitled to an appeal pursuant to § 22 of the SSL.

3. Needs and Benefits:

The proposed regulatory amendment to 18 NYCRR § 358-5.9(a) is necessary in part to clarify the burden of proof for fair hearings concerning Interim Assistance reimbursement (IAR). IAR is the mechanism whereby a social services district is reimbursed by the federal Social Security Administration (SSA) for all the Public Assistance (PA) benefits paid to an individual out of State or local funds during the time that the individual's application for Supplemental Security Income benefits is pending with the SSA. The proposed regulatory amendment provides that a social services district must establish that its actions were correct at a fair hearing concerning the amount deducted from the initial payment of supplemental security income as reimbursement of public assistance.

SSL § 211(5) authorizes the State to enter into an agreement with the Secretary of the Federal Department of Health and Human Services to obtain IAR for Safety Net Assistance or any other payments made from State or local funds furnished for basic needs for any month to or on behalf of persons subsequently determined eligible to receive Supplemental Security Income payments for such month. Federal funding sources include, but are not limited to Home Energy Assistance Program payments, Emergency Assistance to Families benefits, Family Assistance benefits, employment payments financed with federal funds, housing payments financed with federal funds (Housing Opportunities for Persons with AIDS [HOPWA], and Safety Net Assistance Federally Participating, for examples).

OTDA was a party to several lawsuits in which the evidence submitted

by a social services district was found insufficient to establish that payments made to an individual derived exclusively from State or local funds. In Nesby v. Hansell, 69 AD3d 469 (1st Dept. 2010), the petitioner alleged that payments were financed through federal HOPWA funds. The First Department annulled the fair hearing decision because the Court found that the evidence submitted by the social services district failed to establish that the source of the payments was exclusively from State and local funds (id. at 470). In Roberts v. Berlin 2012 WL 5199011 (Sup Ct, N.Y. County Oct. 11, 2012), the court held that the social services district "was required to establish at the hearing that the source of funds was exclusively state and city funds, and its failure to do so - and the Hearing Officer's failure to address that point - require that the decision be annulled" (see also Nesby, 69 AD3d at 470).

On November 12, 2013, OTDA issued 13-LCM-15 "Document Packet for Fair Hearings Related to Interim Assistance Reimbursement (IAR)." The LCM states that the social services district "must provide documentary evidence and oral testimony at fair hearing that any [PA] benefits recovered by IAR were only from expended State and local funds. Additionally, [social services districts] must offer testimonial and documentary evidence at the fair hearing that no [PA] benefits paid with federal funds were recovered by IAR." 13-LCM-15 also provides that where the client is "objecting to calculation of that initial payment due to an alleged inclusion of federal funds, the burden of proof is on the social services agency to establish that its actions were correct." The proposed regulatory amendment would further clarify that, in those cases where an individual challenges the correctness or extent of a social services district's IAR at a fair hearing, the social services district must carry its burden of proving that, consistent with 13- LCM-15, the benefit payments comprising the IAR were paid exclusively out of State and local, rather than federal, funds.

The proposed amendment to 18 NYCRR § 358-5.9(a) would also update references to "food stamp benefits" to reflect the new name, "SNAP benefits."

4. Costs:

OTDA does not anticipate that there will be any costs associated with the proposed regulatory amendment, which is necessary to render existing State regulations consistent with case precedents set by New York State courts.

5. Local Government Mandates:

It is not anticipated that the proposed regulatory amendment will create any new mandates for local governments.

6. Paperwork:

There would be no additional reporting requirements or additional paperwork required to support the proposed regulatory amendment. Social services districts are presently required to present testimony and evidence at fair hearings concerning the amounts deducted from initial supplemental security income payments as reimbursement of PA and to submit documentary or testimonial evidence establishing that any claimed PA benefits recovered are not from expended federal funds, but rather, from expended State and local funds only (see 13-LCM-15). Furthermore, OTDA's Benefits Issuance and Control System (BICS) inquiry database screens indicate case categories and payment dates for Safety Net Assistance payments, and various other financial records maintained by the social services districts also identify and document the sources of PA funding.

7. Duplication:

The proposed regulatory amendment would not duplicate, overlap, or conflict with any existing State or federal regulations.

8. Alternatives:

The alternative is to leave the current § 358-5.9(a) intact. However, the proposed regulatory amendment would clarify the State regulations relative to the burden of proof applicable in cases where an individual challenges a social services district's IAR at a fair hearing, and render existing State regulations consistent with case precedents set by New York State courts.

9. Federal Standards:

The proposed regulatory amendment would not conflict with federal standards for fair hearings.

10. Compliance Schedule:

There is no need to establish a compliance schedule because the proposed regulatory amendment would not impose substantive requirements on regulated parties. The social services districts are already required to be in compliance with the evidentiary requirements of 13-LCM-15. Thus, they will be in compliance with the proposed regulatory amendment on its effective date.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required because the proposed regulatory amendment will neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon small businesses or local governments. As it was evident from the proposed regulatory amendment that it would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the proposed regulatory amendment will neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon public or private entities in rural areas. As it was evident from the proposed regulatory amendment that it would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

Job Impact Statement

A Job Impact Statement is not required for the proposed regulatory amendment. It is apparent from the nature and the purpose of the proposed regulatory amendment that it would not have a substantial adverse impact on jobs and employment opportunities in the social services districts or in the State. The proposed regulatory amendment would not substantively affect the jobs of the employees of the social services districts or the State. The proposed regulatory amendment is necessary to clarify that, except where otherwise established by law or regulation, in fair hearings concerning the source of funding of the amount deducted from the initial payment of supplemental security income as reimbursement of public assistance, the discontinuance, reduction or suspension of public assistance, medical assistance, or food stamp benefits or services, the social services agency must establish that its actions were correct, thereby rendering existing State regulations consistent with case precedents set by New York State courts.

Thus, the proposed regulatory amendment would not have any adverse impact on jobs and employment opportunities in New York State.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Public Assistance (PA) Resources Exemption for Four-Year Accredited Post-Secondary Educational Institutions

I.D. No. TDA-45-15-00012-P

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

Proposed Action: Amendment of section 352.23(b)(4) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 131-n; L. 2014, ch. 58, part J, section 5

Subject: Public Assistance (PA) resources exemption for four-year accredited post-secondary educational institutions.

Purpose: To update State regulation governing PA resources exemption, rendering it consistent with chapter 58 of the Laws of 2014.

Text of proposed rule: Paragraph (4) of subdivision (b) of § 352.23 is amended to read as follows:

(4) an amount up to $1,400 in a separate bank account established by an individual while currently in receipt of public assistance for the sole purpose of paying tuition at a [two year] *two-year or four-year* accredited post-secondary educational institution, so long as the funds are not used for any other purpose. Funds withdrawn for reasons other than paying tuition at a [two year] *two-year or four-year* accredited post-secondary educational institution will result in the full amount of funds in the account prior to the withdrawal being countable toward the public assistance household's resource limit beginning on the first day of the month of the withdrawal;

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, 16-C, Albany, NY 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:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties. SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State. SSL § 131(1) requires social services districts (SSDs), insofar as funds are available, to provide adequately for those un-

able to maintain themselves, in accordance with the provisions of the SSL. Section 5 of Part J of Chapter 58 of the Laws of 2014 amended SSL § 131-n by expanding the existing resources exemption of up to $1,400 for funds in a separate bank account established by a recipient of public assistance (PA) for the sole purpose of paying tuition at two-year or four-year accredited post-secondary educational institutions, so long as the funds are not used for any other purpose. Chapter 58 of the Laws of 2014 became effective on March 31, 2014.

2. Legislative Objectives:

It is the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations, and policies so that adequate provision is made for those persons unable to provide for themselves, so that, whenever possible, such persons can be restored to conditions of self-support and self-care.

3. Needs and Benefits:

The proposed regulatory amendment of 18 NYCRR § 352.23(b)(4) implements the revision of SSL § 131-n provided in § 5 of Part J of Chapter 58 of the Laws of 2014, wherein PA recipients are allowed to exempt up to $1,400 in a separate bank account for the sole purpose of paying tuition at two-year or four-year accredited post-secondary educational institutions. Under the current exemption, PA recipients are allowed to exempt up to $1,400 in a separate bank account for the sole purpose of paying tuition at a two-year accredited post-secondary educational institution. By allowing PA recipients to utilize the exempt resources amount for either a two-year or four-year accredited educational institution, the proposed regulatory amendment would offer PA recipients enhanced educational options to advance their workforce readiness and financial earning capabilities through the pursuit of higher education.

4. Costs:

There would be no new cost associated with this change, insofar as the proposed regulatory amendment would reflect current statutory requirements which have already been implemented by the SSDs and OTDA.

5. Local Government Mandates:

The proposed regulatory amendment would expand the existing resources exemption, and would not require any new resources, procedures, or expertise to support the change.

6. Paperwork:

There would be no additional reporting requirements or additional paperwork required to support the proposed regulatory amendment.

7. Duplication:

The proposed regulatory amendment would not duplicate, overlap or conflict with any existing State or federal regulations.

8. Alternatives:

The alternative is to leave the current 18 NYCRR § 352.23(b)(4) intact. However, under this alternative, the existing State regulation would remain inconsistent with § 5 of Part J of Chapter 58 of the Laws of 2014. Enactment of the proposed regulatory amendment would render the existing State regulation consistent with § 5 of Part J of Chapter 58 of the Laws of 2014.

9. Federal Standards:

The proposed regulatory amendment would not conflict with federal standards for use of resources.

10. Compliance Schedule:

There is no need to establish a compliance schedule because the proposed regulatory amendment would reflect current statutory requirements set forth in § 5 of Part J of Chapter 58 of the Laws of 2014, which have already been implemented by the SSDs and OTDA.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required because the proposed regulatory amendment will neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon small businesses or local governments. As it was evident from the proposed regulatory amendment that it would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the proposed regulatory amendment would neither have an adverse impact upon, nor impose reporting, recordkeeping, or other compliance requirements upon public or private entities in rural areas. As it was evident from the proposed regulatory amendment that it would not have an adverse impact or impose reporting, recordkeeping, or other compliance requirements, no further measures were needed to ascertain those facts and, consequently, none were taken.

Job Impact Statement

A Job Impact Statement is not required for the proposed regulatory amendment. It is apparent from the nature and the purpose of the proposed regulatory amendment that it would not have a substantial adverse impact on jobs and employment opportunities in the private sector, in the social services districts (SSDs) or in the State. The proposed regulatory amendment would not substantively affect the jobs of the employees of the SSDs or the State. The purpose of the proposed regulatory amendment is to revise the current public assistance (PA) resources exemption afforded under 18 NYCRR § 352.23(b)(4) to allow PA recipients to exempt up to $1,400 in separate bank accounts for the sole purpose of paying tuition at two-year or four-year accredited post-secondary educational institutions, thereby rendering the existing State regulation consistent with § 5 of Part J of Chapter 58 of the Laws of 2014.

Thus, the proposed regulatory amendment would not have any adverse impact on jobs and employment opportunities in New York State.

Department of Transportation

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Liability Insurance Policies Required for Highway Work Permits

I.D. No. TRN-45-15-00002-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 sections 127.1, 127.3 and 127.4 of Title 17 NYCRR.

Statutory authority: Transportation Law, section 14(18); Highway Law, section 52

Subject: Liability insurance policies required for Highway Work Permits.

Purpose: To make it easier and less costly for permittees to obtain the liability coverage necessary to obtain Highway Work Permits.

Text of proposed rule: Section 127.1 Financial security requirements, generally

As a condition to the issuance of any permits to perform work or other operations upon state right-of-way pursuant to Parts 125, 126, 129, 131 and 134 of this Title, permittees are required to furnish proof of financial responsibility sufficient to protect the People of the State of New York and/or the Commissioner of Transportation and all employees of the State Department of Transportation from the following costs, expenses and liabilities:

(1) [Any c]Claims, damages, losses and expenses, including but not limited to attorneys' fees, arising [out of any claim, including but not limited to claims for] from personal injuries, property damage or wrongful death and/or environmental claims, [in any way] associated with the permittees, activities or operations.

(2) The reasonable costs necessary to restore state property damaged by permittees work/activities to substantially the same or equivalent condition as existed before such work was undertaken as determined by the Commissioner or his/her designee.

(3) The reasonable costs associated with the review, modification and approval of permit applications, plans, and designs, as well as the inspection of on-going and/or completed work as may be deemed appropriate by the Commissioner or his/her designee.

(4) The payment of all contractors and material suppliers engaged by permittee to make improvements within the bounds of the state right-of-way and to secure the release of any liens asserted in connection therewith.

Section 127.3 General liability insurance requirements

Liability insurance is required, not only for the protection of the State of New York, but also as a means of assuring the accountability of permittees to the traveling public. *Insurance policies are required to provide primary and non-contributory coverage for the State of New York to cover claims that arise out of the permitted work/operations. Insurance policies that remove or restrict blanket contractual liability located in the "insured contract" definition (as stated in Section V, Number 9, Item f in the ISO CGL policy) so as to limit coverage against claims that arise out of permit work, or that remove or modify the "insured contract" exception to the employers liability exclusion, or that do not cover the additional insured for claims involving injury to employees of the named insured or subcontractors, are not acceptable.* The type and limits of liability insurance required from permittees shall vary depending upon the type of permit, the nature of the work being performed, and the dollar-value of the improvements, construction, work or operations. Policies of insurance shall be endorsed to provide coverage to "The [People of the] State of New York

and[/or] the Commissioner of Transportation and all employees of the State Department of Transportation" for claims arising from the permitted work.

The required insurance shall be documented by means of a certificate of insurance, upon a form satisfactory to the department, furnished by the permittee before the commencement of any work/operations. *In the absence of an acceptable general liability insurance policy, a permittee, excluding a permittee for a special use permit, may purchase a protective liability insurance policy with the limits of coverage that would normally apply to general liability insurance.*

Self-insurance is permissible from municipalities, federal agencies, public authorities, public benefit corporations, public utilities, transportation corporations and railroads, by use of an undertaking agreement acceptable to the department. Self-insurance from other permittees in lieu of the required liability insurance may be accepted upon satisfactory proof that permittee has the financial resources and an established self-insurance program to adjust and pay liability claims.

(1) Residential driveways: Any contractor engaged to construct a residential driveway permitted under section 125.9 of this Title shall be required to have a commercial general liability insurance policy with limits of liability of not less than $500,000 per claim/occurrence. The permittee shall provide proof of the insurance for any contractor being utilized to do the work, and shall be required to comply with the indemnity and other security requirements set forth in this Part. A homeowner that performs such work on his/her own residence without the use of a contractor shall be exempt from the requirement to maintain commercial general liability insurance coverage.

(2) Commercial driveways: Any permittee seeking a permit for a commercial driveway permitted under section 125.10(a) of this Title, including those driveways described as either major or minor commercial driveways under sections 125.1(e) and 125.1(f) of this Title, shall be required to have a commercial general liability insurance policy with limits of liability of not less than $1,000,000 per claim/occurrence except that if any of the following conditions apply to the permitted work, the limits of liability shall be not less than $5,000,000 per claim/occurrence:

(a) The estimated value of permitted work in state right-of-way is $250,000 or more;

(b) The permitted work requires or includes the construction, alteration or maintenance of underground features *where workers will be expected to work* at any depth five feet or more below grade;

(c) The permitted work requires or includes the construction, alteration or maintenance of overhead features that include, but are not limited to, traffic signals, overhead sign structures, retaining walls or other grade separation structures.

(3) Utility work: Any permittee seeking a permit to perform utility work under Part 126 of this Title; whether an original installation, maintenance or repair or miscellaneous work, shall be required to have a commercial general liability insurance policy with limits of liability of not less than $1,000,000 per claim/occurrence except that if any of the following conditions apply to the permitted work, the limits of liability shall be not less than $5,000,000 per claim/occurrence:

(a) The estimated value of permitted work in state right-of-way is $250,000 or more.

(b) The permitted work requires or includes the construction, alteration or maintenance of underground features *where workers will be expected to work* at any depth five feet or more below grade.

(c) The permitted work requires or includes the construction, alteration or maintenance of overhead features that include, but are not limited to, traffic signals, overhead sign structures, retaining walls or other grade separation structures.

(4) Vegetation control: Any permittee seeking a permit to control vegetation in connection with any outdoor advertising sign permitted under Part 134 of this Title shall be required to have a commercial general liability insurance policy with limits of liability of not less than $1,000,000 per claim/occurrence.

(5) Adopt-a-Highway: Individuals or community organizations seeking a permit to adopt a highway under Part 126 of this Part, shall not be required to have a liability insurance policy, but shall be required to provide proof of the insurance for any contractor being utilized to do the work.

(6) Other non-utility work. Permittee seeking a permit to perform other nonutility work under Part 126 of this Title, including roadway improvements, tree work, miscellaneous construction, encroachment, or other miscellaneous work operations, shall be required to have a commercial general liability insurance policy with limits of liability of not less than $1,000,000 per claim/occurrence except that if any of the following conditions apply to the permitted work, the limits of liability shall be not less than $5,000,000 per claim/occurrence:

(a) The estimated value of permitted work in state right-of-way is $250,000 or more;

(b) The permitted work requires or includes the construction, alteration or maintenance of underground features *where workers will be expected to work* at any depth five feet or more below grade;

(c) The permitted work requires or includes the construction, alteration or maintenance of overhead features that include, but are not limited to, traffic signals, overhead sign structures, retaining walls or other grade separation structures.

The permittee shall provide proof of the insurance for any contractor being utilized to do the work, and shall be required to comply with the indemnity and other security requirements set forth in this Part. A homeowner that performs such work on his/her own residence without the use of a contractor shall be exempt from the requirement to maintain commercial general liability coverage.

(7) Annual maintenance permits: Any permittee seeking an annual maintenance permit to, maintain or replace existing under-ground or above-ground facilities permitted under Part 129 of this Title, including electric power, communications, poles, gas or water lines shall be required to have a commercial general liability insurance policy with limits of liability of not less than $5,000,000 per claim/occurrence.

(8) Traffic signal permits: Any permittee seeking a permit to install a traffic signal permitted under section 125.11 of this Title, or to construct maintain or alter other overhead features on or attached to traffic signals, bridges or sign structures shall be required to have a commercial general liability insurance policy with limits of liability of not less than $5,000,000 per claim/occurrence.

(9) Special use permits: Any permittee seeking a permit to conduct a special event in the highway right-of-way such as a race, festival, parade or filming of a movie or commercial shall be required to have a commercial general liability insurance policy with limits of liability of not less than $5,000,000 per claim/occurrence. Where registered motor vehicles will be utilized as part of the event, permittee shall also be required to have automobile liability insurance with limits of liability of not less than $1,000,000 per claim/occurrence.

Section 127.4 Protective liability insurance requirements

[In addition to the requirement to provide general liability coverage, p]*P*ermittees will be required to provide protective liability insurance coverage under the following conditions:

(a) The permittee is a homeowner constructing a residential driveway at his/her own home, as permitted under section 125.9 of this Title;

(b) The estimated value of permitted work in state right-of-way is $250,000 or more.

(c) *Where the permittee does not have an acceptable general liability insurance policy.*

Such policy of protective liability insurance shall be issued to, in the name of and covering the liability of the ''the [People of the] State of New York and[/or] the Commissioner of Transportation and all employees of the State Department of Transportation.'' *Unless higher limits are required by section 127.3,* [S]*s*uch policy shall carry limits of liability of not less than $1,000,000 per occurrence/$2,000,000 aggregate. The policy shall be written for the permitted project and shall be kept in force at the expense of the permittee for the duration of the project. The policy shall provide primary coverage to the State of New York [against any] *for* claim*s* arising [in any way] from the permitted work within the area covered by the permit. Annual maintenance permits are exempt from the requirement to provide protective liability insurance coverage as stated above. *This option is not available for special use permits.*

If the permittee is a homeowner constructing a residential driveway at his/her own home, they are eligible to pay an optional insurance fee that supports a blanket insurance policy for the State of New York, as an alternative to the requirement to provide protective liability insurance coverage.

Text of proposed rule and any required statements and analyses may be obtained from: David E. Winans, Associate Counsel, NYS Department of Transportation, Office of Legal Services, 50 Wolf Road, 6th Floor, Albany, NY 12232, (518) 457-2411, email: david.winans@dot.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

The New York State Department of Transportation (the Department) regulates the modification or non-highway use of State right-of-way as required by Highway Law section 52, through a system of permits. Those seeking to perform or host the work, activities or events are required to obtain a permit. The relationship between the Department and the persons seeking permission for such activities is that of an owner and a permittee. In all cases, the State retains ownership of the state property, while giving permission to the permittee to perform the work, engage in the activity, or host the event that is licensed by the approved permit. In regulating activities under a permit, the paramount concerns of the Department are (1)

public safety, (2) the orderly flow of transportation, and (3) the preservation of state property, including possible liability that could be attached to the permitted work or activity. Thus, conditions have been imposed upon permittee activity either through regulations found at Parts 125, 126, 127, 128, 129, 130, 131, 132, and 134, or through internal Department procedures (particularly in the case of Special Use Permits for races, parades, and other events). These conditions include, among other things, rules on traffic control, acceptable designs, limitations on use, and requirements for insurance and bonding.

The Department issues between 6,500 and 7,500 highway work permits each year. Over half of these are issued for various utility activities and operations. The remaining non-utility permits are issued for major commercial developments, residential and minor commercial driveways, residential and commercial improvements, traffic control signals, Adopt-a-Highway groups, and a variety of other miscellaneous construction activities and work operations. The Department has also instituted policies and procedures for the issuance of Special Use permits.

The Department has required that, as a condition of permitted activity, the permittee must meet minimum standards of financial responsibility calculated to protect the State from potential liability that might arise from the permitted activity. This insurance requirement is set forth in Part 127. There is a similar insurance requirement in Section 129.3 for annual maintenance permits. Effective in July of 2014, the Department transitioned to a process that allowed permittees to use the insurance that most of them already have rather than requiring permittees to buy a separate policy to cover the permit work. Although the response from permittees was generally positive, clarification has been requested about the type of insurance that is required. It has also become apparent that some permittees do not have insurance that covers claims that might be asserted against the State. These claims would most likely be made by permittee employees.

The new rule changes clarify the type of insurance that permittees must have and add the option of protective liability insurance for permits in the event that the permittee doesn't have the required liability insurance. The rule amendments to Part 127 will make it easier and less expensive for permittees to obtain permits from the Department by clarifying the insurance requirements. Language has been added to explain the type of underground work that necessitates higher limits of insurance. Because some permittees do not have the required insurance because they consider it to be too expensive, or because it may not be available to them, it was also deemed prudent to expand the option for permittees to buy a protective liability insurance policy. Because the proposed changes to Part 127 will make it easier for permittees to comply with bonding and insurance requirements, the Department has concluded that no person is likely to object to these changes. Because the Department anticipates no objections and because the changes will make compliance with permit requirements faster and easier, we are advancing these changes as a consensus rule.

Job Impact Statement

1. Nature of impact:

The proposed rule changes should not have any impact on jobs because the resulting permit activity should be unaffected. The New York State Department of Transportation (NYSDOT) is clarifying the type of insurance that is required for permit work and expanding the options for insurance that may be supplied. This insurance is available at little or no extra cost.

2. Categories and numbers affected:

NYSDOT issues between 6,500 and 7,500 highway work permits each year. Over half of these permits are issued for various utility activities and operations. Almost all of the utility permits are issued upon an "undertaking" procedure that will be unaffected by the changes in the regulations. Some of the remaining 3,250-3,750 permits are also issued by using an undertaking, however the existing regulations require the purchase of an insurance policy naming the State of New York as the only insured, or the payment if an "insurance fee." Changes in the regulations will clarify the requirements of the insurance policy and provide an alternative insurance policy for the State that the permittee can buy if they do not have the required insurance and don't want to buy it for themselves.

3. Regions of adverse impact:

No disparate adverse impact on jobs in any region is anticipated. There should be no impact on insurance cost even in the most densely urbanized areas where medical expenses are highest, where the attitude is more litigious and where the cost of insurance claims is correspondingly higher. This is because permittees already operate in this environment and the levels and costs of insurance that permittees are should already have is not expected to change.

4. Minimizing adverse impact:

The rule changes allow permitees to utilize a type of insurance that is generally available and frequently in place, and remove a requirement that permittees buy a policy of insurance that may be expensive and not commercially available.

Office of Victim Services

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Attorney's Fees for Representation Before the Office and/or Before the Appellate Division Upon Judicial Review

I.D. No. OVS-45-15-00008-P

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

Proposed Action: Addition of section 525.3(h); and amendment of section 525.9 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 623(3) and 626(1)

Subject: Attorney's fees for representation before the office and/or before the appellate division upon judicial review.

Purpose: The purpose of this rule change is to limit attorney's fees pursuant to article 22 of the Executive Law.

Text of proposed rule: A new subdivision (h) is added to section 525.3:

(h) "Reasonable attorney's fees for representation before the office and/or before the appellate division upon judicial review" shall mean those reasonable attorney's fees incurred by a claimant during (1) the administrative review for reconsideration of such decision pursuant to subdivision (2) of section 627 of the Executive Law and/or (2) the judicial review of the final decision of the office pursuant to section 629 of the Executive Law.

Section 525.9 is amended to read as follows:

525.9 Representation by attorney.

(a) [Parties have the right to] *A claimant and/or victim may choose to* be represented before the office, at [all] *any* stage[s] of a claim, by an attorney-at-law duly licensed to practice in the State of New York and/or before the Appellate Division upon judicial review of the office's final determination. *However, only those fees incurred by a claimant during (1) the administrative review for reconsideration of such decision pursuant to subdivision (2) of section 627 of the Executive Law and/or (2) the judicial review of the final decision of the office pursuant to section 629 of the Executive Law may be considered for reimbursement by the office.* The office shall provide written notification to an applying claimant and/or victim of their right to representation by counsel, as well as their potential eligibility for an award of attorney's fees pursuant to Executive Law subdivision one of section 626 of Article 22 *if they are successful during the administrative review and/or before the appellate division upon judicial review, pursuant to subdivision (g) of section 525.3 of this Part*. Parties shall provide to the office an authorization compliant with subdivision (c) of section 525.3 of this Part.

(b) The attorney shall file a notice of appearance and, when appropriate, a notice of substitution prior to or at his or her first appearance.

(c) [Reasonably] *Upon a successful review pursuant to subdivision (a) of this section* attorney's fees [must] *may* be approved by the office which may require a written statement of services rendered. Whenever an award is made to a claimant who is represented by an attorney, the office [shall] *may* approve a reasonable fee commensurate with the services rendered, up to $1,000. [Fees may be disallowed in cases when the office finds that a claim was submitted without legal or factual basis and/or the claim or action is without merit and frivolous.]

(d) The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the fee customarily charged in the locality for similar legal services;

(3) the amount involved and the results obtained;

(4) the time limitations imposed by the client or by the circumstances;

(5) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(6) whether any part of the cost of the legal service provided to the claimant has been paid or is payable by a third party.

(e) If any party designates an attorney-at-law to represent him or her and such attorney has executed and filed with the office a notice of appearance in the matter, such notice shall remain in effect until:

(1) the party represented files with the office a written revocation of the attorney's authority;

(2) the attorney files with the office a written statement of his or her withdrawal from the case;

(3) the attorney states on the record at an office hearing that he or she is withdrawing from the case; or

(4) the office receives notice of the attorney's death or disqualification.

(f) After the filing of an authorization and a notice of appearance in accordance with this section, and so long as [it may] *both* remain in effect, copies of all written communications or notices in the matter to the party shall be sent to such attorney in addition [of] *to* the party represented. Service upon the attorney shall be deemed service on the party he or she represents.

Text of proposed rule and any required statements and analyses may be obtained from: John Watson, General Counsel, Office of Victim Services, AE Smith State Office Bldg., 80 South Swan Street, 2d Floor, Albany, NY 12210, (518) 457-8066, email: john.watson@ovs.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: New York State Executive Law, section 623(3) grants the Office of Victim Services (OVS or Office) the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. Executive Law, section 626(1) provides for out-of-pocket losses to include the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review of a final determination of the Office.

2. Legislative objectives: By enacting the New York State Executive Law, section 626(1), the Legislature sought to ensure that the Office could reimburse out-of-pocket losses including the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review of a final determination of the Office.

3. Needs and benefits: By enacting the New York State Executive Law, section 626(1), the Legislature sought to ensure that the Office could reimburse out-of-pocket losses including the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review of a final determination of the Office. The current regulations surrounding this provision, however, far exceed the scope of the law. Under current regulations, one could assert that attorneys' fees include any assistance during the course of a claim – from assisting victims and/or claimants in completing and submitting the OVS claim applications themselves, to making phone calls to check on the status of a claim on a claimant's behalf. Reading the plain language of the law, these are not reasonable expenses and not what the Legislature intended.

Additionally, the OVS funds 228 local Victim Assistance Programs (VAPs) across New York State, distributing in excess of $35 million to these programs to assist and advocate on the behalf of victims and claimants. Among the required duties of these VAPs, they are to assist victims and/or claimants in completing and submitting OVS applications and assist claimants through the claim process with the Office.

4. Costs: a. Costs to regulated parties. It is not expected that the proposed regulations would impose any additional costs to the agency or State. The plain meaning interpretation of New York State Executive Law, section 626(1) and the conforming regulatory changes should prove to create operational efficiencies within the Office and save the State money.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations do not impose any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: These proposed regulations do not require any additional paperwork requirements more than is currently required of the Office's claimants.

7. Duplication: These proposed regulations do not duplicate any other existing state or federal requirements.

8. Alternatives: The current regulations are an alternative, but as mentioned above they far exceed the plain language of the law and are not what the Legislature intended in the enacting statute. These cannot be considered reasonable expenses, particularly when the Office itself has invested so much in building a statewide network of VAPs, serving every county in New York State, to assist in this very manner. Besides being required by statute, this regulatory change is necessary to avoid the unnecessary, potential waste of limited victim compensation funds for the same services which the Office has invested significantly in providing across the state.

9. Federal standards: The OVS is funded, in part by the federal Victims of Crime Act (VOCA). The statute which determines how state crime victim compensation programs may determine awards are enumerated in 42 USCS 10602. This rule change does not contradict any of the federal provisions of section 10602 and is permissible under such provisions.

10. Compliance schedule: The regulations will be effective on the date they are adopted.

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

The Office of Victim Services projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change is simply designed to conform the regulations to the enacting statute. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required and therefore have not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Reduction or Denial of a Claim Based on Victim's Conduct Contributing

I.D. No. OVS-45-15-00009-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 525.6(b); and addition of section 525.12(m) to Title 9 NYCRR.

Statutory authority: Executive Law, sections 620, 623(3) and 631(5)

Subject: Reduction or denial of a claim based on victim's conduct contributing.

Purpose: Create standards for the reduction or denial of a claim based on the victim's conduct contributing.

Text of proposed rule: Subdivision (b) of section 525.6 is amended to read as follows:

(b) After investigation of the claim, and after a hearing, if any, the office shall issue a decision either granting an award or denying the claim. The decision may also include a determination whether the victim engaged in conduct contributing to the crime or criminal injury, and shall reduce the amount of the award or deny the claim altogether in accordance with such determination *and pursuant to subdivision (m) of section 525.12 of this Part*.

A new subdivision (m) is added to section 525.12 to read as follows:

(m) When determining an award, the office must consider conduct contributing to the crime or criminal injury.

(1) All awards made pursuant to Executive Law Article 22 and this Part shall be either reduced or denied altogether for conduct contributing in the following manner:

(i) 100% denial of award. Any conduct on part of the victim, as indicated by law enforcement in the investigation of the claim pursuant to subdivision (b) of section 525.5 of this part, constituting felonies or misdemeanors involving violence. For the purpose of this subparagraph, the term "violence" shall include, but not be limited to: gang activity, the dealing of illegal drugs, being the initial aggressor, and the use or brandishing of illegal firearms or other dangerous instruments at or near the time of the crime.

(ii) 75% reduction of award. Any conduct on part of the victim, as indicated by law enforcement in the investigation of the claim pursuant to subdivision (b) of section 525.5 of this part, constituting any other felony not considered in subparagraph (i) of this paragraph.

(iii) 50% reduction of award. Any conduct on part of the victim, as indicated by law enforcement in the investigation of the claim pursuant to subdivision (b) of section 525.5 of this part, constituting any other misdemeanor not considered in subparagraph (i) of this paragraph.

(iv) 25% reduction of award. All other conduct on part of the victim, not considered in subparagraphs (i), (ii) or (iii) of this paragraph, as indicated in the investigation of the claim pursuant to subdivision (b) of section 525.5 of this part.

(2) However, when considering conduct contributing the office shall examine the following mitigating factors: the victim was a minor, a victim of human trafficking, a sex worker, or a victim of sexual assault. If any such mitigating factors are found in the investigation of the claim pursuant to subdivision (b) of section 525.5 of this part, the office may make an award without reduction for conduct contributing.

Text of proposed rule and any required statements and analyses may be obtained from: John Watson, General Counsel, Office of Victim Services, AE Smith State Office Bldg., 80 South Swan Street, 2d Floor, Albany, NY 12210, (518) 457-8066, email: john.watson@ovs.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: New York State Executive Law, section 623(3) grants the Office of Victim Services (OVS or Office) the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. The opening line of OVS' legislative intent, section 620 of the Executive Law, states "The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts." (emphasis added) Executive Law, section 631(5) provides that in determining the amount of an award, the Office shall determine whether, because of his or her conduct, the victim contributed to the infliction of his or her injury and that the Office shall reduce the amount of the award or reject the claim altogether, in accordance with such determination.

2. Legislative objectives: The legislative intent is clear that the purpose of OVS is to assist innocent victims of crime. By enacting the New York State Executive Law, section 631(5), the Legislature sought to ensure that the Office would reduce the amount of an award or reject a claim altogether based upon the victim's own conduct.

3. Needs and benefits: It is clear from the OVS' legislative intent and the other provisions in the Executive Law that the awards made by the agency are meant for the benefit of innocent victims of crime. By enacting the New York State Executive Law, section 631(5), the Legislature sought to ensure that the Office would reduce the amount of an award or reject a claim altogether based upon the victim's own conduct. Under current regulations, "conduct contributing" is defined as, ". . . culpable conduct logically and rationally related to the crime by which the victim was victimized and contributing to the injury suffered by the victim." [9NYCRR525.3(b)] The regulations further provide that both the investigation of, and decision on a claim consider the victim's conduct contributing. [9NYCRR525.5(b) and 9NYCRR525.6(b)] The current regulations surrounding this provision, however, do not provide standards when determining how a victim's conduct contributed to their injury or death and how such conduct should impact their award.

It has long been the standard of the OVS to reduce an award or deny a claim in its entirety based on the above provisions. These regulations are needed to codify standards in order for such determinations to be made in a consistent manner. The standards created under these regulations are also tied to the facts collected during the investigation of the claim, to establish a record-based relationship between the victim's conduct and the crime upon which the claim is based.

Additionally, in 2013 the Appellate Division, Second Department in the Matter of Cox (110 A.D.3d 797, 973 N.Y.S.2d 242) stated that, ". . . general knowledge that narcotics sellers are subject to greater risks of being violently murdered is not sufficient to supply a record-based relationship between the subject homicide and the victim's alleged conduct." While the facts in this particular case did not lend themselves to appealing the case further, the Office was, and is, confident that the conduct of such criminal behavior is itself, "logically and rationally related to the crime by which the victim was victimized and contributing to the injury suffered by the victim." [9NYCRR525.3(b)] Had the facts in this particular case been different, i.e., the chain of custody of the drugs found on the body of the victim been more certain, the OVS certainly would have sought to overturn the Second Department's decision. Being unable to do that, these regulations were drafted to also codify the type of conduct which the Office would consider as "logically and rationally related to the crime by which the victim was victimized" and how such conduct should impact an award.

4. Costs: a. Costs to regulated parties. It is not expected that the proposed regulations would impose any additional costs to the agency or State. The implementation of these regulatory changes should prove to create operational efficiencies within the Office and save the State money.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations do not impose any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: These proposed regulations do not require any additional paperwork requirements than are currently required of the Office's claimants.

7. Duplication: These proposed regulations do not duplicate any other existing state or federal requirements.

8. Alternatives: The current regulations are an alternative, but as mentioned above they lack the standards necessary in order to make consistent determinations. The enacting statute is clear that the Office's awards are meant for the benefit of innocent victims of crime, but its later provisions also demonstrate that the Legislature understood the conduct of the victim could be considered to mitigate the benefits awarded by the Office instead of making an outright denial. The reductions could be more or less, but it has been determined that the reduction amounts and standards by which they are determined, as written, are the fairest to make such determinations.

9. Federal standards: The OVS is funded, in part by the federal Victims of Crime Act (VOCA). The statute which determines how state crime victim compensation programs may determine awards is enumerated in 42 USCS 10602. This rule change does not contradict any of the federal provisions of section 10602 and is permissible under such provisions.

10. Compliance schedule: The regulations will be effective on the date they are adopted.

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

The Office of Victim Services projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change is simply designed to provide standards when determining how a victim's conduct contributed to their injury or death and how such conduct may impact their award. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required and therefore have not been prepared.

Workers' Compensation Board

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Stipulations

I.D. No. WCB-45-15-00019-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 300.5 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 141

Subject: Stipulations.

Purpose: To streamline the process for parties to enter into stipulations in workers' compensation proceedings.

Text of proposed rule: Section 300.5 of Title 12 of the New York Codes Rules and Regulations is amended as follows:

(a) In controverted claims the Workers' Compensation Law Judge shall make a reasoned decision upon the contested points. This decision, outlining the evidence supporting said determination, may be made by an oral statement which shall be entered upon the minutes of the hearings, or may be in a written and signed statement which shall be filed with the papers in the record.

(b)(1) Parties to any claim before the board may stipulate to uncontested facts or proposed findings. [Such stipulation shall be in writing and shall be signed by all parties so stipulating]*A stipulation may be made either as an oral statement on the record at a hearing or, in writing outside of a hearing, when a claimant is represented. A written stipulation must be submitted using the form or format prescribed by the Chair. The stipulation must indicate that each party to the stipulation:*

(i) [have] *has* been advised of the legal effect of stipulating to the facts or proposed findings contained in said stipulation; and

(ii) [have] *has* affixed their signatures to said stipulation of their own free will. *If the stipulation is presented at a hearing, a* [A] Workers' Compensation Law Judge shall *verify the foregoing* through questioning. [that all parties:]

[If the claimant is not represented, the stipulation shall be signed in the presence of a Workers' Compensation Law Judge.]

(2) A stipulation [pursuant to this section shall be subject to the approval of] *made at a hearing and approved by* a Workers' Compensation

Law Judge [and, if approved,] shall be incorporated into the decision of the Workers' Compensation Law Judge and shall be binding upon the parties. *A written stipulation entered into by a represented claimant and the employer or carrier shall be reviewed and approved by a Workers' Compensation Law Judge or conciliator and if approved shall be incorporated into a decision of the Board.* Such stipulation, as incorporated into [the] *a* [decision of the Workers' Compensation Law Judge], shall be subject to the provisions of section 23 of the Workers' Compensation Law and section 300.13 of this Part, and to sections 22 and 123 of the Workers' Compensation Law. *The Chair may direct that stipulations properly submitted in the prescribed format and approved by a Workers' Compensation Law Judge or conciliator constitute the decision of the Workers' Compensation Law Judge.*

(3) When a claimant is not represented, he or she shall give a sworn statement on the record at a hearing indicating an understanding of the facts agreed to and the legal effect of the stipulation.

([3]*4*) The provisions of this subdivision shall not be applicable to agreements settling upon and determining claims for compensation pursuant to section 32 of the Workers' Compensation Law and section 300.36 of this Part.

(c) In every claim where the disability exceeds seven days, the Workers' Compensation Law Judge shall make a finding as to whether or not an accident arising out of and in the course of employment or an occupational disease has been established [; and in every claim involving disability less than seven days, the Workers' Compensation Law Judge shall make such a finding where possible to do so on evidence before him or her. The finding of the Workers' Compensation Law Judge in such cases shall be incorporated in the notice of decision].

(d) The Workers' Compensation Law Judge may excuse the failure of a physician or other health providers to file reports in accordance with the requirements of subdivision (4) of section 13-a, subdivision (3) of section 13-k, subdivision (3) of section 13-l and subdivision (4) of section 13-m of the Workers' Compensation Law whenever after taking testimony the Workers' Compensation Law Judge finds it to be in the interest of justice to excuse such failure, and the decision of the Workers' Compensation Law Judge shall state the reasons therefor.

(e) A claim for reimbursement pursuant to section 15, subdivision 8 of the Workers' Compensation Law shall be filed on a form prescribed by the chair.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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 Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.5. Workers' Compensation Law (WCL) Sections 141 and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: The proposed amendment to 12 NYCRR Section 300.5 is in accordance with the legislative purpose of ensuring prompt findings and payments to injured workers, with the Board overseeing such findings to ascertain the substantial rights of the parties.

3. Needs and benefits: The purpose of the proposed amendment is to streamline the process permitting the parties to a workers' compensation claim to enter into stipulations in accordance with agreements reached outside of a hearing. Currently, parties that wish to stipulate to findings or facts not in dispute, must appear at a hearing, create a writing of the agreement, sign the agreement and have the agreement converted to a notice of decision. The proposed amendment permits employers, carriers and represented claimants to create a written stipulation that may be submitted to the Board for review and approval without requiring all parties to appear at a hearing. This eliminates delays and unnecessary hearings. The proposed amendment also permits all parties (including unrepresented claimants) to enter into a stipulation at a hearing on the record without requiring that such agreement be reduced to a writing, other than the resulting decision of the Workers' Compensation Law Judge overseeing the hearing. The proposed amendment will reduce delays, eliminate unnecessary appearances at hearings and redundant paperwork.

4. Costs: The proposed amendments should reduce costs for all parties, the Board, State and local government, by avoiding unnecessary hearings and duplicate paperwork. There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed amendment does not impose any mandate, duty or responsibility upon any municipality or governmental entity.

6. Paperwork: The proposed amendment reduces duplicate paperwork, wherein a written stipulation signed by the parties is recreated in a notice of decision issued by a Workers' Compensation Law Judge. Under the proposed amendment, instead of having both pieces of paperwork for every stipulation, the parties will have either a written Stipulation reviewed and ordered by the board or a Notice of decision issued by a Workers' Compensation Law Judge.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration. The Board briefly considered permitting all parties to submit written stipulations to the Board for approval, but determined that the risks for unrepresented claimants was too great. Thus unrepresented claimants must present and stipulations at a hearing.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: It is believed that compliance will be easily achieved, following an update in Board processes and forms, and community outreach.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers, though it is intended to bring down the cost of workers' compensation by reducing attendance at hearings and reducing duplicate paperwork.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation. It is anticipated that small businesses and local governments will experience a decrease in their workers' compensation costs as a result of this change.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 300.5 of 12 NYCRR to streamline the process for entering into stipulations in a workers' compensation proceeding. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Requests for Administrative Review

I.D. No. WCB-45-15-00020-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 300.13 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 141

Subject: Requests for Administrative Review.

Purpose: To clarify the proecss for requesting administrative review and full Board review including requests for reconsideration.

Text of proposed rule: Sections 300.13, 300.15 and 300.16 of Title 12 of NYCRR are repealed and a 300.13 is added:

300.13 Administrative Review, Full Board Review, and Applications for Board Reconsideration

(a) Definitions

(1) "Administrative Review" means an administrative appeal from a decision of a Compensation Claims Referee, under section twenty-three of the workers' compensation law, or an administrative appeal of a finalized administrative determination as set forth in part three-hundred twelve of this chapter.

(2) "Full Board Review" means an administrative appeal from a decision of the Board pursuant to section twenty three of the workers' compensation law. Such review is discretionary unless a board member dissents from the ruling regarding a finding other than the issue of whether to appoint an impartial medical specialist. Upon notice to the claimant, his or her legal representative, if any, the employer or carrier or Special Fund, the full board may review any case on its own motion.

(3) "Filing" means an application has been received by the Board at the designated point of receipt. Upon posting on the Board's website, the Chair may prescribe the format and method for filing and service including, among other methods, electronic, mail, fax or personal service.

(4) "Necessary Parties of Interest" means, for the purposes of this section, claimants, self-insured employers, private insurance carriers, the state insurance fund, special funds, or any surety, including but not limited to the uninsured employer's fund, and the liquidation bureau. Treating Medical Providers and Independent Medical Examiners are not parties of interest and may not make filings, oral arguments, or otherwise participate in the administrative review process. Claimant's attorneys and licensed hearing representatives are not necessary parties of interest under this rule, except that an attorney or representative is a necessary party in an appeal that concerns the amount of a fee payable to an attorney or representative or a penalty imposed against an attorney or licensed hearing representative.

(b) Requests for Administrative Review and Requests for Full Board Review filed pursuant to Workers' Compensation Law Section 23, and Requests for Reconsideration of a Board Panel decision pursuant to Section 300.14 of this Part.

(1) Application Format. Unless submitted by an unrepresented claimant, an application to the Board for administrative review of a decision by a Workers' Compensation Law Judge shall be in the format as prescribed by the Chair.

(i) The application in the format prescribed by the Chair must be filled out completely by the appellant, except that the requirement to utilize the application format shall not be imposed upon a claimant who is unrepresented.

(A) Unless otherwise specified by the Chair, the appellant may attach a legal brief of up to five pages in length, in 12-point font, with one inch margins, on 8.5 inch by 11 paper. A brief longer than five pages will not be considered, unless the appellant specifies, in writing, why the legal argument could not have been made within five pages. In no event shall a brief longer than eight pages be considered.

(B) Documents that are present in the Board's electronic case folder at the time the administrative review is submitted may not be, included with or attached to the application. The Board may reject applications for review by an appellant, or an attorney or licensed representative of the appellant, who attaches documents that are already in the case folder at the time of the application.

(C) If the appellant seeks to introduce additional documentary evidence in the administrative appeal that was not presented before the Workers' Compensation Law Judge, the appellant must submit a sworn affidavit, setting forth the evidence, and explaining why it could not have been presented before the Workers' Compensation Law Judge. The Board has discretion to accept or deny such newly filed evidence. Newly filed evidence submitted without the affidavit will not be considered by the Board panel.

(ii) The application for administrative review:

(A) shall specify the issues and grounds for the appeal;

(B) shall specify the objection or exception that was interposed to the ruling, and when the objection or exception was interposed;

(C) shall, when filed by an employer or carrier, specify which payments are continuing pending resolution of the administrative appeal, and which payments are stayed pursuant to section twenty-three of the Workers' Compensation Law. For all payments stayed, the appellant shall indicate the issue on appeal that forms the legal basis for staying payments;

(D) shall include proof of service upon all necessary parties of interest, in the format prescribed by the Chair. Service upon a party who is not adverse to the interest of the appellant is optional, and failure to properly serve an optional party shall not be deemed to render the appeal defective. Failure to properly serve a necessary party shall be deemed defective service and the application shall be rejected by the Board.

(a) Proof of service in the format prescribed by the Chair shall specify the papers served, the person who was served, the date, and method of service including the actual address, email address or fax number where service was transmitted. An affidavit, affirmation, or other satisfactory proof of service as prescribed by the Chair, shall be submitted with the Application for Administrative Review to the Board. The affidavit, affirmation, or other proof of service must certify that all service was completed within thirty days from the filing of the decision that is the subject of the Application for Administrative Review.

(b) There is no requirement that each party be served in the same manner. Service is deemed timely if completed by the party of interest within thirty days of the filing of the decision by the Board.

(c) Unless the Chair directs service by electronic means, the appellant must certify in the affidavit or affirmation of service, that the party served provided explicit permission to receive service by fax, email, or other electronic means.

(d) When the administrative appeal is filed by the carrier, self-insured employer, or other payor or potential payor, service shall be upon the claimant, and claimant's attorney or representative, and other necessary parties in interest.

(e) Service upon a party who is not adverse to the interest of the appellant is optional, and failure to properly serve an optional party shall not be deemed to render the appeal defective.

(E) Shall include any additional fee request in the manner set forth by the Chair. Failure to request an additional fee shall result in waiver of such fee.

(iii) Filing with the Board

(A) The application shall be filed with the board within thirty days after the notice of the filing of the decision. All filings must be made using methods designated, permitted, and prescribed by the Chair. If more than one filing option is permitted by the Chair, the appellant shall choose one method for filing. Any duplicate filings may be deemed to be raising or continuing an issue without reasonable grounds, and may subject the appellant to assessments under 114-a(3) of the Workers' Compensation Law.

(B) Method of filing the application

(a) By mail shall be sent to the Board's designated Centralized Mailing Address;

(b) By fax shall be sent to the Board's designated Centralized Fax Number;

(c) By email shall be sent to the Board's designated email address for claims documents;

(d) By electronic means shall be filed in the method and manner prescribed by the Chair. An application that is submitted by electronic means in accordance with this subparagraphs shall not be deemed filed with the Board until such submission is received and acknowledged by the Board.

(C) The Chair may prescribe and require the format and the methods of filing of administrative appeals, including by electronic means, and may set the requirements to include various data fields, except that claimants who are unrepresented are exempt from the requirement to file electronically.

(iv) Denial of review. The application for review may be denied by issuance of a Board panel decision, or the appellant may be notified by letter or electronic notice provided by the Administrative Review Division, under the following circumstances:

(A) When the appellant, other than a claimant who is not represented, does not comply with prescribed formatting, completion and service submission requirements;

(B) When the appellant does not file the application within thirty days;

(C) When the appellant does not properly file the application with the Board;

(D) When the appellant does not provide proper proof of timely

service upon a necessary party in interest other than a party who is not adverse to the appellant. When the appellant fails to supply proper proof of timely service upon a necessary party,

(a) When a rebuttal is submitted, the necessary party shall raise the issue of defective service in its rebuttal. Failure to raise the issue of defective service in the rebuttal shall constitute a waiver of the issue.

(b) When no rebuttal is filed, the Board may consider whether the application was defectively served, and if so, the Board may deny review without decision.

(E) Where the appellant did not interpose a specific objection or exception to a ruling or award by a workers' compensation law judge.

(a) Where a decision is made at a hearing, the appellant did not preserve a specific objection to the ruling or award at the hearing on the record.

(b) Where proceedings occur off-calendar, such as at a deposition, the appellant did not preserve a specific procedural objections on the record.

(c) No objection to findings made by reserved decision that have not been previously made at a hearing, need be interposed prior to filing of an application for review.

(c) Rebuttal. A party adverse to the application for administrative review may file a rebuttal to such application for review. The rebuttal shall be in writing and, for parties other than an unrepresented claimant, shall be accompanied by a cover sheet in the format prescribed by the chair. Such rebuttal shall be served on the Board and all necessary parties within thirty days after service of the application for review together with proof of service upon all necessary parties in the form and format prescribed by the Chair.

(d) The Board shall have the verbatim records of all hearings and proceedings placed in the case file it maintains in a readable, viewable or audible format where the issue or issues raised in the application for review were covered, and the case file shall only be considered by a Board Panel after the verbatim records covering the disputed issues are inserted in the case file.

(e) Stay of Payments. There is no stay of any payment due to the claimant or the Board upon a filing of an application for full Board review.

(f) When a claimant is not represented, the Board shall have discretion to waive the requirements contained in this section. An unrepresented claimant, who subsequently retains counsel, may have the procedural requirements of this section waived for the time when he or she was unrepresented.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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 Workers' Compensation Board (hereinafter referred to as Board) is authorized to repeal of 300.13, 300.15 and 300.16 of Title 12 of the NYCRR and addition of 12 NYCRR Section 300.5. Workers' Compensation Law (WCL) Sections 141, 117(1) and 23 authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: The proposed addition of 12 NYCRR Section 300.13 facilitates an orderly administrative review process and eliminates ambiguities and inconsistencies.

3. Needs and benefits: The purpose of the proposed addition is to create clear standards for the preservation of a party's right to administrative review, increase the Board's ability to deny applications for review that do not conform to clearly stated standards when the applications are submitted by parties of interest (except unrepresented claimants), and clarify that certain enumerated inconsequential errors, such as failing to serve a party not adverse to the application, does not render the application defective.

4. Costs: The proposed amendments should reduce costs for all parties, the Board, State and local government, by reducing the number of unnecessary decision issued on defective applications, and reducing delays in the administrative review process. There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed amendment does not impose any mandate, duty or responsibility upon any municipality or governmental entity.

6. Paperwork: The proposed amendment reduces duplicate paperwork, wherein parties deliver copies of a request for administrative review by fax, mail, and in person delivery.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration. The Board considered making no change to the current regulations. However, the widespread concern by stakeholders that the current process facilitates unmeritorious applications for review and delays adjudication of claims, caused the Board to reject that consideration.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: It is believed that compliance will be easily achieved, following an update in Board processes and forms, and community outreach.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers, though it is intended to bring down the cost of workers' compensation by reducing reducing duplicate paperwork.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation. It is anticipated that small businesses and local governments will experience a decrease in their workers' compensation costs as a result of this change.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule repeal of 300.13, 300.15 and 300.16 of Title 12 of the NYCRR and addition of 12 NYCRR Section 300.13 to clarify the rules for requesting administrative review in workers' compensation claims. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Convene Board Hearings by Electronic Means

I.D. No. WCB-45-15-00021-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 300.27 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 141

Subject: Convene Board hearings by electronic means.

Purpose: Permit the Chair to convene Board hearings by electronic means.

Text of proposed rule: Section 300.27 of Title 12 of the New York Codes Rules and Regulations is amended as follows:

(a) Regular meetings of the Board shall be held monthly, except in the month of August, at the office of the Board [in Albany] *in Schenectady*, beginning at 10 o'clock in the forenoon on the third Tuesday of the month unless the third Tuesday is a legal holiday, in which event the regular meeting for that month shall be held on the Tuesday next following which is not a legal holiday. Notwithstanding the foregoing, the Board, at a regular meeting, or the Chair, in writing filed with the secretary, may provide that a particular subsequent regular meeting or meetings of the board may be held at any office of the Board at a time and day or days other than as above specified.

(b) In addition to the regular meetings, special meetings of the board may be called by the chair or by not less than five members. Each such call, whether by the chair or by five or more board members, shall be in writing, filed with the secretary, and shall state the business for which the special meeting is called. A copy of the call, together with notice of the place, date and hour of the meeting, shall be delivered [personally or mailed]*as prescribed by the Chair* to each board member not less than five business days prior to the date fixed for the special meeting.

(c) Notice of regular meetings shall not be required, except that if the place, date or hour of a regular meeting is changed by the chair as provided in subdivision (a) of this section, notice of the place, date or hour of the meeting shall be delivered [personally or mailed] *as prescribed by the Chair* to each board member not less than five business days prior to the date fixed for the regular meeting.

(d) The chair or, in his or her absence, the vice-chair shall preside at all board meetings. If at any board meeting neither the chair nor vice-chair shall be present, the members present shall designate one of the members to preside at such meeting.

(e) Business transacted at special meetings shall be confined to the business stated in the call, unless all board members shall consent to the transaction of additional or further items of business.

(f) At each regular meeting of the Board, the attorney responsible for overseeing adjudication, or his or her designee, shall report, orally or in writing, on the conduct and the status of the adjudication of claims by the Board, as the Board may require.

(g) Seven members present at any regular or special meeting shall constitute a quorum for the transaction of business, and no action shall be taken except by the assent of not less than seven members. Each member present at a meeting of the board shall vote on each question duly presented for action unless excused by the board, or unless he or she has a direct personal or pecuniary interest in the outcome of such question. An absent member may not be recorded as voting.

(h) The secretary shall keep minutes of all board meetings and provide the members with copies thereof.

(i) At any regular or special meeting of the Board, Board members, the Chair and Vice Chair may convene by electronic means, including but not limited to, teleconferencing and videoconferencing. The means of attendance shall be duly recorded in the minutes of the meeting by the secretary.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

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

Regulatory Impact Statement

1. Statutory authority: The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.27. Workers' Compensation Law (WCL) Sections 141 and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: The proposed amendment to 12 NYCRR Section 300.27 is in accordance with the Chair's authority to set meetings, place sand times, in order to facilitate the efficient operation of the Board.

3. Needs and benefits: The purpose of the proposed amendment is to change the location of the executive offices of the Board to Schenectady (its current location) and to permit the Chair to convene Board members electronically as needed. This will facilitate efficient operation of the Board and eliminate delays due to travel impediments associated to Board members wide geographic disbursement.

4. Costs: The proposed amendment will not increase costs. It is anticipated that the proposed change may reduce costs by eliminating unnecessary travel expenses.

5. Local government mandates: The proposed amendment does not impose any mandate, duty or responsibility upon any municipality or governmental entity.

6. Paperwork: The proposed amendment does not increase any paperwork obligations on affected parties.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration. The Board could make no change. However, experience has shown that there are delays when all Board members must appear in person. As the Board has the needed technological capabilities to permit electronic appearances, there is no reason not to adopt a regulatory amendment to permit this change.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: It is believed that there are no compliance obligations associated other than an update to Board form(s).

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers, though it is intended to enhance the efficiency of the workers' compensation system by providing an alternative to the formal administrative review process.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 300.27 of 12 NYCRR to provide an alternative process for the prompt resolution of administrative appeals. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Voluntary Binding Review of Decisions

I.D. No. WCB-45-15-00022-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 300.36 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 32, 117 and 141

Subject: Voluntary Binding Review of Decisions.

Purpose: To permit parties to a workers' compensation case to enter into voluntary binding review of issues related to compensation.

Text of proposed rule: § 300.36 Section 32 agreements

Statement of purpose. To encourage the parties in interest to enter into agreements settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents*, or to agree to accept a voluntary review process for the determination of compensation benefits.*

(a) The parties in interest to a claim for compensation may settle upon and determine any and all issues and matters by agreement, in accordance with section 32 of the Workers' Compensation Law, subject to the terms and conditions of this rule.

(b) Any agreement submitted to the board for approval shall be on a form prescribed by the chair or, alternatively, contain the information prescribed by the chair.

(c) The receipt of an agreement by the board for approval shall act as a stay on all related proceedings before the board.

(d) A represented claimant and an employer, insurance carrier or special fund, who have had a dispute regarding compensation benefits determined by a workers' compensation law judge, may agree to enter into a voluntary binding review process, wherein the parties establish the parameters of a section 32 agreement. Such proposed agreement with the parameters and other terms included therein, shall be submitted to a designee of the Chair. Upon the summary determination by the Chair's designee made pursuant to and within the parameters of the parties' agreement, such determination of compensation benefits set forth therein shall be deemed to be incorporated as a term of the agreement as approved by the board on the date the decision approving the agreement was duly filed and served pursuant to subparagraph b of section 32 of the Workers' Compensation Law.

([d]*e*) An agreement submitted pursuant to section 32 of the Workers' Compensation Law shall not be binding on the parties in interest unless it is approved by the chair, a designee of the chair, a member of the board, or a Workers' Compensation Law Judge. The agreement shall be approved unless it is determined that:

(1) the agreement is unfair, unconscionable, or improper as a matter of law; or

(2) the agreement is the result of an intentional misrepresentation of a material fact; or

(3) within 10 days of submission of the agreement, the board has received from any party in interest a written request that the agreement be disapproved by the board. *A claimant who cashes or deposits a check made pursuant to the agreement may not request that the agreement be disapproved by the board, provided however that a claimant who has been paid an incorrect amount shall have recourse to recover any unpaid amounts and penalties associated to the late or incorrect payment. When the agreement provides for payment to be made pursuant to section 25(9) of the Workers' Compensation Law, the claimant must immediately return such payment when requesting disapproval of the agreement or such request for disapproval may be deemed waived and applicable penalties imposed.*

([e]*f*) The agreement shall be reviewed by the chair, a designee of the chair, a member of the board, or a Workers' Compensation Law Judge, who will make a determination whether to approve or disapprove the agreement. The chair, designee of the chair, member of the board, or Workers' Compensation Law Judge reviewing the agreement may approve or disapprove the agreement administratively, based on a review of the record before the board, or may choose to schedule a meeting to question the parties about the agreement. If the agreement is reviewed administratively, the Board shall advise the parties in writing of the date the agreement shall be deemed submitted for the purposes of section 32 of the Workers' Compensation Law and this section. If a meeting is scheduled to question the parties about the agreement, the agreement will be deemed submitted for the purposes of Section 32 of the Workers' Compensation Law and this section at such meeting. No agreement shall be approved for a period of 10 calendar days after submission to the board.

([f]*g*) The board will advise the parties of the approval or disapproval of all agreements by duly filing and serving a notice of approval or disapproval.

([g]*h*) An agreement which is approved shall be final and conclusive on the parties in interest, and shall not be subject to review pursuant to section 23 of the Workers' Compensation Law. An agreement which is disapproved shall be subject to review pursuant to section 23 of the Workers' Compensation Law.

([h]*i*) The carrier shall make payments of any award as required in the agreement within 10 days of the filing of the decision approving the agreement. If the carrier fails to make such payments, the carrier shall be subject to penalties pursuant to paragraph (f) of subdivision 3 of section 25 of the Workers' Compensation Law.

([i]*j*) An agreement may provide for reasonable fees commensurate with the services rendered by the claimant's attorney or licensed representative. Whenever a fee is requested in excess of $ 450, the requested fee is to be made upon form OC-400.1 attached to the submitted agreement.

([j]*k*) Any agreement submitted and approved pursuant to section 32 of the Workers' Compensation Law and this rule may be modified at any time by agreement of all parties in interest provided such modification is approved by the board.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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 Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.36. Workers' Compensation Law (WCL) Sections 32, 141 and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: The proposed amendment to 12 NYCRR Section 300.36 is in accordance with the legislative purpose of Section 32 to permit settlement of claims following agreement by the parties with Board oversight and approval of such findings to ascertain the substantial rights of the parties.

3. Needs and benefits: The purpose of the proposed amendment is to provide a streamlined alternative for resolution of administrative appeals. This process will provide an efficient and effective mechanism for prompt resolution of disputes regarding compensation benefits. The proposed regulation provides a voluntary alternative to the traditional administrative review process. By creating a new and swift process for resolution of administrative review, the entire administrative review process should proceed more efficiently.

4. Costs: The proposed amendments should reduce costs for all parties, the Board, State and local government, by reducing legal paperwork in these disputes. There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed amendment does not impose any mandate, duty or responsibility upon any municipality or governmental entity.

6. Paperwork: The proposed amendment reduces paperwork, as it eliminates the need for parties to prepare and submit formal requests for administrative review.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration. Pursuant to the Board's Business Process Reengineering project, the Board heard from participants in the workers' compensation system that a new avenue for resolution of administrative appeals was needed to provide an opportunity for speedy resolution of disputes. Given the parameters of the Workers' Compensation Law, the Section thirty-two process offered the best mechanism for such a solution.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: This is a voluntary process. Accordingly, there is no mandate on the parties. Nonetheless it is believed that this process will be easy to follow for parties that choose this alternative.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers,

though it is intended to enhance the efficiency of the workers' compensation system by providing an alternative to the formal administrative review process.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 300.36 of 12 NYCRR to provide an alternative process for the prompt resolution of administrative appeals. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Permitted Expenses for Funerals

I.D. No. WCB-45-15-00023-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 311.1 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 16, 117 and 141

Subject: Permitted expenses for funerals.

Purpose: To increase the permitted amount for reimbursement of funeral and memorial services for work related deaths.

Text of proposed rule: Section 311.1 of Title 12 of the New York Codes Rules and Regulations is amended as follows:

Reimbursement for funeral expenses *or memorial services* under the Workers' Compensation Law, including but not limited to the following items: grave sites; headstone; organist; priest, minister, rabbi or other officiant; removal from hospital; casket; vault; chapel rental; embalming; preparation fees; hearse; cemetery fees including plot; death certificates; newspaper ad; and cremation costs, shall not exceed $ [6]*12,5*00 in the counties of Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester. In the remaining counties, reimbursement for such funeral expenses shall not exceed $ [5]*10,5*00. This fee schedule shall be applicable to deaths occurring on or after [July 31, 1990] *April 1, 2016*.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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 Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 311.1. Workers' Compensation Law (WCL) Sections 16, 141 and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: The proposed amendment to 12 NYCRR Section 311.1 is in accordance with the legislative purpose of reimbursement for the costs of funeral expenses when an employee dies due to a work related injury.

3. Needs and benefits: The purpose of the proposed amendment is to increase the amount of reimbursement available for funeral expenses and permit reimbursement for memorial services. Section 16 of the Workers' Compensation Law provides for reimbursement of reasonable funeral expenses. Section 16 also provides that the Chair shall determine what is a reasonable funeral expense through consultation with the New York State funeral directors association. The fees for funeral expenses have not been changed since 1990. After consultation with the NYS funeral directors association, it was determined that the reasonable cost for a funeral in the enumerated downstate counties is $12, 500 and the cost for a reasonable funeral in upstate New York is $10, 500.

4. Costs: The proposed amendment will increase costs to insurance carriers and self-insured employers for work related deaths. Nonetheless, these costs have not increased since 1990. The amendment provides for reimbursement that accurately reflects the legislative purpose of determining what is a reasonable expense for a funeral. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed amendment does not impose any mandate, duty or responsibility upon any municipality or governmental entity.

6. Paperwork: The proposed amendment does not increase any paperwork obligations on affected parties.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration. The Board briefly considered simplification of the system to have no difference between upstate and downstate. However, as there is a real difference between the costs in different area of the state, this alternative was not chosen.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: It is believed that there are no compliance obligations associated other than an update to Board form(s).

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will not affect insured employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact insured small businesses or local governments as employers. The rule will impact self-insured employers, who will see their obligation for reimbursement of funeral expenses for work related deaths. Fortunately, work related deaths are a very small percentage of the overall number of workers' compensation claims field each year. In addition, there has been no increase on this expense in twenty-five years. The increase will bring the regulation in line with the legislative mandate that requires reimbursement for reasonable expenses.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses who are no self-insured under the workers' compensation system. The proposed regulation will have minimal impact on self-insured local governments as their obligation for reimbursement of funeral and memorial expenses will increase in the very small number of work related deaths.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The proposed regulation will affect every self-insured employer in the state, regardless of where that business is located, inasmuch as it will increase its reimbursement obligations for funerals and memorial services when an employee suffers a work related death.

2. Reporting, recordkeeping and other compliance requirements; and professional services:The proposed regulation does not require any action by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses in rural areas. Self-insured local governments, after twenty-five years of no increase, will see their obligations for reimbursement for funerals and memorial services due to a work related death increase. These cases constitute a very small percentage of the overall number of workers' compensation claims.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 311.1 of 12 NYCRR to provide increase in the reimbursement amount for funerals and memorial services due to work related deaths. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medical Treatment Guideline Variances

I.D. No. WCB-45-15-00025-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 324.3 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 117 and 141

Subject: Medical Treatment Guideline variances.

Purpose: Permit the Chair to require submission of variance requests via an electronic medical portal.

Text of proposed rule: Subsection (i) of section 324.1 of Title 12 of the New York Code Rules and Regulations is amended as follows:

§ 324.1(i) ''Prescribed method of same day transmission'' means (1) facsimile transmission, provided that the receiving party has designated a facsimile number for this purpose to other persons, entities, or the Board; (2) electronic mail (email)[, provided that the receiving party has designated an electronic mail address for this purpose to other persons, entities, or the Board]; or (3) such other means of electronic delivery as [the receiving party or] the Chair has designated for this purpose to other persons, entities, or the Board. *The Chair shall have discretion to mandate or prohibit any means of same day transmission. When the means of same day transmission is the electronic portal maintained by the Workers' Compensation Board for receipt of medical information and available to all parties of interest and Treating Medical Providers, the requesting Treating Medical Provider and parties shall only be required to submit the request, response or request for review to the portal maintained by the Board and shall not be required to transmit the request, response or request for review to other parties or the requesting Treating Medical Provider.*

Section 324.3 of Title 12 of the New York Code Rules and Regulations is amended as follows:

§ 324.3 Variances

(a) Treating Medical Providers

(1) When a Treating Medical Provider determines that medical care that varies from the Medical Treatment Guidelines, such as when a treatment, procedure, or test is not recommended by the Medical Treatment Guidelines, is appropriate for the claimant and medically necessary, he or she shall request a variance [from the insurance carrier or Special Fund] by submitting the request in the format prescribed by the Chair [for such purpose] *as set forth in subsection (i) of section 324.1 herein*. A variance must be requested and granted by the insurance carrier, Special Fund, the Board or order of the Chair before medical care that varies from the Medical Treatment Guidelines is provided to the claimant and a request for a variance will not be considered if the medical care has already been provided.

(2) The burden of proof to establish that a variance is appropriate for the claimant and medically necessary shall rest on the Treating Medical Provider requesting the variance.

(3) The Treating Medical Provider requesting a variance shall submit the request in the format prescribed by the Chair [to the insurance carrier or Special Fund, Board, claimant, and the claimant's legal representative, if any, on the same day. A variance request must be submitted within two business days of the date it is prepared and signed.] The Treating Medical Provider shall submit the variance request [to the insurance carrier or Special Fund and Board] by one of the prescribed methods of same day transmission [if equipped to do so] *as set forth in subsection (i) of section 324.1 herein*, otherwise the Treating Medical Provider may send the form by regular mail with a certification that the Treating Medical Provider is not equipped to send and receive the variance request by one of the prescribed methods of same day transmission and the date the variance request was sent to the insurance carrier or Special Fund and Board. The Treating Medical Provider shall either submit at the same time as the variance request or reference on the variance request, if already in the claim file maintained by the Board, the necessary medical documentation to support the variance request. All questions on the variance request prescribed by the Chair must be answered completely, clearly setting forth information that meets the following requirements:

(i) for all variances:

(a) a medical opinion by the Treating Medical Provider, including the basis for the opinion that the proposed medical care that varies from the Medical Treatment Guidelines is appropriate for the claimant and medically necessary, and

(b) a statement that the claimant agrees to the proposed medical care, and

(c) an explanation of why alternatives under the Medical Treatment Guidelines are not appropriate or sufficient; and

(ii) for appropriate claims:

(a) a description of any signs or symptoms which have failed to improve with previous treatments provided in accordance with the Medical Treatment Guidelines; or

(b) if the variance involves frequency or duration of a particular treatment, a description of the functional outcomes that, as of the date of the variance request, have continued to demonstrate objective improvement from that treatment and are reasonably expected to further improve with additional treatment.

(4) Treating Medical Providers may submit citations or copies of relevant literature published in recognized, peer-reviewed medical journals in support of a variance request.

(5)(i) No variance is permitted from the maximum frequency and duration of ongoing maintenance care contained in New York Mid and Low Back Injury Medical Treatment Guidelines Sections D.10(a)(ii) and D.11, New York Neck Injury Medical Treatment Guidelines Sections D.11(d)(ii) and D.12, New York Shoulder Injury Medical Treatment Guidelines Section E.12, New York Knee Injury Medical Treatment Guidelines Section E.9, [and] New York Carpal Tunnel Syndrome Medical Treatment Guidelines Section E.4.g*, and New York Non-Acute Pain Medical Treatment Guidelines Section H.1.e*.

(ii) The Treating Medical Provider may render or prescribe treatment in accordance with the ongoing maintenance care guidelines contained in New York Mid and Low Back Injury Medical Treatment Guidelines Sections D.10(a)(ii) and D.11, New York Neck Injury Medical Treatment Guidelines Sections D.11(d)(ii) and D.12, New York Shoulder Injury Medical Treatment Guidelines Section E.12, New York Knee Injury Medical Treatment Guidelines Section E.9, [and] New York Carpal Tunnel Syndrome Medical Treatment Guidelines Section E.4.g*, and New York Non-Acute Pain Medical Treatment Guidelines Section H.1.e* when (A)

the Board has made a legal determination that the claimant has a permanent disability, or (B) a medical provider submits a medical opinion evidencing that the claimant has reached maximum medical improvement and has a permanent impairment, in the format prescribed by the Chair for such purpose, and the Board has not yet made a legal determination on maximum medical improvement or permanent disability.

(6) If a claim is controverted or the time to controvert the claim has not expired and the Treating Medical Provider needs to request a variance from the Medical Treatment Guidelines, [he or she must request] such variance *shall be requested* from the insurance carrier or Special Fund who would become responsible in the event the claim is established by complying with paragraphs (1) through (4) of this subdivision.

(7) Resubmission of a variance request.

(i) If a variance request for substantially similar treatment, procedure or test has been previously denied by the insurance carrier or Special Fund, the Treating Medical Provider shall submit the date of such denial and additional documentation or justification in support of a new variance request. A variance request that is substantially similar to any previous request may not be submitted until the insurance carrier or Special Fund has denied any previous variance request.

(ii) In the event that a variance request is submitted before a previous variance request for substantially similar treatment, procedure or test has been denied, the insurance carrier or Special Fund may submit the denial of the subsequent request without a medical opinion by its medical professional, a review of records, or independent medical examination.

(iii) In the event that a variance request, following denial of a request for substantially similar treatment, procedure or test, is submitted without additional documentation or justification beyond the prior variance request, the insurance carrier or Special Fund may deny the variance request by specifying that a prior variance request for substantially similar treatment, procedure or test has been denied, and the subsequent variance request does not contain any additional documentation or justification. Such denial may be submitted without a medical opinion by its medical professional, a review of records, or independent medical examination.

(b) Insurance carriers and Special Fund.

(1) Insurance carriers and Special Fund shall designate a qualified employee or employees in its office, if it handles its own claims, or a qualified employee or employees in the office of its representative licensed pursuant to Workers' Compensation Law Section 50 (3-b) or (3-d) as a point of contact for the Board and Treating Medical Providers regarding variance requests. Insurance carriers and Special Fund shall provide the Chair or his or her designee with the name and contact information for the point(s) of contact, including his, her, or their direct telephone number(s), facsimile number(s), and email address(es), within thirty days of the effective date of this paragraph. If the designated point(s) of contact changes at any time for any reason, the insurance carrier or Special Fund shall notify the Chair or his or her designee within ten [business] days of the change. The list of designated points of contact for each insurance carrier and Special Fund shall be posted on the Board's website.

(2) Review by insurance carrier or Special Fund.

(i) Without IME or review of records.

(a) The insurance carrier or Special Fund shall review the variance request and respond to the variance request [in the format prescribed by the Chair] *as set forth in subparagraph (4) of subdivision (a) herein* within fifteen days of receipt, except as provided in subparagraph (ii) of this paragraph. Receipt is deemed to be the date submitted, if submitted by one of the prescribed methods of same day transmission, or, if sent by regular mail, five business days after the date the Treating Medical Provider requesting the variance certified that the form was sent to the insurance carrier or Special Fund.

(b) If the request for a variance was submitted after the medical care was rendered, a medical opinion by the insurance carrier or Special Fund's medical professional, a review of records, or independent medical examination is not required and the insurance carrier or Special Fund may deny the variance request on the basis that it was not requested before the medical care was provided.

(c) The insurance carrier or Special Fund may deny a request for a variance on the basis that the Treating Medical Provider did not meet the burden of proof that a variance is appropriate for the claimant and medically necessary as set forth in subdivision (a) of this Section without review by the insurance carrier or Special Fund's medical professional, a review of records, or an independent medical examination. If the insurance carrier or Special Fund also wishes to obtain a medical opinion, a review of records, or independent medical examination, it must also comply with the timeframes set forth in subparagraph (ii) of this paragraph.

(d) When an insurance carrier or Special Fund denies a variance request on the basis that the Treating Medical Provider did not meet the burden of proof, the insurance carrier or Special Fund must also assert any other basis for denial or such basis for denial will be deemed waived.

(e) The insurance carrier or Special Fund may deny a request for a variance on the basis that (i) the Treating Medical Provider seeks a variance for a treatment, procedure or test that is substantially similar to a prior variance request from the Treating Medical Provider that has not yet been denied by the carrier or Special Fund; or (ii) that a prior substantially similar variance request has been denied, and the subsequent variance request does not contain any additional documentation or justification to the previous variance request. The carrier or Special Fund may deny the variance request by specifying the basis for the denial. The carrier or Special Fund may submit the denial without a medical opinion by its medical professional, a review of records, or independent medical examination.

(f) A denial of the request for a variance for reasons other than those set forth in clauses (b), (c) and (e) of this subparagraph must be reviewed by the insurance carrier or Special Fund's medical professional, if an independent medical examination or review of records is not conducted as set forth in subparagraph (ii) of this paragraph.

(ii) Review with IME or review of records.

(a) If the carrier or Special Fund wants an independent medical examination conducted of the claimant or a review of records in order to respond to the variance request, it shall notify the Chair and the Treating Medical Provider of this decision in the format prescribed by the Chair *as set forth in subparagraph (4) of subdivision (a) herein* within five [business] days of receipt of the variance request by one of the prescribed methods of same day transmission, except if the Treating Medical Provider has certified he or she is not equipped to send and receive by one of such methods, then by regular mail to the requesting Treating Medical Provider. A final response to the variance request shall be submitted in the format prescribed by the Chair in the same manner as the notice in the preceding sentence within thirty days of receipt of the request. Receipt is deemed to be the date sent, if sent by one of the prescribed methods of same day transmission, or, if sent by regular mail, five business days after the date the Treating Medical Provider requesting the variance certified that the form was sent to the insurance carrier or Special Fund.

(b) If the claimant fails to appear without reasonable cause for an independent medical examination scheduled by the insurance carrier or Special Fund in order to respond to a request for a variance, the request for a variance shall be denied. The insurance carrier or Special Fund shall submit the response to the variance request within thirty days of receipt of the request. Receipt is determined as provided in clause (a) of this subparagraph. If the claimant requests review of the denial of the variance request based on his or her failure to appear, such request for review shall be reviewed by the Board in the manner prescribed by the Chair. Such request for review of the denial of the variance shall be submitted in the manner prescribed by the Chair *as set forth in subparagraph (4) of subdivision (a) herein* within twenty-one [business] days of receipt of the insurance carrier or Special Fund's denial by the claimant. If the claimant requests review of the denial of the variance request and it is determined that the failure to appear was for reasonable grounds, the insurance carrier or Special Fund will have thirty days from the date of the filing of the decision to obtain an independent medical examination and provide a further response to the request for a variance.

(3) Insurance carrier or Special Fund response to variance request.

(i) The variance response shall be in the format prescribed by the Chair and shall clearly state whether the variance has been granted, denied, or partially granted. If a variance request has been partially granted, the variance response shall specify the medical treatment, procedure or test that has been granted.

(ii) The variance response shall be submitted by one of the prescribed methods of same day transmission to the Treating Medical Provider who requested the variance, the Board, claimant, claimant's legal representative, if any, or any other parties. However, if the Treating Medical Provider certified he or she is not equipped to send and receive by one of the prescribed methods of same day transmission, and/or if the claimant, claimant's legal representative, if any, or any other party is not capable of receiving the response by one of the prescribed methods of same day transmission or has not provided the insurance carrier or Special Fund with the necessary contact information, the insurance carrier or Special Fund shall send the response to such individual or individuals by regular mail with a certification of the date and to whom the response was sent.

(iii) If the insurance carrier or Special Fund denies a variance request, it shall state the basis for the denial in detail and, if for reasons other than those set forth in paragraph (2) (i) (b) or (c) or (2) (ii) (b) of this subdivision, submit with its response the [written] report of the insurance carrier or Special Fund's medical professional that reviewed the variance request or the review of records, if it has not already been submitted to the Board and to all other parties. The denial shall identify the independent medical examination report or review of records report, if already submitted to the Board, by the document identification number in the electronic case folder and date received by the Board. The insurance carrier or Special Fund may submit citations or copies of relevant literature published in recognized, peer-reviewed medical journals in support of a denial of a variance request.

(4) If a claim is controverted or the time to controvert the claim has not expired, and the insurance carrier or Special Fund grants or partially grants a variance request, such grant is limited to the question of appropriateness for the claimant and medical necessity, and it shall not be construed as an admission that the condition for which the variance is requested is compensable and the insurance carrier or Special Fund is not liable for the cost of such treatment unless the claim or condition is established.

(5) Prior to submitting the response, the insurance carrier or Special Fund may initially respond orally to the Treating Medical Provider about the variance requested by such provider.

(c) Request for review of denial of variance. Upon receipt of the denial of the variance request, the claimant or claimant's legal representative, if any, shall consult with the Treating Medical Provider who requested the variance to determine if such variance is still appropriate and medically necessary. If the Treating Medical Provider still believes it is appropriate and medically necessary, the claimant or claimant's legal representative, if any, may request review of the denial of the variance. A request for review of the denial of the variance shall be submitted within twenty-one [business] days of receipt of the insurance carrier or Special Fund's denial by the claimant. Receipt is deemed to be the date sent, if sent by one of the prescribed methods of same day transmission, or, if sent by regular mail, five business days after the date the insurance carrier or Special Fund certified that the variance response was sent to the claimant or the claimant's legal representative, if any. The request shall be made in the format prescribed by the Chair and provide all information requested, unless the claimant is unrepresented. When a denial is not based on a claimant's failure to appear for an independent medical examination pursuant to subparagraph (ii) of paragraph (2) of subdivision (b) herein and the claimant seeks review of such denial, a represented claimant or such claimant's legal representative shall notify the Chair if he or she requests resolution by an expedited hearing in accordance with paragraph (3) of subdivision (d) of this section simultaneous with requesting review of the insurance carrier or Special Fund's denial of the request for a variance. If a represented claimant or such claimant's legal representative does not notify the Chair of his or her request for an expedited hearing, the request for review of the denial of the variance request will be resolved through the medical arbitration process set forth in paragraph (2) of subdivision (d) of this section. If the request is not received by the Board within twenty-one [business] days of receipt of the denial, the denial of the request for the variance will be deemed final. If the claimant or claimant's legal representative, if any, is informed or knows that the Treating Medical Provider is trying to informally resolve the denial of the variance request in accordance with subdivision (d) of this section, the claimant or claimant's legal representative shall not request review of the denial until advised that attempts at informal resolution have been unsuccessful [or the informal resolution period has expired]. If the claimant or claimant's legal representative submits a timely request for review of the denial of the variance, such request will be resolved in accordance with subdivision (d) (2) or (3) of this section.

(d) Process for requesting review of denial of variance except denials based on the claimant's failure to appear for an IME.

(1) Informal resolution.

[(i)] If the insurance carrier or Special Fund denies the variance request in accordance with subdivision (b) of this section, the Treating Medical Provider who requested the variance may elect to try to resolve the dispute by discussing the variance request directly with the insurance carrier or Special Fund's medical professional prior to the resolution of the dispute through the medical arbitrator process set forth in paragraph (2) of this subdivision or the expedited hearing process set forth in paragraph (3) of this subdivision. *In the event the Treating Medical Provider and insurance carrier or Special Fund informally resolve the denial of the variance request, the insurance carrier or Special Fund shall update its response to the variance request in accordance with subdivision (a)(4) herein, identifying in the updated response whether the request has been granted or partially granted.*

[(ii) If the dispute is resolved, the insurance carrier or Special Fund confirms the resolution by submitting notice of the resolution in the format prescribed by the Chair for this purpose reflecting the resolution to the Treating Medical Provider, Board, claimant, claimant's legal representative, if any, and to any other parties, by one of the prescribed methods of same day transmission or, if one of the recipients is not equipped to receive the notice of resolution through one of the prescribed methods, by regular mail to such recipient.

(iii) The parties shall make every effort to resolve the dispute, however if the discussion fails to resolve the dispute the Treating Medical Provider shall notify the claimant and the claimant's legal representative, if any, that the dispute was not resolved so that the claimant or claimant's legal representative, if any, may request review of the denial of the request for a variance and have the dispute resolved through the medical arbitrator process set forth in paragraph (2) of this subdivision or expedited hearing process set forth in paragraph (3) of this subdivision.]

(2) Medical arbitrator process.

(i) If the claimant or claimant's legal representative requests review of the denial of a variance, the Chair shall order the claim into the medical arbitrator process, when:

(a) the Treating Medical Provider and insurance carrier or Special Fund have attempted and failed to resolve the denial of the variance informally; and

(b) the claimant or insurance carrier or Special Fund has not requested that the issue be decided by expedited hearing as provided in paragraph (3) of this subdivision.

(ii) The request for review, variance request, and denial will be reviewed by the medical arbitrator. Such review will not commence if the Treating Medical Provider and insurance carrier or Special Fund resolve the denial of the variance informally and the insurance carrier or Special Fund confirms the resolution by submitting the notice of resolution in the format prescribed by the Chair for this purpose as provided in paragraph (1) [(ii)] of this subdivision. The medical arbitrator shall rule on the request for review of the denial of the variance and issue a notice of resolution setting forth the ruling and the basis for such ruling. If the basis for the insurance carrier or Special Fund's denial of the variance request was that the Treating Medical Provider failed to meet the burden of proof that the variance was appropriate for the claimant and medically necessary, and the medical arbitrator rules that the Treating Medical Provider did meet his or her burden of proof, the medical arbitrator shall then immediately rule on whether the variance request is approved or denied. The notice of resolution issued by the medical arbitrator is binding and not appealable under Workers' Compensation Law Section 23.

(3) Expedited hearing process.

(i) Upon request of a party, the case may be referred for an expedited hearing for review of the denial. A request for referral for an expedited hearing is applicable only to the specific variance denial under review. Subsequent requests for review of a variance denial shall be referred to the medical arbitrator process unless a party requests referral for an expedited hearing.

(ii) Claims referred to the expedited hearing process to resolve the request for review of the denial of a variance may be heard by a Workers' Compensation Law Judge designated to hear such issues. Notice of the expedited hearing shall provide that the parties may take the testimony of the claimant's Treating Medical Provider and the insurance carrier or Special Fund's medical professional, independent medical examiner, or records reviewer who wrote the written report upon which the denial of the variance request was based at or prior to the hearing, unless the denial was solely based on the failure of the Treating Medical Provider to meet his or her burden of proof as provided in subdivision (b) (2) (i)(c). If the medical professionals are deposed, transcripts shall be provided to the Board on or before the hearing and within thirty days of the request for the expedited hearing. If the claimant is unrepresented the testimony of claimant's attending physician and the independent medical examiner shall be taken at a hearing. For good cause shown, the Workers' Compensation Law Judge may grant an adjournment if one or both of the medical professionals cannot be deposed and transcripts filed with the Board at or prior to the hearing, or if one or both of the medical professionals cannot appear to testify at the expedited hearing. The Workers' Compensation Law Judge shall issue his or her decision on the request for review of the denial of the variance at the expedited hearing, including the reasons and evidence supporting the decision, and a notice of decision will be sent after the close of the hearing, unless the Workers' Compensation Law Judge determines on the record that there are complex medical issues, in which case he or she will reserve his or her decision and the written decision shall be issued shortly after the expedited hearing. The case shall not be continued for further development of the record except where there are complex medical issues of diagnosis, treatment or causation present and then it shall be continued for no more than thirty days.

(4) The claimant and the Treating Medical Provider who requested the variance shall have the burden of proof that such variance is appropriate for the claimant and medically necessary.

(5) The Board shall consider relevant literature published in recognized, peer-reviewed medical journals cited by the Treating Medical Provider or the insurance carrier or Special Fund or both, and may consider relevant literature not previously cited, in determining whether a variance is medically necessary, including satisfaction of the relevant requirements in subdivision (a)(3) of this section.

(6) If the insurance carrier or Special Fund fails to respond to the variance request, fails to timely deny the variance request in accordance with subdivision (b) of this section, or, except if the basis for the denial is one of the reasons set forth in subdivision (b) (2)(i)(b), (c) or (e) of this section, fails to submit the written report, or identify the report in the electronic case folder, the variance is deemed approved on the ground that

such approval was unreasonably withheld and the Chair will issue an order stating that the request is approved. Such order of the Chair is not appealable under Workers' Compensation Law section 23. When a substantially similar variance has been submitted in violation of paragraph (7) of subdivision (a) herein, the failure of the carrier or Special Fund to timely deny such request shall not result in the variance being deemed approved and the Chair is not required to issue an order stating that the request is approved.

(7) When the Chair issues an order as provided in paragraph (6) of this subdivision in a claim that is controverted or the time to controvert the claim has not expired, the insurance carrier or Special Fund shall not be responsible for the payment of such medical care until the question of compensability is resolved and then only if that insurance carrier or Special Fund is found liable for the claim.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

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

Regulatory Impact Statement

1. Statutory authority: The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 324.1 and 324.3. Workers' Compensation Law (WCL) Sections 13, 141 and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: WCL Section 13-a (5) requires that a medical provider that seeks to perform a medical procedure costing more than one thousand dollars seek prior approval from the employer or insurance carrier and requires the Chair to create a list of procedures that are preauthorized. The Medical Treatment Guidelines (MTG) identifies recommended treatments and protocols for treatment of the stated injuries. Any treatment performed consistent with the MTG does not require preauthorization. Treatment performed that is not consistent with the MTG, requires that the provider seek a variance for the treatment from the employer or insurance carrier regardless of the cost of the treatment. The proposed amendment to 12 NYCRR Sections 324.1 and 324.3 updates the regulations to permit the Chair to require that such requests for approval be made using an electronic portal maintained by the Board unless the medical provider does not have the ability to submit electronically. The proposed amendment also permits the Chair to waive service requirements on other parties because once the electronic portal is operational all parties will receive notices from the portal and have access to the same information.

3. Needs and benefits: The purpose of the proposed amendment is to permit the Chair to require use of a self-service medical portal when making requests for variances. The medical portal is a product of the Board's Business Process Reengineering project whereby system participants widely expressed an interest in having the ability to operate in a self-service environment and to simplify the processes for requesting approval for medical treatment. The medical portal will be available to all system participants and will do calculations for timing and proper process behind the scenes to relieve users of the need to perform these calculations and analyses.

4. Costs: There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed regulation does not impose any mandate, duty or responsibility upon any municipality or governmental entity. Self-insured municipalities may use a medical portal if they are able. If the self-insured municipality does not have internet access, it may continue to receive requests by paper.

6. Paperwork: The proposed amendment would permit the Chair to eliminate the use of various paper forms associated to requesting medical treatment.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: The proposed amendment gives the Chair discretion to require use of the medical portal subject to exceptions. The Chair may delay this requirement to assure that all participants are ready and will dedicate needed resources to assure all participants are capable of using the portal before requiring same.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed amendment will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers or medical providers, though it is intended to enhance the efficiency of the workers' compensation system by providing a self-service medical portal for easy submission and responses to medical authorization requests. A self-insured employer medical provider that does not have the ability to access the medical portal, may continue to process authorizations as is done today.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. In the unlikely event that a self-insured employer or medical provider operating in a rural area does not have internet access, he or she will be able to continue to submit and respond to variance requests as is done today.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Sections 324.1 and 324.3 of 12 NYCRR to provide an alternative process for the prompt resolution of administrative appeals. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medical Authorizations

I.D. No. WCB-45-15-00026-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 325-1.4 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13-a, 117 and 141

Subject: Medical Authorizations.

Purpose: Permit the Chair to require submission of medical authorization requests via an electronic medical portal.

Text of proposed rule: Section 325-1.4 of Title 12 of the New York Code Rules and Regulations is amended as follows:

§ 325-1.4 Authorization for special services

(a) Authorization for medical care in accepted or established claims.

(1) When it is necessary for the attending physician to engage the services of a specialist, consultant, or a surgeon, or to provide for X-ray examinations or occupational therapy or physical therapy or special diagnostic laboratory tests costing more than one thousand dollars, or when it is necessary for a self-employed physical or occupational therapist to continue physiotherapeutic or occupational therapy procedures prescribed by an attending physician costing more than one thousand dollars, he or she must request and secure authorization from the employer or insurance carrier or the Chair, by setting forth the medical necessity of the special services required *and submitting the request in the format prescribed by the Chair*.[on the Chair prescribed form for such purpose]. Such requests are not required in an emergency or for pre-authorized procedures as set forth in subdivision (d) of this section and section 324.2(c) of this Subchapter. *Requests shall be submitted by one of the prescribed methods of same day transmission as set forth in subsection (i) of section 324.1. When the Treating Medical Provider is not equipped to send and receive the authorization request by one of the prescribed methods of same day transmission, he or she may send the request by regular mail with a certification that the Treating Medical Provider is not equipped to send and receive the authorization request by one of the prescribed methods of same day transmission and the date the authorization request was sent to the insurance carrier or Special Fund and Board.*

(2) This section also applies to hospitals, specialists, consultants and surgeons, who are actually engaged to perform such services.

(3) The attending physician or self-employed physical or occupational therapist seeking authorization shall *submit the request in accordance with subparagraph (1) herein* [file the form prescribed by the Chair for this purpose with the Board and also on the same day serve a copy on the insurance carrier by one of the prescribed methods of same day transmission set forth in section 324.1(h) of Part 324 of this Subchapter or by regular mail with confirmation of delivery]. All questions [on the form prescribed by the Chair for this purpose] shall be answered completely, clearly setting forth the medical necessity of the special services requested. The attending physician or self-employed physical or occupational therapist shall not request authorization for the same special service multiple times without any change of the claimant's medical condition.

(4) In order to process such requests expeditiously and within the time limits specified hereunder, the insurance carrier shall designate a qualified employee or employees in its office, and the self-insured employer shall designate a qualified employee or employees in its office or an authorized employee or employees of its licensed representative, to receive and act upon such requests.

(5) In response to requests for authorization for treatment related to an established body part or illness, the self-insured employer or insurance carrier may have the claimant examined within four business days if the claimant is hospitalized or thirty days if the patient is not hospitalized, by an appropriate specialist who is authorized by the Chair, to conduct independent medical examinations of workers' compensation claimants. If such specialist is not available or where the claimant resides outside of state, consultation may be rendered by a qualified provider who may conduct the independent medical examination as provided in Workers' Compensation Law section 137(3)(a) and section 300.2(b)(9) and (d)([7] *10*) of this Chapter.

(6) The self-insured employer or insurance carrier shall respond to the authorization request orally and in writing by one of the prescribed methods of same day transmission as defined in section 324.1 ([h] *i*) of this Subchapter or by regular mail with confirmation of delivery within thirty days. The thirty day time period begins to run from the date *of receipt* [the completed form prescribed by the Chair for this purpose was sent] if sent by one of the prescribed methods of same day transmission or five days after it was sent if sent by regular mail with confirmation of delivery. The [written] response shall be [on a copy of the form] *in the format* prescribed by the Chair [completed by the attending physician seeking authorization] and shall clearly state whether the authorization request has been granted or denied. If the authorization has been denied, the insurance carrier shall submit with the [written response] *denial* a report offering a conflicting opinion from an independent medical examiner, a qualified medical professional as defined in section 300.2(b)(9) and (d)([7] *10*) of this Chapter, or, if the report was made upon review of the records without a physical examination, *in accordance with 300.2(b)(12)*[a physician authorized to treat workers' compensation claimants]. If the report offering a conflicting opinion is already contained in the Board file, the insurance carrier shall not submit the report but shall identify the report [on the form prescribed by the Chair] by providing the name of the independent medical examiner, qualified medical professional as defined in section 300.2(b)(9) of this Chapter, or physician authorized to treat workers' compensation claimants who gave the conflicting opinion, the date of the report, and the date it was received by the Board. Nothing herein shall relieve the carrier from complying with the provisions of section 300.23 of this Title.

(7) The oral response to the authorization request shall be to the attending physician or self-employed physical or occupational therapist who requested the authorization. The written response to the authorization request shall be to the attending physician or self-employed physical or occupational therapist with a copy to the Board, claimant, claimant's legal counsel, if any, and to any other parties of interest.

(8) If such authorization or denial has not been sent by one of the prescribed methods of transmission in section 324.1 ([h] *i*) of this Subchapter to the attending physician or self-employed physical or occupational therapist with copies to the Board, the claimant's legal representative, if any, and to any other parties within thirty calendar days, such request shall be deemed authorized and the employer or insurance carrier shall be liable for payment for such special service. The Chair may issue an order stating that such request is deemed authorized or requiring the employer or carrier to provide written authorization, if such documentation is required by the claimant to secure necessary medical treatment. Such order of the Chair is not appealable under Workers' Compensation Law section 23.

(9)(i) Upon the timely receipt by the board of [the form prescribed by the Chair denying] *a denial by the employer or carrier of a request for* authorization of the special medical service and a report offering a conflicting opinion from an independent medical examiner, a qualified medical professional as defined in section 300.2(b)(9) and (d)(7) of this Chapter, or, if the report was made upon review of the records without a physical examination, a physician authorized to treat workers' compensation claimants, the Board shall order the claim into the Expedited Hearing Process wherein an expedited hearing shall be scheduled within thirty days. Notice of the expedited hearing shall provide that the parties may depose the claimant's attending physician and the independent medical examiner, qualified medical professional, or physician authorized to treat workers' compensation claimants who submitted the conflicting medical report at or prior to the hearing. If the physicians are deposed, transcripts shall be provided to the Board on or before the hearing. If the claimant is unrepresented the testimony of claimant's attending physician and the independent medical examiner shall be taken at a hearing. For good cause shown, the Workers' Compensation Law Judge may grant an adjournment if one or both of the medical professionals cannot be deposed and transcripts prior to the Board at or prior to the hearing, or if one or both of the medical professionals cannot appear to testify at the expedited hearing. If authorization is denied for one of the procedures listed in Section 324.2(d)(2) of this Subchapter, the Workers' Compensation Law Judge may require examination of the claimant or a review of the claimant's records and submission of a report of such examination or review by an impartial specialist pursuant to Workers' Compensation Law Section 13(e) as additional evidence to consider in rendering a decision. The Workers' Compensation Law Judge shall rule on the authorization at the expedited hearing and file a subsequent decision, or shall issue a reserved decision on the issue within fifteen days of the expedited hearing date. The case shall not be continued for further development of the record except where there are complex medical issues of diagnosis or causation present and then it shall be continued for no more than thirty days.

(ii) If the [form prescribed by the Chair denying] *denial of* the authorization *request* is untimely or does not reference or [have attached] *include* a conflicting medical report *in accordance with subdivision (7) herein,*[from an independent medical examiner, a qualified medical professional as defined in section 300.2(b)(9) of this Chapter, or, if the report was made upon review of the records without a physical examination, a physician authorized to treat workers' compensation claimants,] the Chair will issue an order stating that such request is deemed authorized. Such order of the Chair is not appealable under Workers' Compensation Law Section 23.

(10) Pursuant to Workers' Compensation Law Section 13-a(4)(b), claimants shall cooperate in an examination by the insurance carrier's independent medical examiner. If a claimant fails to attend an examination scheduled in accordance with Workers' Compensation Law Section 137 and section 300.2 of this Chapter at a medical facility convenient to the claimant during the thirty day authorization time period, the insurance carrier may [file the form prescribed by the Chair] *file a response to the authorization request* along with contemporaneous supporting evidence that claimant failed to attend a scheduled medical examination pursuant to the provisions of Workers' Compensation Law Section 137. Upon receipt of [the form prescribed by the Chair for this purpose] *such response* and the contemporaneous supporting evidence of failure to attend the scheduled medical examination, the Board shall order the claim into the Expedited Hearing Process wherein an expedited hearing shall be scheduled within

thirty days on the request for prior authorization and the claimant's failure to attend the independent medical examination.

(11) Such authorization is not required in an emergency under the provisions of Workers' Compensation Law Section 13-a(5).

(b) Authorization for medical care when the right to compensation is controverted or the body part or condition has not been established.

(1) When it is necessary for the attending physician to secure specialist consultations, surgical operations, physiotherapeutic or occupational therapy procedures, x-ray examinations or special diagnostic laboratory tests costing more than one thousand dollars, or when it is necessary for a physical or occupational therapist to continue physiotherapeutic or occupational therapy procedures prescribed by an attending physician costing more than one thousand dollars, and the claim is controverted or the time to controvert the claim has not expired or the body part or condition has not been established, he or she shall request and obtain authorization from the employer or insurance carrier who would become responsible in the event the claim is adjudicated compensable by following the procedures in subdivision (a) of this section. All such procedures are applicable to such requests.

(2) The authorization herein referred to, if granted by the self-insured employer or insurance carrier, is limited to the question only of medical necessity of the services requested, and such authorization shall not be construed as an admission that the condition for which these services are required is compensable and the self-insured employer or insurance carrier is not liable for the cost of said treatment unless the claim or condition is established as compensable.

(3) When the Chair issues an order, pursuant to subdivision (a)(8) of this section in a controverted case, the carrier shall not be responsible for the payment of such services until the question of compensability is resolved and then only if the claim is established as compensable.

(c) Multiple special services. If an attending physician provides medical treatment or special services to more than one body part or more than one medical treatment or special service to the same body part, such treatment or special services shall be considered separate and shall not require a request for prior authorization pursuant to Workers' Compensation Law Section 13-a(5) or this section if the medical treatments or special services individually costs less than one thousand dollars. Notwithstanding the previous sentence, if the medical treatment or special services are a series of related treatment or care, such as physical or occupational therapy, or part of a battery of related tests, such as electro-diagnostic tests, the aggregate amount of such treatment, care, or tests shall be considered as a single request and shall require a request for prior authorization pursuant to Workers' Compensation Law Section 13-a(5) or this section if the aggregate amount is more than one thousand dollars.

(d) Workers' Compensation Law Section 13-a(5) authorizes the creation of a list of preauthorized procedures costing more than one thousand dollars. Prior authorization pursuant to Workers' Compensation Law Section 13-a(5) and this section is not required for procedures on the preauthorized list set forth in paragraph (1) of section 324.2(d) of this Subchapter. Prior authorization is required for the procedures excluded from that list as set forth in paragraphs (2) and (3) of section 324.2(d) of this Subchapter.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

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

Regulatory Impact Statement

1. Statutory authority: The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 325-1.4. Workers' Compensation Law (WCL) Sections 13-a and 117(1) authorize the Board to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: WCL Section 13-a (5) requires that a medical provider that seeks to perform a medical procedure costing more than one thousand dollars seek prior approval from the employer or insurance carrier. The proposed amendment to 12 NYCRR Sections 325-1.4 updates the regulation to permit the Chair to require that such request for approval be made using an electronic portal maintained by the Board unless the medical provider does not have the ability to submit electronically. The proposed amendment also permits the Chair to waive service requirements on other parties because once the electronic portal is operational as all parties will receive notices from the portal and have access to the same information.

3. Needs and benefits: The purpose of the proposed amendment is to permit the Chair to require use of a self-service medical portal when making requests for authorizations. The medical portal is a product of the Board's Business Process Reengineering project whereby system participants widely expressed an interest in having the ability to operate in a self-service environment and to simplify the processes for requesting approval for medical treatment. The medical portal will be available to all system participants and will do calculations for timing and proper process behind the scenes to relieve users of the need to perform these calculations and analyses.

4. Costs: There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed regulation does not impose any mandate, duty or responsibility upon any municipality or governmental entity. Self-insured municipalities may use a medical portal if they are able. If the self-insured municipality does not have internet access, it may continue to receive requests by paper.

6. Paperwork: The proposed amendment would permit the Chair to eliminate the use of various paper forms associated to requesting medical treatment.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: The proposed amendment gives the Chair discretion to require use of the medical portal subject to exceptions. The Chair may delay this requirement to assure that all participants are ready and will dedicate needed resources to assure all participants are capable of using the portal before requiring same.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed amendment will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers, though it is intended to enhance the efficiency of the workers' compensation system by providing a self-service medical portal for easy submission and responses to medical authorization requests. A self-insured employer that does not have the ability to access the medical portal, may continue to process authorizations as it does today.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. In the unlikely event that a self-insured employer or medical provider operating in a rural area does not have internet access, he or she will be able to continue to submit and respond to authorization requests as is done today.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local governments in rural areas. Small businesses and local governments in rural areas will not have to engage any professional services as a result of the proposed regulation.

3. Costs: Small businesses and local governments in rural areas will not

incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 325-1.4 of 12 NYCRR to provide an alternative process for the prompt resolution of administrative appeals. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medical Treatment Guideline Optional Prior Approval

I.D. No. WCB-45-15-00027-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 324.4 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 117 and 141

Subject: Medical Treatment Guideline optional prior approval.

Purpose: Change the time to respond from business days to calendar days.

Text of proposed rule: Section 324.4 of Title 12 of the New York Code Rules and Regulations is amended as follows:

§ 324.4 Optional prior approval

(a) Insurance carriers and Special Funds that participate in the optional prior approval process shall designate a qualified employee or employees in its office, if it handles its own claims, or a qualified employee or employees in the office of its representative licensed pursuant to Workers' Compensation Law Section 50 (3-b) and (3-d) as a point of contact for the Board and Treating Medical Providers regarding optional prior approval.

Insurance carriers and Special Funds that participate in the optional prior approval process must notify and provide all requested information to the Chair or his or her designee and shall provide the Chair or his or her designee with the name and contact information for the point(s) of contact, including, his, her, or their direct telephone number(s), facsimile number(s), and email address(es), within thirty days of the effective date of this paragraph. An insurance carrier or Special Fund may opt-out of the optional prior approval process by notifying the Chair or his or her designee in writing before final authorization to write workers' compensation insurance, before final authorization to be self-insured, or at least sixty days before the last day of participation. An insurance carrier or Special Fund that has opted-out of this process may opt-in by providing notice to the Chair or his or her designee in writing sixty days prior to beginning participation.

The Treating Medical Provider has the option of requesting prior approval from the insurance carrier or Special Fund to confirm that the proposed medical care is consistent with the Medical Treatment Guidelines. To request the optional prior approval, the Treating Medical Provider shall submit the optional prior approval request to the insurance carrier or Special Fund and Board by one of the prescribed methods of same day transmission. The optional prior approval request shall be in a format prescribed by the Chair for such purpose. In addition to submitting the optional prior approval request in a format prescribed by the Chair, the Treating Medical Provider may also contact the insurance carrier, self-insured employer or Special Fund by telephone.

(c) The insurance carrier, self-insured employer or Special Fund has eight [business] days from submission of the optional prior approval request to approve or deny the medical care. Any prior approval request must be reviewed by the insurance carrier, self-insured employer or Special Fund's medical professional before it may be denied.

(1) If the insurance carrier, self-insured employer or Special Fund agrees that the medical care for which optional prior approval is requested is consistent with the Medical Treatment Guidelines, it shall respond using the prescribed format and submit the approval to the Treating Medical Provider and the Board by using one of the prescribed methods of same day transmission.

(2) If the insurance carrier, self-insured employer or Special Fund denies that the medical care for which optional prior approval is requested is consistent with the Medical Treatment Guidelines, it shall respond using the prescribed format, stating the basis for its denial, and submit the denial to the Treating Medical Provider and the Board by using one of the prescribed methods of same day transmission.

(3) If the insurance carrier, self-insured employer or Special Fund fails to respond to a request for optional prior approval within eight [business] days, the medical care is deemed approved on the ground that approval was unreasonably withheld and the medical arbitrator will issue an order stating that the request is approved.

(d) If a claim is controverted or the time to controvert the claim has not expired, and the insurance carrier, self-insured employer or Special Fund agrees that the medical care for which optional prior approval is requested is consistent with the Medical Treatment Guidelines, such agreement shall not be construed as an admission that the condition for which the optional prior approval is requested is compensable and the insurance carrier or Special Fund is not liable for the cost of such treatment unless the claim or condition is established.

(e) If the insurance carrier or Special Fund denies that the medical care for which optional prior approval is requested is consistent with the Medical Treatment Guidelines, the Treating Medical Provider may elect to try to resolve the dispute by discussing the optional prior approval request directly with the insurance carrier or Special Fund's medical professional prior to commencing the review provided in subdivision (f) of this section.

(1) If the dispute is resolved, the insurance carrier or Special Fund shall confirm the resolution in the format prescribed by the Chair and shall submit the resolution to the Treating Medical Provider and Board by using one of the prescribed methods of same day transmission.

(2) If the discussion fails to resolve the dispute, the Treating Medical Provider may request review of such denial by submitting the request for review in the format prescribed by the Chair by using one of the prescribed methods of same day transmission. The request for review of the denial of the optional prior approval will be reviewed in accordance with subdivision (f) of this Section.

(f) Whether or not the Treating Medical Provider attempts to informally resolve the denial of the optional prior approval with the insurance carrier or Special Fund as provided in paragraph (1) of subdivision (e), he or she may request review by the medical arbitrator of the denial of optional prior approval within fourteen days of the date of the denial by submission of the request in the format prescribed by the Chair for such purpose. Upon the request of the Treating Medical Provider, the optional prior approval request and denial will be reviewed by a medical arbitrator. The medical arbitrator shall rule on whether the medical care is consistent with the Medical Treatment Guidelines and issue a notice of resolution setting forth the ruling and the basis for such ruling within eight [business] days of receipt of the request for review by the Board. Such notice of resolution is binding and not appealable under Workers' Compensation Law Section 23. This notice of resolution does not preclude, where applicable, a subsequent request for a variance as provided in section 324.3 of this Part.

(g) An insurance carrier or Special Fund shall not dispute a bill for medical care on the basis that it was not consistent with the Medical Treatment Guidelines if it has approved a request for optional prior approval for such medical care or the medical arbitrator has issued a notice of resolution approving the medical care.

(h) When the medical arbitrator issues a resolution as provided in subdivisions (b)(3) and (e) of this section in a claim that has been controverted or the time to controvert the claim has not expired, the insurance carrier or Special Fund shall not be responsible for the payment of such services until the question of compensability is resolved and then only if the claim or condition is established.

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 325 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

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

Regulatory Impact Statement

1. Statutory authority: The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 324.4. Workers' Compensation Law (WCL) Sections 13, 141and 117(1) authorize the Chair to adopt reasonable rules consistent with and supplemental to the provisions of the WCL.

2. Legislative objectives: WCL Section 13-a (5) requires that a medical provider that seeks to perform a medical procedure costing more than one thousand dollars seek prior approval from the employer or insurance carrier and requires the Chair to create a list of procedures that are preauthorized. The Medical Treatment Guidelines (MTG) identifies recommended treatments and protocols for treatment of the stated injuries. Any

treatment performed consistent with the MTG does not require pre-authorization. When a medical provider wishes to confirm that treatment is consistent with the MTG, he or she may seek prior approval from the employer or carrier (provided the employer or carrier participate in the optional prior approval program). The proposed amendment to 12 NYCRR Section 324.4 simply changes the time for an employer or carrier to respond to a request for optional prior approval from eight business days to eight calendar days.

3. Needs and benefits: The purpose of the proposed amendment is simplify the process for requesting medical treatment. During the Board's Business Process Reengineering project, system participants widely expressed a desire to have the timelines for processes either be measured in calendar days rather than as calendar days in some MTG regulations and as business days in other MTG regulations.

4. Costs: There are no projected costs to regulated parties who may be affected by the proposed regulation. There are no projected costs to the Board, State and local governments.

5. Local government mandates: The proposed regulation does not impose any mandate, duty or responsibility upon any municipality or governmental entity. Self-insured municipalities may use a medical portal if they are able. If the self-insured municipality does not have internet access, it may continue to receive requests by paper.

6. Paperwork: The proposed amendment does not impose any additional paperwork on system participants.

7. Duplication: There is no duplication of State or federal regulations or standards.

8. Alternatives: There were no significant alternative proposals under consideration.

9. Federal standards: There are no applicable federal standards which address the standards contained in the proposed regulation.

10. Compliance schedule: There are no impediments to compliance that require scheduling.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed amendment will not affect employers, as defined in WCL § 2(3), including the State, municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims. The rule does not impact small businesses or local governments as employers or medical providers.

2. Compliance requirements: The proposed regulation does not require any action by small businesses or local governments. The proposed regulation does not impose or require any reporting requirements or additional paperwork on the part of small businesses or local government.

3. Professional services: Small businesses and local governments will not have to engage any professional services as a result of the proposed regulation.

4. Compliance costs: Small businesses and local governments will not incur any compliance costs as a result of this proposed regulation.

5. Economic and technological feasibility: Small businesses and local governments will not incur any capital costs or annual operating costs or be required to purchase or update technological equipment as a result of the proposed regulation.

6. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments.

7. Small business and local government participation: Although the proposed regulation does not adversely impact on public or private entities, the Board requested comment on the proposed regulation from the Business Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The proposed regulation should not affect employers, as defined in WCL § 2(3), in rural areas, including municipal corporations, fire districts, public authorities and political subdivisions, who appear before the Board on matters relating to Workers' Compensation claims.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed regulation does not require any action whatsoever by small businesses or local governments in rural areas.

3. Costs: Small businesses and local governments in rural areas will not incur any capital costs, annual operating costs or any compliance costs as a result of the proposed regulation.

4. Minimizing adverse impact: The proposed regulation will have no adverse economic impact on small businesses or local governments in rural areas.

5. Rural area participation: Because the proposed amendment should have no impact on rural areas, the Board has not conducted outreach regarding the proposed amendment.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Section 324.4 of 12 NYCRR to provide an alternative process for the prompt resolution of administrative appeals. The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.