

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.

Education Department

EMERGENCY RULE MAKING

Probationary Appointments and Tenured Teacher Hearings

I.D. No. EDU-27-15-00006-E

Filing No. 997

Filing Date: 2015-11-17

Effective Date: 2015-11-20

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

Action taken: Amendment of section 30-1.3 and Subpart 82-1; and addition of Subpart 82-3 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 215(not subdivided), 305(1), (2), 2509(1), (2), 2573(1), (5), (6), 3001(2), 3004(1), 3009(1), 3012(1), (2), 3012-c(1)-(10), 3012-d(1)-(15), 3014(1), (2), 3020(3), (4), 3020-a(2) and 3020-b(1)-(6); L. 2015, ch. 56, part EE, subparts D and G

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to conform the Commissioner's Regulations to changes in the Education Law enacted in Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. The Department then revised the proposed amendment to address public comment and the Board of Regents adopted the revised rule as an emergency action at its September 16-17 meeting, effective September 21, 2015. A Notice of

Revised Rule Making was published in the State Register on October 7, 2015. 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 the State Administrative Procedure Act (SAPA) sections 201(1) and (5) for revised rulemakings, would be the November 16-17, 2015 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 December 2, 2015, the date a Notice of Adoption would be published in the State Register.

The September emergency rule will expire on November 20, 2015, 60 days after its filing with the Department of State on September 21, 2015. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and revised at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption in order to timely implement Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

Subject: Probationary Appointments and Tenured Teacher Hearings.

Purpose: To Implement subparts D and G of of part EE chapter 56 of the Laws of 2015.

Substance of emergency rule: Section 30-1.3 and Subpart 82-1 of the Commissioner's Regulations have been amended and a new Subpart 82-3 has been added, to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings. The proposed rule has been adopted as an emergency action at the November 16-17, 2015 Regents meeting, effective November 20, 2015. The following is a summary of the substance of the emergency rule.

Section 30-1.3 is amended to provide that for appointments of classroom teachers and building principals made on or after July 1, 2015, the board resolution must reflect that, except to the extent required by the applicable provisions of Education Law § 2509, 2573, 3212 and 3014, in order to be granted tenure, the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, "classroom teacher" and "building principal" means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

The Title of Subpart 82-1 and section 82-1.1 are amended to provide that Subpart 82-1 applies to hearings on charges against tenured school employees pursuant to section 3020-a of the Education Law that are commenced by the filing of charges on or after August 25, 1994 and prior to July 1, 2015.

A new Subpart 82-3 is added, relating to hearings on charges against tenured school employees pursuant to section 3020-a of the Education Law that are commenced by the filing of charges on or after July 1, 2015.

Section 82-3.1, Application of this Subpart, provides that Subpart 80-3 applies to hearings on charges against tenured school employees pursuant to sections 3020-a and 3020-b of the Education Law that are commenced by the filing of charges on or after July 1, 2015.

Section 82-3.2, Definitions, provides definitions of terms used in Subpart 82-3, including "employee", "chief school administrator", "board", "clerk", "Commissioner", "association", "hearing officer", "communication", "Day", and "Party."

Section 82-3.3, Charges, establishes requirements and procedures for bringing charges.

Section 82-3.4, Request for a hearing, sets forth the requirements and procedures for requesting a hearing.

Section 82-3.5, Appointment of hearing officer in standard and expedited § 3020-a proceedings, sets forth requirements and procedures for appointment of a hearing officer from a list of qualified individuals, as specified in the regulation, who are selected by the American Arbitration Association to preside in standard and expedited § 3020-a proceedings.

Section 82-3.6, Appointment of hearing officer in expedited § 3020-b proceeding, establishes different procedures for the appointment of hearing officers for standard § 3020-a hearings and the four categories of expedited hearings.

Section 82-3.7, Pre-Hearing Conference, sets forth requirements and procedures for conducting pre-hearing conferences.

Section 82-3.8, General hearing procedures, establishes general hearing requirements and procedures including time deadlines for hearings, powers of hearing officers, parties rights, record of proceedings, public access to hearings, submission of memoranda of law, and requirements for issuing decisions.

Section 82-3.9, Special Hearing Procedures for expedited hearings, establishes special requirements and procedures for expedited § 3020-a proceedings (based on revocation of certification, or based on charges constituting physical or sexual abuse of a student), and for expedited § 3020-b hearings (relating to a removal proceeding for charges of incompetence based two consecutive ineffective composite or overall APPR ratings, or relating to a removal proceeding for charges of incompetence based three consecutive ineffective composite or overall APPR ratings).

Section 82-3.10, Probable Cause Hearing for Certain Suspensions without pay, provides for conduct of a probable cause hearing in instances where an employee is suspended without pay pending a determination in an expedited hearing based on charges of misconduct constituting physical or sexual abuse of a student. By statute, the hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to the rotational selection process contained in Education Law § 4404, and the proposed amendment clarifies that this will be a rotational list of hearing officers who have agreed to serve under the terms and conditions set forth in Education Law § 3020-a(2)(c).

Section 82-3.11, Monitoring and enforcement of timelines, provides for the monitoring and investigation by the State Education Department of a hearing officer's compliance with the timelines prescribed in Education Law § § 3020-a and 3020-b, and provides for the removal of hearing officers from the qualified list on grounds of a record of continued failure to commence and complete hearings within the time periods prescribed, and provides for reinstatement to the list, at the Commissioner's discretion and upon application made after one year.

Section 82-3.12, Reimbursable hearing expenses, sets forth requirements for compensation and reimbursement by the Commissioner of necessary travel expenses and other reasonable expenses of a hearing officer.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-15-00006-EP, Issue of July 8, 2015. The emergency rule will expire January 15, 2016.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law § 101 charges the State Education Department with the general management and supervision of the educational work of the State and establishes the Regents as head of the Department.

Education Law § 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Education Law § 215 authorizes the Commissioner to require reports from schools under State educational supervision.

Education Law § 305(1) and (2) authorize the Commissioner to enforce laws relating to the State educational system and execute Regents educational policies, and provides the Commissioner with general supervision over schools and authority to advise and guide school district officers in their duties and the general management of their schools. Section 305(7-a), as amended by Subpart G of Part EE of Chapter 56 of the Laws of 2015, authorizes the Commissioner to revoke and annul a certificate for a teacher convicted of a sex offense for which registration as a sex offender is required pursuant to Article 6-C of the Correction Law or of any other violent felony offense committed against a child when such child was the intended victim of such offense.

Education Law § § 2509(1) and (2), 2573(1), (5) and (6), 3012(1) and (2), 3012(1) and (2) and 3014(1) and (2), as amended by Subpart D of Part EE of Chapter 56 of the Laws of 2015, provide with certain limited exceptions, for a three year probationary appointment of members of the teaching staff and supervising staff who are appointed prior to July 1, 2015 and

a four year probationary term for those appointed on or after July 1, 2015; and to provide that, in the case of classroom teachers and building principals, the teacher or principal must have received composite or overall ratings of Effective or Highly Effective on their Annual Professional Performance Review (APPR) in order to receive tenure and cannot have received an Ineffective rating on the APPR in the final year of his or her probationary period.

Education Law § 3001(2) establishes certification by the Department as a qualification to teach in the public schools of New York State.

Education Law § 3004(1) authorizes the Commissioner to prescribe regulations governing certification of teachers.

Education Law § 3009(1) provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

Education Law § 3012-c establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES).

Education Law § 3012-d establishes a new evaluation system for classroom teachers and building principals employed by school districts and BOCES for the 2015-16 school year and thereafter.

Education Law § 3020(3) and (4)(a), as amended by Subpart G of Part EE of Chapter 56 of the Laws of 2015, provides that no tenured employee may be disciplined except as set forth in section 3020-a of the Education Law or in accordance with alternate disciplinary procedures set forth in a collective bargaining agreement, and further provides that any alternative disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after July 1, 2015 shall provide that all hearings pursuant to Education Law § § 3020-a or 3020-b shall be conducted before a single hearing officer and that two consecutive ineffective ratings, or three consecutive ineffective ratings, if not overcome as respectively specified in the statute, shall constitute prima facie evidence of incompetence, and absent extraordinary circumstances, shall be just cause for removal.

Education Law § 3020-a, as amended by Subpart G of Part EE of Chapter 56 of the Laws of 2015, establishes requirements for hearings on charges of tenured school employees. Section 3020-a(2) directs the Commissioner to establish in regulations a process for a probable cause hearing before an impartial hearing officer to determine whether to continue or reverse a decision of a board of education to suspend an employee without pay where charges of misconduct constituting physical or sexual abuse of a student are brought on or after July 1, 2015.

Education Law section 3020-b, as added by § 4 of Subpart G of Part EE of Chapter 56 of the Laws of 2015, establishes requirements for a streamlined removal procedures for charges brought against tenured school employees who received two or more consecutive ineffective ratings.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subparts D and G of Part EE of Chapter 56 of the Laws of 2015.

Section 80-1.3(d) is amended to provide that for appointments of classroom teachers and building principals made on or after July 1, 2015, the board resolution must reflect that, except to the extent required by the applicable provisions of Education Law § § 2509, 2573, 3212 and 3014, in order to be granted tenure, the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, "classroom teacher" and "building principal" means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

There were several amendments made in Chapter 56 to Education Law § 3020-a that require conforming amendments to the provisions of Part 82 of the Regulations of the Commissioner relating to procedures in tenured teacher hearings. Notably, Subpart G of Part EE of Chapter 56 made the following changes to Education Law § 3020-a:

- The use of a three-member panel for incompetency cases was eliminated and all § 3020-a hearings must be held before a single hearing officer.
- The prior expedited hearing process applicable to a pattern of ineffec-

tive teaching based on two consecutive Ineffective APPR ratings was repealed, and replaced by the new expedited hearing procedures in Education Law § 3020-b.

- A new expedited hearing process was established for cases involving charges of misconduct constituting physical or sexual abuse of a student.
- For employees charged on or after July 1, 2015 with misconduct constituting physical or sexual abuse of a student, the board of education is authorized to suspend the employee without pay pending an expedited hearing, provided that a probable cause hearing must be held within 10 days in accordance with procedures prescribed in the Regulations of the Commissioner.
- A provision was added to require the hearing officer at the pre-hearing conference to provide for full and fair disclosure of the witnesses and evidence to be offered by the employee. Previously, only the employing board was required to provide full and fair disclosure of the nature of the case and evidence against the employee.
- A provision was added to require the hearing officer, in determining the penalty to be imposed on an employee, to give serious consideration to the penalty recommended by the employing board, and if he or she rejects the recommended penalty, the rejection must be based on reasons based in the record and expressed in the written decision.
- A provision was added authorizing a child witness under the age of 14 to testify through the use of a live, two-way closed circuit television under certain specified conditions.

New Education Law § 3020-b, which takes effect July 1, 2015, establishes procedures for expedited hearings commenced by the filing of charges of incompetence against a classroom teacher or building principal based on receipt of either two or three consecutive Ineffective composite or overall APPR ratings under Education Law § 3012-c and/or 3012-d. Section 3020-b requires the Commissioner to adopt regulations prescribing the necessary rules and procedures for the conduct of hearings. The procedures set forth in the statute for an expedited hearing based on two Ineffective APPR ratings are significantly different from those for an expedited hearing based on three Ineffective APPR ratings. The two processes are summarized below:

1. Expedited Proceedings Based on two Ineffective APPR Ratings:

- Where the charges are based on two Ineffective ratings pursuant to the annual professional performance reviews conducted pursuant to Education Law § § 3012-c or 3012-d, the school may bring charges of incompetence.
- The school must have developed and substantially implemented a Teacher Improvement Plan or Principal Improvement Plan in accordance with Education Law § § 3012-c or 3012-d for the educator following the first evaluation in which the educator was rated Ineffective, and the immediately preceding evaluation if the employee was rated Developing.
- The parties jointly select the hearing officer.
- Two consecutive Ineffective APPR ratings are prima facie evidence of incompetence overcome only by clear and convincing evidence that the employee is not incompetent in light of the surrounding circumstances.
- The final hearing date must be within 90 days of the date of the hearing request. Adjournments that would extend the hearing beyond the 90 day period may be granted if the hearing officer determines that the delay is attributable to a circumstance or occurrence beyond the control of the requesting party and an injustice would result if the adjournment were not granted.
- The hearing officer must render a decision within 10 days of the last day of hearing.

2. Expedited Proceedings Based on Three Ineffective APPR Ratings:

- Where the charges are based on three Ineffective ratings pursuant to annual professional performance reviews conducted pursuant to Education Law § § 3012-c or 3012-d, the school shall bring charges of incompetence.
- The Commissioner selects the hearing officer, instead of the parties.
- Three Ineffective ratings are prima facie evidence of incompetence which may be overcome only by clear and convincing evidence that the calculation of one or more of the underlying components on the APPR was fraudulent, which includes mistaken identity.
- The final hearing date must be within 30 days of the date of the hearing request. The hearing must conclude within 30 days of the date of the hearing request. Adjournments that would extend the hearing beyond the 30 day period may be granted if the hearing officer determines that the delay is attributable to a circumstance or occurrence beyond the control of the requesting party and an injustice would result if the adjournment were not granted.
- The hearing officer must render a decision within 10 days of the last day of hearing.

Education Law § 3020-b includes many, but not all of the procedural provisions included in Education Law § 3020-a. For example, § 3020-b does not include the provision requiring charges to be brought between the opening and closing of school, the provision giving the parties 15 days to

select a hearing officer or various other provisions prescribing the timelines for pre-hearing conferences and other steps in the hearing process between the request for the hearing and the 30 or 90 days within which the expedited hearing must be completed. In fact, Education Law § 3020-b specifically charges the Commissioner with responsibility to establish timelines in regulations to ensure that the duration of the hearing is no longer than 30 days or 90 days, as applicable.

The proposed amendments also add a new Subpart 82-3 to the Rules of the Board of Regents to establish procedural requirements that will apply to tenured teacher hearings commenced by the filing of charges on or after July 1, 2015. The changes made by Chapter 56 have effectively established different procedures for standard § 3020-a proceedings and expedited hearings under § 3020-a and § 3020-b.

The categories of expedited hearings are as follows:

- expedited hearings upon revocation of a teaching certificate;
- expedited hearings on charges of misconduct constituting the physical or sexual abuse of students;
- expedited 3020-b hearings based on two consecutive Ineffective APPR ratings; and
- expedited 3020-b hearings based on three consecutive Ineffective APPR ratings.

In addition, the Commissioner is charged with adopting regulations prescribing the procedures for probable cause hearings when a board of education suspends an employee for misconduct that constitutes the physical or sexual abuse of students.

Like Subpart 82-1, the new Subpart 82-3 (which applies to § 3020-a hearings commenced prior to July 1, 2015) sets forth the procedures on charges, requests for hearings and general hearing procedures that apply across all § 3020-a and § 3020-b hearing proceedings.

Section 82-3.6 establishes different procedures for the appointment of hearing officers for standard § 3020-a hearings and the four categories of expedited hearings.

Section 82-3.9 sets forth the special hearing procedures that apply to each of the four categories of expedited hearings.

Section 82-3.10 establishes procedures for probable cause hearings related to suspensions without pay of employees charged with misconduct constituting the physical or sexual abuse of a student. By statute, the hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to the rotational selection process contained in Education Law § 4404, and the proposed amendment clarifies that this will be a rotational list of hearing officers who have agreed to serve under the terms and conditions set forth in Education Law § 3020-a(2)(c).

With very few exceptions, the procedures set forth in Subpart 82-1, which apply to § 3020-a hearings commenced prior to July 1, 2015, are carried forward without substantive change except where they would conflict with Chapter 56 of the Laws of 2015 or other laws. One exception is that a provision is added relating to selection of hearing officers in § 3020-a proceedings to address what happens after the second time that hearing officer selected by the parties declines to serve. This situation is not addressed in § 3020-a, and in order to ensure the timeliness of the hearings, the proposed amendment specifies that the Commissioner would appoint a hearing officer from the list after two declinations. In addition, a technical amendment is made to the provisions related to reimbursement of hearing officers to clarify that reimbursement will be made for actual days of service, defined as 7 hours, and pro-rated to the nearest 1/10 hour.

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 rule is necessary to implement Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, and does not impose any costs on the State, local government, private regulated parties or the State Education Department, beyond those costs imposed by, or inherent in, the statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2015, and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in the statute.

6. PAPERWORK:

The proposed rule is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2015, and does not impose any specific recordkeeping, reporting or other paperwork requirements beyond those imposed by, or inherent in, the statute.

7. DUPLICATION:

The proposed rule is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2015, and does not duplicate existing State or federal requirements.

8. ALTERNATIVES:

The proposed rule is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2015. Consequently, the major provisions of the proposed rule are statutorily imposed, and there were no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subparts D and G of Part EE of Chapter 56 of the Laws of 2015 and does not impose any additional costs or compliance requirements beyond those imposed by, or inherent in, the statute. It is anticipated that regulated parties will be able to achieve compliance with the proposed rule on its effective date.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed rule implements Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings, and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. Because it is evident from the nature of the rule that it does not affect small businesses, no further steps were needed to ascertain that fact and one was taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to approximately 695 school districts and 37 boards of cooperative educational services ("BOCES") in the State.

2. COMPLIANCE REQUIREMENTS:

The rule conforms the regulations to the legislative provisions by making the following major changes in Subpart 30-1.3, 82-1 and 82-3 of the Regents Rules.

Section 80-1.3(d) is amended to provide that for appointments of classroom teachers and building principals made on or after July 1, 2015, the board resolution must reflect that, except to the extent required by the applicable provisions of Education Law § 2509, 2573, 3212 and 3014, in order to be granted tenure, the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, "classroom teacher" and "building principal" means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

There were several amendments made in Chapter 56 to Education Law § 3020-a, that require conforming amendments to the Commissioner's Regulations relating to procedures in tenured teacher hearings. Subpart G of Part EE of Chapter 56 made the following changes to Education Law § 3020-a:

- Use of three-member panel for incompetency cases was eliminated and all § 3020-a hearings must be held before a single hearing officer.
- Prior expedited hearing process applicable to a pattern of ineffective teaching based on two consecutive Ineffective APPR ratings was repealed, and replaced with new expedited hearing procedures in Education Law § 3020-b.
- New expedited hearing process established for cases involving charges of misconduct constituting physical or sexual abuse of a student.
- For employees charged on or after July 1, 2015 with misconduct constituting physical or sexual abuse of a student, the school board is authorized to suspend employee without pay pending an expedited hearing, provided a probable cause hearing is held within 10 days in accordance with procedures prescribed in the Commissioner's Regulations.
- Provision added to require hearing officer at pre-hearing conference to provide for full and fair disclosure of witnesses and evidence to be offered by the employee. Previously, only employing board was required to provide full and fair disclosure of the nature of the case and evidence against the employee.
- Provision added to require hearing officer, in determining penalty to be imposed on an employee, to give serious consideration to penalty recommended by employing board, and if he/she rejects recommended penalty, rejection must be based on reasons based in the record and expressed in written decision.
- Provision added authorizing a child witness under the age of 14 to testify through use of live, two-way closed circuit television under certain specified conditions.

New Education Law § 3020-b, which takes effect July 1, 2015, establishes procedures for expedited hearings commenced by filing of

charges of incompetence against a classroom teacher or building principal based on receipt of either two or three consecutive Ineffective composite or overall APPR ratings under Education Law § 3012-c and/or 3012-d. Section 3020-b requires Commissioner to adopt regulations prescribing necessary rules and procedures for conduct of hearings. Procedures set forth in the statute for an expedited hearing based on two Ineffective APPR ratings are significantly different from those for an expedited hearing based on three Ineffective APPR ratings. The two processes are summarized below:

1. Expedited Proceedings Based on two Ineffective APPR Ratings:
 - Where charges based on two Ineffective ratings pursuant to annual professional performance reviews conducted pursuant to Education Law § 3012-c or 3012-d, school may bring charges of incompetence.
 - School must have developed and substantially implemented a Teacher Improvement Plan or Principal Improvement Plan in accordance with Education Law § 3012-c or 3012-d for the educator following first evaluation in which educator was rated Ineffective, and immediately preceding evaluation if employee was rated Developing.
 - Parties jointly select hearing officer.
 - Two consecutive Ineffective APPR ratings are prima facie evidence of incompetence overcome only by clear and convincing evidence that employee is not incompetent in light of surrounding circumstances.
 - Final hearing date must be within 90 days of date of hearing request. Adjournments extending hearing beyond 90 day period may be granted if hearing officer determines that delay is attributable to a circumstance or occurrence beyond control of requesting party and injustice would result if adjournment were not granted.
 - Hearing officer must render a decision within 10 days of last day of hearing.
 2. Expedited Proceedings Based on Three Ineffective APPR Ratings:
 - Where charges based on three Ineffective ratings pursuant to annual professional performance reviews conducted pursuant to Education Law § 3012-c or 3012-d, school shall bring charges of incompetence.
 - Commissioner selects hearing officer, instead of parties.
 - Three Ineffective ratings are prima facie evidence of incompetence which may be overcome only by clear and convincing evidence that calculation of one or more of underlying components on the APPR was fraudulent, which includes mistaken identity.
 - Final hearing date must be within 30 days of the date of hearing request. Hearing must conclude within 30 days of date of hearing request. Adjournments extending hearing beyond 30 day period may be granted if hearing officer determines delay attributable to a circumstance or occurrence beyond control of requesting party and injustice would result if adjournment not granted.
 - Hearing officer must render a decision within 10 days of last day of hearing.
- Education Law § 3020-b includes many, but not all, of procedural provisions included in Education Law § 3020-a. For example, § 3020-b does not include provision requiring charges be brought between opening and closing of school, provision giving the parties 15 days to select hearing officer, or various other provisions prescribing timelines for pre-hearing conferences and other steps in hearing process between request for hearing and 30 or 90 days within which expedited hearing must be completed. In fact, Education Law § 3020-b specifically charges Commissioner with responsibility to establish timelines in regulations to ensure duration of hearing no longer than 30 days or 90 days, as applicable.
- The rule also adds a new Subpart 82-3 to the Regents Rules to establish procedural requirements that will apply to tenured teacher hearings commenced by filing of charges on or after July 1, 2015. Changes made by Chapter 56 have effectively established different procedures for standard § 3020-a proceedings and expedited hearings under § 3020-a and § 3020-b.
- The categories of expedited hearings are as follows:
- expedited hearings upon revocation of teaching certificate;
 - expedited hearings on charges of misconduct constituting physical or sexual abuse of students;
 - expedited 3020-b hearings based on two consecutive Ineffective APPR ratings; and
 - expedited 3020-b hearings based on three consecutive Ineffective APPR ratings.
- In addition, Commissioner is charged with adopting regulations prescribing procedures for probable cause hearings when a board of education suspends an employee for misconduct that constitutes the physical or sexual abuse of students.
- Like the old Subpart 82-1, The new Subpart 82-3, which applies to § 3020-a hearings commenced prior to July 1, 2015, sets forth procedures on charges, requests for hearings and general hearing procedures that apply across all § 3020-a and § 3020-b hearing proceedings.
- Section 82-3.6 establishes different procedures for appointment of hearing officers for standard § 3020-a hearings and the four categories of expedited hearings.

Section 82-3.9 sets forth special hearing procedures applicable to each of the four categories of expedited hearings.

Section 82-3.10 establishes procedures for probable cause hearings related to suspensions without pay of employees charged with misconduct constituting physical or sexual abuse of a student. By statute, hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to rotational selection process contained in Education Law § 4404, and rule clarifies this will be a rotational list of hearing officers who have agreed to serve under terms and conditions set forth in Education Law § 3020-a(2)(c).

With very few exceptions, procedures set forth in Subpart 82-1, which apply to § 3020-a hearings commenced prior to July 1, 2015, are carried forward without substantive change except where they would conflict with Chapter 56 of the Laws of 2015 or other laws. One exception is that a provision is added relating to selection of hearing officers in § 3020-a proceedings to address what happens after the second time that hearing officer selected by the parties declines to serve. This situation is not addressed in § 3020-a, and in order to ensure the timeliness of the hearings, the rule specifies Commissioner would appoint a hearing officer from list after two declinations. In addition, a technical amendment is made to provisions related to reimbursement of hearing officers to clarify that reimbursement will be made for actual days of service, defined as 7 hours, and pro-rated to the nearest 1/10 hour.

3. PROFESSIONAL SERVICES:

The rule does not impose any additional professional services requirements on school districts or BOCES.

4. COMPLIANCE COSTS:

The rule does not impose any compliance costs on school districts and BOCES, beyond those imposed by the statutes.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed above under Compliance Costs.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Chapter 56 of the Laws of 2015 relating to probationary appointments and tenure teacher hearings to implement requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015. Since these provisions of the Education Law apply equally to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements.

7. LOCAL GOVERNMENT PARTICIPATION:

During the public comment period, the Department will be seeking comments on the proposed amendment from representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The rule applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The rule conforms the regulations to the legislative provisions by making the following major changes in Subpart 30-1.3, 82-1 and 82-3 of the Regents Rules.

Section 80-1.3(d) is amended to provide that for appointments of classroom teachers and building principals made on or after July 1, 2015, the board resolution must reflect that, except to the extent required by the applicable provisions of Education Law § § 2509, 2573, 3212 and 3014, in order to be granted tenure, the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, "classroom teacher" and "building principal" means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

There were several amendments made in Chapter 56 to Education Law § 3020-a, that require conforming amendments to the Commissioner's Regulations relating to procedures in tenured teacher hearings. Subpart G of Part EE of Chapter 56 made the following changes to Education Law § 3020-a:

- Use of three-member panel for incompetency cases was eliminated and all § 3020-a hearings must be held before a single hearing officer.

- Prior expedited hearing process applicable to a pattern of ineffective teaching based on two consecutive Ineffective APPR ratings was repealed,

and replaced with new expedited hearing procedures in Education Law § 3020-b.

- New expedited hearing process established for cases involving charges of misconduct constituting physical or sexual abuse of a student.

- For employees charged on or after July 1, 2015 with misconduct constituting physical or sexual abuse of a student, the school board is authorized to suspend employee without pay pending an expedited hearing, provided a probable cause hearing is held within 10 days in accordance with procedures prescribed in the Commissioner's Regulations.

- Provision added to require hearing officer at pre-hearing conference to provide for full and fair disclosure of witnesses and evidence to be offered by the employee. Previously, only employing board was required to provide full and fair disclosure of the nature of the case and evidence against the employee.

- Provision added to require hearing officer, in determining penalty to be imposed on an employee, to give serious consideration to penalty recommended by employing board, and if he/she rejects recommended penalty, rejection must be based on reasons based in the record and expressed in written decision.

- Provision added authorizing a child witness under the age of 14 to testify through use of live, two-way closed circuit television under certain specified conditions.

New Education Law § 3020-b, which takes effect July 1, 2015, establishes procedures for expedited hearings commenced by filing of charges of incompetence against a classroom teacher or building principal based on receipt of either two or three consecutive Ineffective composite or overall APPR ratings under Education Law § 3012-c and/or 3012-d. Section 3020-b requires Commissioner to adopt regulations prescribing necessary rules and procedures for conduct of hearings. Procedures set forth in the statute for an expedited hearing based on two Ineffective APPR ratings are significantly different from those for an expedited hearing based on three Ineffective APPR ratings. The two processes are summarized below:

1. Expedited Proceedings Based on two Ineffective APPR Ratings:

- Where charges based on two Ineffective ratings pursuant to annual professional performance reviews conducted pursuant to Education Law § § 3012-c or 3012-d, school may bring charges of incompetence.

- School must have developed and substantially implemented a Teacher Improvement Plan or Principal Improvement Plan in accordance with Education Law § § 3012-c or 3012-d for the educator following first evaluation in which educator was rated Ineffective, and immediately preceding evaluation if employee was rated Developing.

- Parties jointly select hearing officer.

- Two consecutive Ineffective APPR ratings are prima facie evidence of incompetence overcome only by clear and convincing evidence that employee is not incompetent in light of surrounding circumstances.

- Final hearing date must be within 90 days of date of hearing request. Adjournments extending hearing beyond 90 day period may be granted if hearing officer determines that delay is attributable to a circumstance or occurrence beyond control of requesting party and injustice would result if adjournment were not granted.

- Hearing officer must render a decision within 10 days of last day of hearing.

2. Expedited Proceedings Based on Three Ineffective APPR Ratings:

- Where charges based on three Ineffective ratings pursuant to annual professional performance reviews conducted pursuant to Education Law § § 3012-c or 3012-d, school shall bring charges of incompetence.

- Commissioner selects hearing officer, instead of parties.

- Three Ineffective ratings are prima facie evidence of incompetence which may be overcome only by clear and convincing evidence that calculation of one or more of underlying components on the APPR was fraudulent, which includes mistaken identity.

- Final hearing date must be within 30 days of the date of hearing request. Hearing must conclude within 30 days of date of hearing request. Adjournments extending hearing beyond 30 day period may be granted if hearing officer determines delay attributable to a circumstance or occurrence beyond control of requesting party and injustice would result if adjournment not granted.

- Hearing officer must render a decision within 10 days of last day of hearing.

Education Law § 3020-b includes many, but not all, of procedural provisions included in Education Law § 3020-a. For example, § 3020-b does not include provision requiring charges be brought between opening and closing of school, provision giving the parties 15 days to select hearing officer, or various other provisions prescribing timelines for pre-hearing conferences and other steps in hearing process between request for hearing and 30 or 90 days within which expedited hearing must be completed. In fact, Education Law § 3020-b specifically charges Commissioner with responsibility to establish timelines in regulations to ensure duration of hearing no longer than 30 days or 90 days, as applicable.

The rule also adds a new Subpart 82-3 to the Regents Rules to establish procedural requirements that will apply to tenured teacher hearings commenced by filing of charges on or after July 1, 2015. Changes made by Chapter 56 have effectively established different procedures for standard § 3020-a proceedings and expedited hearings under § 3020-a and § 3020-b.

The categories of expedited hearings are as follows:

- expedited hearings upon revocation of teaching certificate;
- expedited hearings on charges of misconduct constituting physical or sexual abuse of students;
- expedited 3020-b hearings based on two consecutive Ineffective APPR ratings; and
- expedited 3020-b hearings based on three consecutive Ineffective APPR ratings.

In addition, Commissioner is charged with adopting regulations prescribing procedures for probable cause hearings when a board of education suspends an employee for misconduct that constitutes the physical or sexual abuse of students.

Like the old Subpart 82-1, The new Subpart 82-3, which applies to § 3020-a hearings commenced prior to July 1, 2015, sets forth procedures on charges, requests for hearings and general hearing procedures that apply across all § 3020-a and § 3020-b hearing proceedings.

Section 82-3.6 establishes different procedures for appointment of hearing officers for standard § 3020-a hearings and the four categories of expedited hearings.

Section 82-3.9 sets forth special hearing procedures applicable to each of the four categories of expedited hearings.

Section 82-3.10 establishes procedures for probable cause hearings related to suspensions without pay of employees charged with misconduct constituting physical or sexual abuse of a student. By statute, hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to rotational selection process contained in Education Law § 4404, and rule clarifies this will be a rotational list of hearing officers who have agreed to serve under terms and conditions set forth in Education Law § 3020-a(2)(c).

With very few exceptions, procedures set forth in Subpart 82-1, which apply to § 3020-a hearings commenced prior to July 1, 2015, are carried forward without substantive change except where they would conflict with Chapter 56 of the Laws of 2015 or other laws. One exception is that a provision is added relating to selection of hearing officers in § 3020-a proceedings to address what happens after the second time that hearing officer selected by the parties declines to serve. This situation is not addressed in § 3020-a, and in order to ensure the timeliness of the hearings, the rule specifies Commissioner would appoint a hearing officer from list after two declinations. In addition, a technical amendment is made to provisions related to reimbursement of hearing officers to clarify that reimbursement will be made for actual days of service, defined as 7 hours, and pro-rated to the nearest 1/10 hour. The rule does not impose any additional professional services requirements on entities in rural areas.

3. COSTS:

The rule does not impose any compliance costs on school districts and BOCES in rural areas, beyond those imposed by the statutes.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Chapter 56 of the Laws of 2015 relating to probationary appointments and tenure teacher hearings to implement requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015. Since these provisions of the Education Law apply to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREA PARTICIPATION:

The State Education Department has sent the proposed amendment to the Rural Advisory Committee, which has members who live or work in rural areas across the State.

Job Impact Statement

The purpose of proposed rule is to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the State Register on October 7, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

The emergency regulations could be read to allow charges brought

under Education Law § 3020-b to be initiated at any time, even when school is not in session. Charges under 3020-a cannot be brought during the summer. The commenter requests that the regulations be modified to treat charges under 3020-b in the same way.

DEPARTMENT RESPONSE:

The language in Education Law § 3020-a(1) requires that charges be filed during the period between the actual opening and closing of the school year for which the employed is normally required to serve. This language is not contained in Education Law § 3020-b(1), which otherwise repeats the language from § 3020-a(1) relating to the filing of charges. By omitting the limitation on the filing of charges during the period between the actual opening and closing of the school year, the regulation is conforming to the language of Education Law § 3020-b(1). Absent any evidence in the legislative history to the contrary, the Department concludes that this language was intentionally omitted from Education Law § 3020-b(1) and that the regulatory language allowing charges to be brought when school is not in session is consistent with Education Law § 3020-b.

2. COMMENT:

The emergency regulations provide that the unpaid suspension begins from the time of the employing board of education's decision to suspend without pay. The commenter, a teacher's collective bargaining representative, has proposed and continues to propose that the suspension without pay should commence upon the hearing officer's finding of probable cause and not before. The new law does not state that school districts can take the teacher off the payroll prior to the probable cause hearing. Under the New York City DOE/UFT contract, the teacher stays on the payroll until a probable cause determination is made.

DEPARTMENT RESPONSE:

Education Law § 3020-a(2)(c) specifically provides that, where charges of misconduct constituting physical or sexual abuse of a student are brought on or after July 1, 2015, the board of education may suspend the employee without pay pending an expedited hearing. It also requires the Commissioner to establish a process in regulations for a probable cause hearing before an impartial hearing officer within 10 days to determine whether the decision to suspend an employee without pay should be continued or reversed. The reference in the statute to the hearing officer determining at the probable cause hearing whether a suspension without pay should be continued, is a clear and unequivocal indicator that a board of education may suspend without pay prior to the hearing officer's determination of probable cause. The Department believes that regulation is consistent with the statutory language which authorizes the employee to be suspended without pay pending an expedited hearing. The fact that the language of Education Law § 3020-a(2)(c) differs from a collectively bargained alternative probable cause hearing process in this regard is not controlling. The plain language of the statute indicates that a board of education may suspend without pay in this instance unless and until a probable cause determination reversing the suspension is made.

3. COMMENT:

The emergency regulations add a requirement that the seven hour hearing day must exclude any time taken for meal breaks. The commenter requests that this should be deleted as unnecessary absent evidence that such breaks are excessive in length under current regulations.

DEPARTMENT RESPONSE:

The Department believes that this policy is reasonable and that pursuant to Education Law § 3020-a and 3020-b, hearing officers should only be reimbursed for their actual service and that this is consistent with customary employment practice.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Instruction in Cardiopulmonary Resuscitation (CPR) and Use of Automated External Defibrillators (AEDs)

I.D. No. EDU-48-15-00007-EP

Filing No. 995

Filing Date: 2015-11-17

Effective Date: 2015-11-17

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

Proposed Action: Amendment of section 100.2(c)(11) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2), (20), (52), 308 (not subdivided), 804-c(2), 804-d (not subdivided); L. 2014, ch. 417

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 allow an exemption of a student identified as having a disability that precludes his or her ability to participate in hands-only instruction in cardiopulmonary resuscitation (CPR) and instruction in the use of Automated External Defibrillators (AEDs) from the new instruction requirement in section 100.2(c)(11) of the Commissioner's regulations, which became effective October 7, 2015.

Because the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular action after publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 2, 2015 and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202 would be the February 22-23, 2016 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the February meeting, would be March 9, 2016, the date a Notice of Adoption would be published in the State Register. However, the instruction requirement in section 100.2(c)(11) became effective on October 7, 2015 and is now in effect for the 2015-16 school year. While most students with disabilities have the ability to complete the instruction in hands-only CPR and the use of AEDs, the Department recognizes that there may be some students who, due to the nature of their disability, will not be able to physically or cognitively perform the tasks included in such instruction (e.g., demonstrating the psychomotor (hands-on) skills to perform CPR). These students should be allowed an exemption from the requirement for instruction in CPR and the use of AEDs.

Emergency action is therefore necessary for the preservation of the general welfare in order to ensure the timely implementation during the 2015-2016 school year of the exemption option for students with disabilities from the instruction in hands-only CPR and the use of AEDs requirement in senior high school.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the February 22-23, 2016 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 45-day public comment period prescribed by the State Administrative Procedure Act for State agency rule makings.

Subject: Instruction in Cardiopulmonary Resuscitation (CPR) and Use of Automated External Defibrillators (AEDs).

Purpose: Provide limited exemption to students with disabilities from CPR/AED required instruction.

Text of emergency/proposed rule: A new subparagraph (iv) of paragraph (11) of subdivision (c) of section 100.2 is added, effective November 17, 2015, as follows:

(iv) A student identified with a disability that precludes his or her ability to participate in hands-only cardiopulmonary resuscitation and the use of an automated external defibrillator may be exempted from the instruction requirement in this paragraph if the student's individualized education program developed in accordance with section 200.4 of this Title or accommodation plan developed pursuant to section 504 of the Rehabilitation Act of 1973 states that the student is physically or cognitively unable to perform the tasks included in the instruction.

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 February 14, 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@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.

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

Regulatory Impact Statement
STATUTORY AUTHORITY:

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

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

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of 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 execute all educational policies determined by the Regents.

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

Education Law § 804-c authorizes school districts to provide cardiopulmonary resuscitation (CPR) instruction as part of the health education curriculum at their own discretion. If a district chooses to include such instruction, in addition to the requirement that all teachers of health education are certified to teach health, persons providing CPR instruction must possess valid certification in the performance and teaching of CPR. School districts that choose to offer CPR instruction under § 804-c are required to provide necessary facilities, time, learning aids, and curricular resource materials to support such course study.

Education Law § 804-d provides that senior high schools in which CPR instruction is provided pursuant to Education Law § 804-c, must also include instruction regarding the correct use of Automated External Defibrillators (AEDs). Individuals providing instruction in the correct use of AEDs must possess valid certification by a nationally recognized organization or the State emergency medical services council offering certification in the operation of an AED and in its instruction.

Chapter 417 of the Laws of 2014 added Education Law § 305(52) to require the Commissioner to make a recommendation to the Board of Regents regarding a potential new mandate for required instruction in CPR and the use of AEDs in senior high schools. The law further requires the Commissioner to seek the recommendations of teachers, school administrators, educators, and others with educational expertise in such curriculum, as well as comments from parents, students, and other interested parties prior to making a recommendation to the Board of Regents.

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

Education Law § 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.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to allow an exemption of a student identified as having a disability that precludes his or her ability to participate in hands-only instruction in CPR and instruction in the use of AEDs from the instruction requirement in section 100.2(c)(11) of the Commissioner's regulations.

NEEDS AND BENEFITS:

In September 2015, the Board of Regents permanently adopted the addition of a new section 100.2(c)(11) of the Commissioner's regulations to implement Chapter 417 of the Laws of 2014, which became effective October 7, 2015. Under the new regulation, students are required to complete hands-only instruction in CPR and instruction in the use of AEDs at least once between grades 9-12 before graduation. The standards for such instruction must be based on a nationally recognized instructional program that utilizes the most current guidelines for CPR and emergency cardiovascular care issued by the American Heart Association or a substantially equivalent organization and be consistent with the requirements of the programs adopted by the American Heart Association or the American Red Cross, and must incorporate instruction designed to:

- recognize the signs of a possible cardiac arrest and to call 911;
- provide an opportunity to demonstrate the psychomotor skills necessary to perform hands-only CPR; and
- provide awareness in the use of an AED.

Most students with disabilities have the ability to complete the instruction in hands-only CPR and the use of AEDs described above. However, the Department recognizes that there may be some students who, due to the nature of their disability, will not be able to physically or cognitively perform the tasks included in such instruction (e.g., demonstrating the psychomotor (hands-on) skills to perform CPR). The proposed amendment would allow a student's Committee on Special Education (CSE) or Multidisciplinary Team (MDT) pursuant to Section 504 of the Rehabilitation Act of 1973 to exempt a student identified as having a disability that precludes his or her ability to participate in hands-only CPR and the use of AEDs from the instruction requirement in section 100.2(c)(11) of the Commissioner's regulations. The student's individualized education program (IEP) or Section 504 accommodation plan would need to indicate that such student is physically or cognitively unable to perform the tasks included in the instruction in hands-only CPR and the use of AEDs.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: The proposed amendment will not impose any significant costs beyond those imposed by federal statutes and regulations and State statutes. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is reviewed, and would not require a separate meeting. Any costs associated with CSE or Section 504 MDT meetings that may need to be convened in the 2015-2016 school year for the sole purpose of determining if a student should be exempt from the instruction in hands-only CPR and the use of AEDs requirement in section 100.2(c)(11) of the Commissioner's regulations are expected to be minimal and capable of being absorbed by using existing district staff and resources.

(c) Costs to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon school districts beyond those imposed by federal and State statutes and regulations. In accordance with federal and State law and regulations, the CSE is already required to meet to review a student's IEP at least annually, and would include a determination of the extent, if any, to which a student will not participate in regular class and/or extracurricular and other nonacademic activities with nondisabled peers. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs requirement would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is annually reviewed, and would not require a separate meeting. For students with disabilities exiting in the 2015-16 school year, it may be necessary for the CSE or Section 504 MDT to convene a meeting for the sole purpose of determining if a student should be exempt from the instruction in CPR and the use of AEDs requirement. In accordance with the procedures in section 200.4(g)(2) of the Commissioner's regulations, a school district and the parent may also agree not to convene a meeting for the purpose of amending an IEP and instead may develop a written document to amend the IEP to identify if the student is exempt from the instruction requirement in hands-only CPR and the use of AEDs.

PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements. The Department will be amending the State's mandated IEP form to include a statement to identify if a student is exempt from the instruction requirement in CPR and the use of AEDs. Therefore, there would be no additional paperwork requirements imposed since school districts must currently use the IEP form prescribed by the Commissioner.

DUPLICATION:

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

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no applicable Federal standards.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis**Small Businesses:**

The proposed amendment relates to general school requirements and is necessary to implement Regents policy to allow an exemption of a student identified as having a disability that precludes his or her ability to participate in hands-only instruction in cardiopulmonary resuscitation (CPR) and instruction in the use of Automated External Defibrillators (AEDs) from the instruction requirement in section 100.2(c)(11) of the Commissioner's regulations.

The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:**EFFECT OF RULE:**

The proposed amendment applies to all public schools, charter schools, and State agency operated and approved private schools in the State that have Committee on Special Education (CSE) or Section 504 multidisciplinary team (MDT) responsibilities.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance

requirements beyond those imposed by federal statutes and regulations and State law. In accordance with federal and State law and regulations, the CSE is already required to meet to review a student's individualized education program (IEP) at least annually, and would include a determination of the extent, if any, to which a student will not participate in regular class and/or extracurricular and other nonacademic activities with nondisabled peers. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is annually reviewed, and would not require a separate meeting. For students with disabilities exiting in the 2015-16 school year, it may be necessary for the CSE or Section 504 MDT to convene a meeting for the sole purpose of determining if a student should be exempt from the instruction in CPR and the use of AEDs requirement. However, in accordance with the procedures in section 200.4(g)(2) of the Commissioner's regulations, a school district and the parent may also agree not to convene a meeting for the purpose of amending an IEP and instead may develop a written document to amend the IEP to identify if the student is exempt from the instruction requirement in hands-only CPR and the use of AEDs.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on school districts, charter schools, and State agency operated and approved private schools in the State.

COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs beyond those imposed by federal statutes and regulations and State statutes. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is reviewed, and would not require a separate meeting. Any costs associated with CSE or Section 504 MDT meetings that may need to be convened in the 2015-2016 school year for the sole purpose of determining if a student should be exempt from the instruction in hands-only CPR and the use of AEDs requirement in section 100.2(c)(11) of the Commissioner's regulations are expected to be minimal and capable of being absorbed by using existing district staff and resources.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZE ADVERSE IMPACT:

The proposed amendment would implement Regents policy to allow an exemption of a student with a disability from the instruction in hands-only instruction in CPR and instruction in the use of AEDs requirement in section 100.2(c)(11) of the Commissioner's regulations. It does not impose any additional compliance requirements or significant costs and therefore would have no adverse impact on the regulated parties.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment 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.

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 Regents policy regarding instruction in CPR and the use of AEDs pursuant to Education Law section 305(52), as added by Chapter 417 of the Laws of 2014. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of 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 all public schools, charter schools, and State agency operated and approved private schools in the State that have Committee on Special Education (CSE) or Section 504 multidisciplinary team (MDT) responsibilities, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose any additional compliance

requirements beyond those imposed by federal statutes and regulations and State law. In accordance with federal and State law and regulations, the CSE is already required to meet to review a student's individualized education program (IEP) at least annually, and would include a determination of the extent, if any, to which a student will not participate in regular class and/or extracurricular and other nonacademic activities with nondisabled peers. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is annually reviewed, and would not require a separate meeting. For students with disabilities exiting in the 2015-16 school year, it may be necessary for the CSE or Section 504 MDT to convene a meeting for the sole purpose of determining if a student should be exempt from the instruction in CPR and the use of AEDs requirement. However, in accordance with the procedures in section 200.4(g)(2) of the Commissioner's regulations, a school district and the parent may also agree not to convene a meeting for the purpose of amending an IEP and instead may develop a written document to amend the IEP to identify if the student is exempt from the instruction requirement in hands-only CPR and the use of AEDs.

3. COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs beyond those imposed by federal statutes and regulations and State statutes. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is reviewed, and would not require a separate meeting. Any costs associated with CSE or Section 504 MDT meetings that may need to be convened in the 2015-2016 school year for the sole purpose of determining if a student should be exempt from the instruction in hands-only CPR and the use of AEDs requirement in section 100.2(c)(11) of the Commissioner's regulations are expected to be minimal and capable of being absorbed by using existing district staff and resources.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to allow an exemption of a student identified as having a disability that precludes his or her ability to participate in hands-only instruction in cardiopulmonary resuscitation (CPR) and instruction in the use of Automated External Defibrillators (AEDs) from the instruction requirement in section 100.2(c)(11) of the Commissioner's regulations. It does not impose any additional compliance requirements or significant costs upon schools located in rural areas. The determination regarding a student's ability to participate in instruction in hands-only CPR and the use of AEDs would generally be made at the CSE or Section 504 MDT meeting at which a student's IEP or accommodation plan is reviewed, and would not require a separate meeting. Any costs associated with CSE or Section 504 MDT meetings that may need to be convened in the 2015-2016 school year for the sole purpose of determining if a student should be exempt from the instruction in hands-only CPR and the use of AEDs requirement are expected to be minimal and capable of being absorbed by using existing district staff and resources. Because this policy is applicable throughout the State, it was not possible to adopt different standards for schools in rural areas.

5. RURAL AREA PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement Regents policy regarding instruction in CPR and the use of AEDs pursuant to Education Law section 305(52), as added by Chapter 417 of the Laws of 2014. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of 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 Regents policy to allow an exemption of a student identified as having a disability that precludes his or her ability to participate in instruction hands-only cardiopulmonary resuscitation (CPR) and the use of Automated External Defibrillators (AEDs) from the instruction requirement in section 100.2(c)(11) of the Commissioner's regulations.

The proposed amendment will not have a substantial adverse impact on

jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact, or a positive impact, on jobs or employment opportunities, no further 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Extension and Expansion of the Collaborative Drug Therapy Management (CDTM) Demonstration Program for Pharmacists

I.D. No. EDU-48-15-00009-EP

Filing No. 999

Filing Date: 2015-11-17

Effective Date: 2015-12-13

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

Proposed Action: Amendment of section 63.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a) and 6801-a; L. 2015, ch. 238; L. 2011, ch. 21

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

Specific reasons underlying the finding of necessity: The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement Chapter 238 of the Laws of 2015, which amended Education Law section 6801-a in relation to the Collaborative Drug Therapy Management (CDTM) Demonstration Program enacted in 2011 for physicians and pharmacists working under the auspices of a teaching hospital, by extending the CDTM program for an additional three year period and expanding CDTM to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist. The purpose of such collaboration is to reduce morbidity and mortality, reduce emergency room visits and hospital admissions, and otherwise reduce health care spending. Included among the many disease states in which such improvements have been documented are asthma, diabetes, and clotting disorders or other indications for anticoagulation.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment can be presented for adoption on a non-emergency basis, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) section 202(1) and (5), would be the February 22-23, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the February meeting, would be March 9, 2016, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 238 of the Laws of 2015 will become effective December 13, 2015.

Emergency action is necessary for the preservation of the public health and general welfare in order to enable the State Education Department to immediately establish requirements and otherwise conform the Commissioner's Regulations to timely implement the provisions of Chapter 238 of the laws of 2015, so that the CDTM program can be expanded to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the February 22-23, 2016 meeting of the Board of Regents, after publication in the State Register and expiration of the 45-day comment period on proposed rule makings required by the State Administrative Procedure Act.

Subject: Extension and expansion of the Collaborative Drug Therapy Management (CDTM) Demonstration Program for Pharmacists.

Purpose: To implement chapter 238 of the Laws of 2015 to extend and expand the CDTM program for pharmacists.

Text of emergency/proposed rule: Section 63.10 of the Regulations of the Commissioner of Education is amended, effective December 13, 2015, to read as follows:

(a) Applicability. This section shall apply only to the extent that the applicable provisions in Education Law sections 6801 and 6801-a, authorizing certain pharmacists to participate in collaborative drug therapy management, have not expired or been repealed.

(b) Experience requirement for participating pharmacists.

(1) As used in Education Law section 6801-a(2)(b), a year of experience shall mean not less than 1,680 hours of work as a pharmacist within a period of one calendar year.

(2) In order to be counted as a year of experience that includes clinical experience in a health facility, such experience shall include, on average, not less than 15 hours per week of clinical experience which involves consultation with physicians with respect to drug therapy, as determined by the facility that employs or is affiliated with the pharmacist.]

(b) Definitions. As used in this section:

(1) Board means the State Board of Pharmacy as established by section 6804 of the Education Law.

(2) Clinical services means the collection and interpretation of patient data for the purpose of initiating, modifying and monitoring drug therapy with associated accountability and responsibility for outcomes in a direct patient care setting.

(3) Collaborative drug therapy management means the performance of clinical services by a pharmacist relating to the review, evaluation and management of drug therapy to a patient, who is being treated by a physician for a specific disease or associated disease states, in accordance with a written agreement or protocol with a voluntarily participating physician and in accordance with the policies, procedures, and protocols of the facility.

(4) Facility means:

(i) a teaching hospital or general hospital, including any diagnostic center, treatment center, or hospital-based out-patient department as defined in section 2801 of the Public Health Law; or

(ii) a nursing home with an on-site pharmacy staffed by a licensed pharmacist; provided, however, for the purposes of this section the term facility shall not include dental clinics, dental dispensaries, residential health care facilities and rehabilitation centers.

(5) Teaching hospital means a hospital licensed pursuant to Article 28 of the Public Health Law that is eligible to receive direct or indirect graduate medical education payments pursuant to Article 28 of the Public Health Law.

(6) Physician means the physician selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient for the disease and associated disease states that are the subject of the collaborative drug therapy management.

(7) Written agreement or protocol means a written document, pursuant to and consistent with an applicable state or federal requirements, that addresses a specific disease or associated disease states and that describes the nature and scope of collaborative drug therapy management to be undertaken by the pharmacists, in collaboration with the participating physician in accordance with the requirements of this section.

(c) Requirements. A pharmacist seeking to engage in collaborative drug therapy management shall submit his or her credentials, in a form determined by the department, to the department for review. Those pharmacists who the department determines to meet the requirements of paragraph (3) of this subdivision and who are employed by or otherwise affiliated with a facility shall be permitted to enter into a written agreement or protocol with a physician authorizing collaborative drug therapy management, subject to the limitations set forth in this section, within the scope of such employment or affiliation, and shall be identified as being so authorized by a designation determined by the department.

(1) As used in section 6801-a(2)(b) of the Education Law, a year of experience shall mean not less than 1,680 hours of work as a pharmacist within a period of one calendar year.

(2) In order to be counted as a year of experience that includes clinical experience in a health facility, such experience shall include, on average, not less than 15 hours per week of clinical experience which involves consultation with physicians with respect to drug therapy, as determined by the facility with which the pharmacist is employed or affiliated.

(3) A participating pharmacist shall:

(i)(a) have been awarded either a master of science in clinical pharmacy or a doctor of pharmacy degree;

(b) maintain a current unrestricted license; and

(c) have a minimum of two years experience, of which at least one year of such experience shall include clinical experience in a health facility, which involves consultation with physicians with respect to drug therapy and may include a residency at a facility involving such consultation, and such clinical experience shall be gained within the three years immediately preceding the pharmacist's submission of his or her credentials to the department for review; or

(ii)(a) have been awarded a bachelor of science in pharmacy;

(b) maintain a current unrestricted license; and

(c) within the last seven years, have a minimum of three years experience, of which at least one year of such experience shall include clinical experience in a health facility, which involves consultation with physicians with respect to drug therapy and may include a residency at a facility involving such consultation, and such clinical experience shall be gained within the three years immediately preceding the pharmacist's submission of his or her credentials to the department for review; and

(iii)(a) have residency training in a program accredited or

accreditation-pending by a nationally recognized accreditation body acceptable to the department; or

(b) have board certification awarded by a certification body acceptable to the department and shall include baseline and ongoing competency assessments; and

(iv) meet additional experience provisions as follows:

(a) for pharmacists seeking to engage in collaborative drug therapy management by satisfying the requirements of clauses (a) through (c) of subparagraph (i) of this paragraph, if he or she seeks to utilize residency training to satisfy the one year of clinical experience requirement, the second year of required experience shall also be clinical experience, unless such pharmacist possesses board certification that satisfies the requirements of clause (b) of subparagraph (iii) of this paragraph.

(b) for pharmacists seeking to engage in collaborative drug therapy by satisfying the requirements of clauses (a) through (c) of subparagraph (ii) of this paragraph, if he or she seeks to utilize residency training to satisfy the one year of clinical experience requirement, an additional year's experience of the three years required shall also be clinical experience, unless such pharmacist possesses board certification that satisfies the requirements of clause (b) of subparagraph (iii) of this paragraph.

(d) Requirements for collaborative drug therapy management written agreements or protocols. A physician who is a party to a written agreement or protocol to authorize collaborative drug treatment shall be employed by or otherwise affiliated with the same facility with which the pharmacist is also employed or affiliated and their written agreement or protocol may include, and shall be limited to, the following:

(1) Adjusting or managing a drug regimen of a patient, pursuant to a patient specific order or protocol made by the patient's physician, which may include adjusting drug strength, frequency of administration or route of administration. Adjusting the drug regimen shall not include substituting or selecting a different drug which differs from that initially prescribed by the patient's physician unless such substitution is expressly authorized in the written order or protocol. The pharmacist shall be required to immediately document in the patient's medical record changes made to the patient's drug therapy and shall use any reasonable means or method established by the facility to notify the patient's other treating physicians with whom he or she does not have a written agreement or protocol regarding such changes. The patient's physician may prohibit, by written instruction, any adjustment or change in the patient's drug regimen by the pharmacist;

(2) Evaluating and, only if specifically authorized by the protocol and only to the extent necessary to discharge the responsibilities set forth in this section, ordering disease state laboratory tests related to the drug therapy management for the specific disease or disease state specified within the written agreement or protocol; and

(3) Only if specifically authorized by the written agreement or protocol and only to the extent necessary to discharge the responsibilities set forth in this section, ordering or performing routine patient monitoring functions as may be necessary in the drug therapy management, including the collecting and reviewing of patient histories, and ordering or checking patient vital signs, including pulse, temperature, blood pressure and respiration.

(e) Additional provisions relating to collaborative drug therapy management written agreements and protocols.

(1) The existence of a written agreement or protocol on collaborative drug therapy management and the patient's right to choose to not participate in collaborative drug therapy management shall be disclosed to any patient who is eligible to receive collaborative drug therapy management. Collaborative drug therapy management shall not be utilized unless the patient or the patient's authorized representative consents, in writing, to such management. If the patient or the patient's authorized representative consents, it shall be noted on the patient's medical record. If the patient or the patient's authorized representative who consented to collaborative drug therapy management chooses to no longer participate in such management, at any time, it shall be noted in the patient's medical record. In addition, the existence of the written agreement or protocol and the patient's consent to such management shall be disclosed to the patient's primary care physician and any other treating physician or healthcare provider.

(2) Participation in a written agreement or protocol authorizing collaborative drug therapy management shall be voluntary, and no patient, physician, pharmacist, or facility shall be required to participate.

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 February 14, 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@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.

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:

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

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

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

Section 6801-a of the Education Law establishes the Collaborative Drug Therapy Management (CDTM) Demonstration Program.

Section (5) of Chapter 21 of the Laws of 2011 authorizes and directs the promulgation of any rule or regulation necessary for the implementation of the CDTM Demonstration Program.

Chapter 238 of the Laws of 2015 extends and expands the provisions that were enacted by Chapter 21 of the Laws of 2011 by extending the CDTM Demonstration Program for an additional three years and expanding CDTM to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist.

Section (4) of Chapter 238 of the Laws of 2015 authorizes and directs the promulgation of any rule or regulation necessary for the implementation of the extension and expansion of the CDTM Demonstration Program.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes and will conform the Regulations of the Commissioner of Education to Chapter 238 of the Laws of 2015, which amended Education Law section 6801-a, as added by Chapter 21 of the Laws of 2011.

On May 17, 2011, Governor Cuomo signed into law Chapter 21 of the Laws of 2011, which added a new section 6801-a of the Education Law authorizing the CDTM Demonstration Program for physicians and pharmacists working under the auspices of a teaching hospital. This law, which was scheduled to sunset three years from its effective date, restricted collaboration to pharmacists who meet specified education and experience requirements. CDTM authorizes collaboration between medication prescribers and pharmacists for the purpose of improving therapeutic outcomes from medication therapies.

In 2011, the Board of Regents added section 63.10 to the Regulations of the Commissioner of Education to implement this law by establishing the standards for the experience required for a pharmacist to participate in CDTM and amended section 63.7 of the Regulations of the Commissioner of Education to revise the continuing education requirements to reflect the statutory provisions of Chapter 21 of the Laws of 2011 for pharmacists engaging in CDTM.

On September 14, 2015, Governor Cuomo signed into law Chapter 238 of the Laws of 2015, which extends and expands the provisions that were enacted in 2011 by extending the CDTM program for an additional three years and expanding CDTM to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist. Chapter 238 of the Laws of 2015 also directs the Department to prepare a report on the expanded CDTM program at least four months prior to the program's expiration.

This legislation further authorizes the Department to develop regulations necessary to implement it. The proposed amendment establishes the experience and education requirements for pharmacists seeking to participate in CDTM. It requires such pharmacists to submit an application to the Department for approval to participate in CDTM. The proposed amendment further establishes the requirements for CDTM written agreements and protocols.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 238 of the Laws of 2015, which extends and expands the CDTM Demonstration Program that was established by Chapter 21 of the Laws of 2011.

At least 46 other states have already authorized collaboration between medication prescribers and pharmacists for the purpose of improving therapeutic outcomes from medication therapies. The purpose of such collaboration is to reduce morbidity and mortality, reduce emergency room visits and hospital admissions, and otherwise reduce health care spending. Included among the many disease states in which such improvements have

been documented are asthma, diabetes, and clotting disorders or other indications for anticoagulation.

4. COSTS:

(a) Costs to State government: The proposed amendment is necessary to implement Chapter 238 of the Laws of 2015 and imposes no additional costs on State government, other than those inherent in the statute.

(b) Costs to local government: The proposed amendment relates solely to the requirements of the CDTM program, including requirements for licensees engaged in the practice of pharmacy, and does not impose any additional costs on local government.

(c) Costs to private regulated parties: The proposed amendment will not increase costs and may provide cost-savings to regulated parties, patients and institutions. Therefore, there will be no additional costs to private regulated parties.

(d) Costs to the regulatory agency for implementation and continued administration of the amendment: The proposed amendment imposes no additional costs on the State Education Department, other than those inherent in the statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates solely to the requirements of the CDTM program, including requirements for licensees engaged in the practice of pharmacy, and does not impose any programs, service, duty, or responsibility upon local governments.

6. PAPERWORK:

As required by Chapter 238 of the Laws of 2015, the proposed rule will require pharmacists seeking to participate in CDTM to submit an application to the Department for approval to participate in CDTM. The proposed rule further implements the requirements of Chapter 238 of the Laws of 2015 for CDTM written practice agreements and protocols.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements and is necessary to implement Chapter 238 of the Laws of 2015.

8. ALTERNATIVES:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 238 of the Laws of 2015, which extends and expands the CDTM Demonstration Program that was established by Chapter 21 of the Laws of 2011. There are no viable significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 238 of the Laws of 2015. Consistent with the statute, the proposed amendment will become effective on December 13, 2015, at which time licensees and participating facilities must comply with the proposed amendments if engaged in CDTM. Participation in CDTM is voluntary and it is anticipated that regulated parties will be able to comply with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

On May 17, 2011, Governor Cuomo signed into law Chapter 21 of the Laws of 2011, which added a new section 6801-a of the Education Law authorizing the Collaborative Drug Therapy Management (CDTM) Demonstration Program for physicians and pharmacists working under the auspices of a teaching hospital. This law, which was scheduled to sunset three years from its effective date, restricted collaboration to pharmacists who meet specified education and experience requirements. CDTM authorizes collaboration between medication prescribers and pharmacists for the purpose of improving therapeutic outcomes from medication therapies.

In 2011, the Board of Regents added section 63.10 to the Regulations of the Commissioner of Education to implement this law by establishing the standards for the experience required for a pharmacist to participate in CDTM and amended section 63.7 of the Regulations of the Commissioner of Education to revise the continuing education requirements to reflect the statutory provisions of Chapter 21 of the Laws of 2011 for pharmacists engaging in CDTM.

On September 14, 2015, Governor Cuomo signed into law Chapter 238 of the Laws of 2015, which extends and expands the provisions that were enacted in 2011 by extending the CDTM program for an additional three years and expanding CDTM to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist.

The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement the extension and expansion of the CDTM program pursuant to Chapter 238 of the Laws of 2015. The proposed amendment establishes the experience and education requirements for pharmacists seeking to participate in CDTM. It requires such pharmacists to submit an application to the Department for approval to

participate in CDTM. The proposed amendment further establishes the requirements for CDTM written agreements and protocols.

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The rule will apply to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Of the 25,535 pharmacists registered by the State Education Department, 3,025 pharmacists report their permanent address of record in a rural county.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 6801-a, as amended by Chapter 238 of the Laws of 2015. The proposed rule will require pharmacists seeking to engage in collaborative drug therapy management (CDTM) to submit an application to the Department for approval to participate in CDTM. The proposed rule further implements the requirement of Chapter 238 of the Laws of 2015 for CDTM written practice agreements and protocols. The proposed rule does not impose any professional services requirements on entities in rural areas.

3. COSTS:

The proposed rule is necessary to implement Chapter 238 of the Laws of 2015 and does not impose any additional costs on regulated parties, including those in rural areas. The proposed rule will not increase costs, and may provide cost-savings to regulated parties, patients and institutions.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 6801-a, as amended by Chapter 238 of the Laws of 2015. Following discussion, including obtaining input from practicing professionals, the State Board for Pharmacy has considered the terms of the proposed amendment to the Regulations of the Commissioner of Education and has recommended the change. Additionally, the measures have been shared with educational institutions, professional associations, and practitioners representing the profession of pharmacy. The amendments are supported by representatives of these sectors. The proposals make no exception for individuals who live in rural areas. The Department has determined that such requirements should apply to all pharmacists and pharmacies State-wide, regardless of their geographic location, to ensure a uniform standard of practice across the State. Accordingly, it is neither appropriate nor warranted to establish different requirements for entities located in rural areas. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREAS PARTICIPATION:

Comments on the proposed rule were solicited from Statewide organizations representing all parties having an interest in the practice of pharmacy. Included in this group were members of the State Board of Pharmacy, educational institutions, and professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York and the New York State Council of Health-system Pharmacists. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and opportunity to comment on the regulations.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements in Chapter 238 of the Laws of 2015 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 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

On May 17, 2011, Governor Cuomo signed into law Chapter 21 of the Laws of 2011, which added a new section 6801-a of the Education Law authorizing the Collaborative Drug Therapy Management (CDTM) Dem-

onstration Program for physicians and pharmacists working under the auspices of a teaching hospital. This law, which was scheduled to sunset three years from its effective date, restricted collaboration to pharmacists who meet specified education and experience requirements. CDTM authorizes collaboration between medication prescribers and pharmacists for the purpose of improving therapeutic outcomes from medication therapies.

In 2011, the Board of Regents added section 63.10 to the Regulations of the Commissioner of Education to implement this law by establishing the standards for the experience required for a pharmacist to participate in CDTM and amended section 63.7 of the Regulations of the Commissioner of Education to revise the continuing education requirements to reflect the statutory provisions of Chapter 21 of the Laws of 2011 for pharmacists engaging in CDTM.

On September 14, 2015, Governor Cuomo signed into law Chapter 238 of the Laws of 2015, which extends and expands the provisions that were enacted in 2011 by extending the CDTM program for an additional three years and expanding CDTM to general hospitals and nursing homes with an on-site pharmacy staffed by a licensed pharmacist.

The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement the extension and expansion of the CDTM program pursuant to Chapter 238 of the Laws of 2015. The proposed amendment establishes the experience and education requirements for pharmacists seeking to participate in CDTM. It requires such pharmacists to submit an application to the Department for approval to participate in CDTM. The proposed amendment further establishes the requirements for CDTM written agreements and protocols.

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

NOTICE OF ADOPTION

Probationary Appointments and Tenured Teacher Hearings

I.D. No. EDU-27-15-00006-A

Filing No. 998

Filing Date: 2015-11-17

Effective Date: 2015-12-02

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

Action taken: Amendment of section 30-1.3 and Subpart 82-1; and addition of Subpart 82-3 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 215(not subdivided), 305(1), (2), 2509(1), (2), 2573(1), (5), (6), 3001(2), 3004(1), 3009(1), 3012(1), (2), 3012-c(1)-(10), 3012-d(1)-(15), 3014(1), (2), 3020(3), (4), 3020-a(2) and 3020-b(1)-(6); L. 2015, ch. 56, part EE, subparts D and G

Subject: Probationary Appointments and Tenured Teacher Hearings.

Purpose: To implement subparts D and G of part EE chapter 56 of the Laws of 2015.

Text or summary was published in the July 8, 2015 issue of the Register, I.D. No. EDU-27-15-00006-EP.

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

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

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 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the State Register on October 7, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

The emergency regulations could be read to allow charges brought under Education Law § 3020-b to be initiated at any time, even when school is not in session. Charges under 3020-a cannot be brought during the summer. The commenter requests that the regulations be modified to treat charges under 3020-b in the same way.

DEPARTMENT RESPONSE: The language in Education Law § 3020-a(1) requires that charges be filed during the period between the actual opening and closing of the school year for which the employed is normally required to serve. This language is not contained in Education Law § 3020-b(1), which otherwise repeats the language from § 3020-a(1) relating to the filing of charges. By omitting the limitation on the filing of charges during the period between the actual opening and closing of the school year, the regulation is conforming to the language of Education Law § 3020-b(1). Absent any evidence in the legislative history to the contrary, the Department concludes that this language was intentionally omitted from Education Law § 3020-b(1) and that the regulatory language allowing charges to be brought when school is not in session is consistent with Education Law § 3020-b.

2. COMMENT:

The emergency regulations provide that the unpaid suspension begins from the time of the employing board of education's decision to suspend without pay. The commenter, a teacher's collective bargaining representative, has proposed and continues to propose that the suspension without pay should commence upon the hearing officer's finding of probable cause and not before. The new law does not state that school districts can take the teacher off the payroll prior to the probable cause hearing. Under the New York City DOE/UFT contract, the teacher stays on the payroll until a probable cause determination is made.

DEPARTMENT RESPONSE: Education Law § 3020-a(2)(c) specifically provides that, where charges of misconduct constituting physical or sexual abuse of a student are brought on or after July 1, 2015, the board of education may suspend the employee without pay pending an expedited hearing. It also requires the Commissioner to establish a process in regulations for a probable cause hearing before an impartial hearing officer within 10 days to determine whether the decision to suspend an employee without pay should be continued or reversed. The reference in the statute to the hearing officer determining at the probable cause hearing whether a suspension without pay should be continued, is a clear and unequivocal indicator that a board of education may suspend without pay prior to the hearing officer's determination of probable cause. The Department believes that regulation is consistent with the statutory language which authorizes the employee to be suspended without pay pending an expedited hearing. The fact that the language of Education Law § 3020-a(2)(c) differs from a collectively bargained alternative probable cause hearing process in this regard is not controlling. The plain language of the statute indicates that a board of education may suspend without pay in this instance unless and until a probable cause determination reversing the suspension is made.

3. COMMENT:

The emergency regulations add a requirement that the seven hour hearing day must exclude any time taken for meal breaks. The commenter requests that this should be deleted as unnecessary absent evidence that such breaks are excessive in length under current regulations.

DEPARTMENT RESPONSE: The Department believes that this policy is reasonable and that pursuant to Education Law § 3020-a and 3020-b, hearing officers should only be reimbursed for their actual service and that this is consistent with customary employment practice.

NOTICE OF ADOPTION

State High School Equivalency Diploma

I.D. No. EDU-36-15-00019-A

Filing No. 996

Filing Date: 2015-11-17

Effective Date: 2015-12-02

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

Action taken: Amendment of section 100.7 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) and 3204

Subject: State high school equivalency diploma.

Purpose: To update, clarify and make technical changes, including provisions relating to the Alternative High School Equivalency Preparation Programs (AHSEP), and otherwise conform to reflect current Department policy and practice.

Text or summary was published in the September 9, 2015 issue of the Register, I.D. No. EDU-36-15-00019-P.

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 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Licensing Examination Requirements for Dental Hygienists

I.D. No. EDU-48-15-00008-P

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

Proposed Action: Amendment of section 61.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 6606(1), (2), 6608 (not subdivided) and 6609(4)

Subject: Licensing Examination Requirements for Dental Hygienists.

Purpose: To address a name-change by the testing agency for Part II of the licensing exam; and remove remedial education requirements.

Text of proposed rule: Section 61.7 of the Regulations of the Commissioner of Education is amended, effective March 9, 2016, as follows:

61.7 Licensing examination for dental hygienist.

(a) Content. The examination shall consist of two parts:

(1) Part I. Designed to sample knowledge from all areas related to dental hygiene.

(2) Part II. An examination in dental hygiene practice, including both comprehensive and clinical components the scope and content of which shall be determined by the State Board for Dentistry.

(b) The department may accept grades acceptable to the State Board for Dentistry on an examination of the National Board Dental Hygiene Examination[s] as meeting the requirements of Part I of the licensing examination, and satisfactory performance on [the] a clinical examination administered by [the Northeast Regional Board of Dental Examiners or another] a [acceptable] clinical testing agency *acceptable to the department* for Part II of the licensing examination.

(c) . . .

(d) . . .

(e) A candidate who fails any component of Part II shall retain credit for components of that part passed, *to the extent permitted by the testing agency*. [for two subsequent examinations. Before admission to the third administration of Part II may be granted, such candidate shall present evidence satisfactory to the department of completion of instruction subsequent to the second failure, in a school of dental hygiene registered by the department or accredited by an accrediting organization acceptable to the department, in accordance with the following provisions:

(1) completion of 20 clock hours of instruction in each subject failed in the Dental Hygiene Comprehensive component of Part II; and

(2) completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II.]

(f) Special examination conditions.

(1) An applicant who has completed not less than one academic year in a program of dental hygiene education registered by the department or accredited by an accrediting organization acceptable to the department may be admitted to Part I of the examination. Such applicant shall meet all requirements for admission to the licensing examination, except for the completion of professional education.

(2) An applicant attending a program of dental hygiene education registered by the department, or accredited by an accrediting organization acceptable to the department, may be admitted to Part II during the last year of study and prior to graduation.

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.

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:

Section 207 of the Education Law grants general rulemaking authority

to the Board of Regents to carry into effect the laws and policies of the State relating to education.

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

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

Subdivision (1) of section 6606 of the Education Law defines the practice of dental hygiene. Subdivision (2) of section 6606 of the Education Law authorizes the Commissioner of Education to promulgate regulations defining the functions a dental hygienist may perform that are consistent with the training and qualifications for a license as a dental hygienist.

Section 6608 of the Education Law defines the practice of certified dental assisting.

Subdivision (4) of Education Law 6609 authorizes the Commissioner of Education to promulgate regulations to establish the examination requirements for dental hygiene licensure.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative intent of the aforementioned statutes that the Board of Regents and the Department regulate the admission to and practice of the professions.

The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education will delete the reference to the Northeast Regional Board of Dental Examiners (NERB), which, on January 9, 2015, changed its name to the Commission on Dental Competency Assessments (CDCA). The proposed amendment will also eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name, by stating that the Department may accept satisfactory performance on a clinical examination administered by a clinical testing agency acceptable to the Department for Part II of the licensing examination, instead of specifically naming the acceptable testing agency.

The proposal will also amend section 61.7(e), which contains the remedial education requirements candidates must currently satisfy prior to their admission to a third administration of the Part II examination, when they have failed any component of the Part II examination during two prior administrations of the examination. When the remedial education requirements were promulgated, the examination was structured in such a way that candidates would know which topic or topics they had failed and could determine the kind of remedial education they needed. However, the examination has changed, and now consists of 100 questions which are not categorized or separated by topic, and the candidates are graded pass/fail based on the number of questions they have answered correctly. This has created a situation where a candidate, who has failed a component of Part II, cannot satisfy the remedial education requirements of section 61.7(e) because he or she has no way of knowing what topic area or areas he or she failed. In addition, a remediation curriculum does not exist for either component of the Part II examination. This situation has created undue hardship for some candidates for dental hygiene licensure.

Moreover, section 61.7(e) has adversely affected numerous candidates for New York State licensure, who have practiced dental hygiene out of state and are seeking to relocate to this State. There have been instances where out of state candidates who have failed the examination twice and then eventually passed it, and had been practicing dental hygiene in other states for years, have been required to take remedial education to satisfy the requirements of section 61.7(e) for an examination they passed years ago, in order to become licensed in this State. The remedial education requirement in these instances does not further the protection of the public and creates an unnecessary barrier to licensure for such out of state licensure candidates. This may adversely affect New Yorkers' access to dental hygiene services.

The proposed amendment of section 61.7(e) would eliminate all of the aforementioned issues, as well as all the unnecessary barriers to dental hygiene licensure in this State.

3. NEEDS AND BENEFITS:

The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education will delete the reference to the Northeast Regional Board of Dental Examiners, which, on January 9, 2015, changed its name to the Commission on Dental Competency Assessments (CDCA). The proposed amendment will also eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name, by stating that the Department may accept satisfactory performance on a clinical examination administered by a clinical testing agency acceptable to the Department for Part II of the licensing examination, instead of specifically naming the acceptable testing agency.

In addition, the proposed amendment to section 61.7(e) would eliminate all of the issues discussed in the Legislative Objectives section above, as well as all the unnecessary barriers to dental hygiene licensure in this State.

4. COSTS:

The proposed amendment simply removes the reference to NERB and eliminates the remedial education requirements for dental hygiene candidates; it imposes no costs on any parties.

(a) Costs to State government. There are no additional costs to State government.

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

(c) Costs to private regulated parties. There are no additional costs to private regulated parties.

(d) Costs to the regulatory agency. There are no additional costs to the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility on local governments.

6. PAPERWORK:

There are no new forms, reporting requirements, or other recordkeeping associated with the proposed amendment.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education arose out of the change in the name of the named clinical testing agency from NERB to CDCA. The proposed amendment will eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name.

The proposed amendment to paragraph (e) of section 61.7 arose out of changes in the structure of Part II of the licensing examination, which has created a situation where a candidate, who has failed a component of Part II, cannot satisfy the current remedial education requirements of this section because he or she has no way of knowing what topic area or areas he or she failed. In addition, a remediation curriculum does not exist for either component of the Part II examination. The remedial education requirements also have adversely affected numerous candidates for New York State licensure, who have practiced dental hygiene out of state and are seeking to relocate to this State, and created an unnecessary barrier to licensure for such candidates, without furthering the protection of the public.

The proposed amendment's removal of the remedial education requirements would eliminate all the aforementioned issues, as well as the unnecessary barriers to dental hygiene licensure in this State. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

No Federal standards apply to the subject matter of this rule making. The Federal government does not regulate the examination requirements for candidates for dental hygiene licensure in New York State. Since there are no applicable federal standards, the proposed amendment does not exceed any minimum federal standards for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

If adopted at the February 2016 Regents meeting, the proposed amendment will become effective on March 9, 2016. It is anticipated that regulated parties will be able to comply with the proposed amendments by the effective date.

Regulatory Flexibility Analysis

Presently, for licensing purposes, section 61.7(b) of the Regulations of the Commissioner of Education states that, inter alia, the Department may accept satisfactory performance on the clinical examination administered by the Northeast Regional Board of Dental Examiners or another acceptable clinical testing agency for Part II of the licensing examination for dental hygiene candidates. However, on January 9, 2015, the Northeast Regional Board of Dental Examiners (NERB) changed its name to the Commission on Dental Competency Assessments (CDCA). The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education will eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name. Instead of specifically naming the acceptable testing agency, the proposed amendment states that the Department may accept satisfactory performance on a clinical examination administered by a clinical testing agency acceptable to the Department for Part II of the licensing examination.

The CDCA Examination in Dental Hygiene consists of two components – the Computer Simulated Clinical Examination (CSCE) and the Patient Treatment Clinical Examination (PTCE). Currently, under section 61.7(e) of the Regulations of the Commissioner of Education, a candidate who fails any component of Part II retains credit for components of that part passed for two subsequent examination administrations. However, before admission to a third administration of the Part II examination may be granted, the candidate must present evidence satisfactory to the Department of completion of remedial education subsequent to the second fail-

ure, in a school of dental hygiene registered by the Department, or accredited by an accrediting organization acceptable to the Department. Such remedial education must include completion of 20 clock hours of instruction in each subject failed in the Dental Hygiene Comprehensive component of Part II and completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. In addition, CDCA requires that candidates failing either the CSCE or the PTCE on three successive attempts must begin the entire examination process again and retake both of these examination components. However, due to changes in the examination, candidates who have failed a component of the Part II examination cannot satisfy the remedial education requirements of section 61.7(e) because they have no way of knowing what topic area or areas they failed. In addition, a remediation curriculum does not exist for either the CSCE or the PTCE. This situation has created undue hardship for some candidates for dental hygiene licensure.

Moreover, section 61.7(e) has adversely affected numerous candidates for New York State licensure, who have practiced dental hygiene out of state and are seeking to relocate to this State. There have been instances where out of state candidates who have failed the examination twice and then eventually passed it, and had been practicing dental hygiene in other states for years, have been required to take remedial education to satisfy the requirements of section 61.7(e) for an examination they passed years ago, in order to become licensed in this State. The remedial education requirement in these instances does not further the protection of the public and creates an unnecessary barrier to licensure for such out of state licensure candidates. This may adversely affect New Yorkers' access to dental hygiene services.

Additionally, as stated above, section 61.7(e) currently requires completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. However, there is a lack of places to send such candidates for the required remedial education because dental hygiene schools cannot take on the liability of having a candidate perform clinical procedures on a patient if they are not enrolled in the school.

The proposed amendment's removal of the remedial education requirements of section 61.7(e) would eliminate all of the aforementioned issues, as well as all the unnecessary barriers to dental hygiene licensure in this State.

The proposed amendment is applicable to candidates for dental hygienist licensure only. The proposed amendment will not affect small business or local governments in New York State. The measure will not impose any adverse economic impact, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required, and one was not prepared.

Rural Area Flexibility Analysis

Presently, for licensing purposes, section 61.7(b) of the Regulations of the Commissioner of Education states that, inter alia, the Department may accept satisfactory performance on the clinical examination administered by the Northeast Regional Board of Dental Examiners or another acceptable clinical testing agency for Part II of the licensing examination for dental hygiene candidates. However, on January 9, 2015, the Northeast Regional Board of Dental Examiners (NERB) changed its name to the Commission on Dental Competency Assessments (CDCA). The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education will eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name. Instead of specifically naming the acceptable testing agency, the proposed amendment states that the Department may accept satisfactory performance on a clinical examination administered by a clinical testing agency acceptable to the Department for Part II of the licensing examination.

The CDCA Examination in Dental Hygiene consists of two components – the Computer Simulated Clinical Examination (CSCE) and the Patient Treatment Clinical Examination (PTCE). Currently, under section 61.7(e) of the Regulations of the Commissioner of Education, a candidate who fails any component of Part II retains credit for components of that part passed for two subsequent examination administrations. However, before admission to a third administration of the Part II examination may be granted, the candidate must present evidence satisfactory to the Department of completion of remedial education subsequent to the second failure, in a school of dental hygiene registered by the Department, or accredited by an accrediting organization acceptable to the Department. Such remedial education must include completion of 20 clock hours of instruction in each subject failed in the Dental Hygiene Comprehensive component of Part II and completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. In addition, CDCA requires that candidates failing either the CSCE or the PTCE on three successive attempts must begin the entire examination process again and retake both of these examination components. However, due to changes in the exami-

nation, candidates who have failed a component of the Part II examination cannot satisfy the remedial education requirements of section 61.7(e) because they have no way of knowing what topic area or areas they failed. In addition, a remediation curriculum does not exist for either the CSCE or the PTCE. This situation has created undue hardship for some candidates for dental hygiene licensure.

Moreover, section 61.7(e) has adversely affected numerous candidates for New York State licensure, who have practiced dental hygiene out of state and are seeking to relocate to this State. There have been instances where out of state candidates who have failed the examination twice and then eventually passed it, and had been practicing dental hygiene in other states for years, have been required to take remedial education to satisfy the requirements of section 61.7(e) for an examination they passed years ago, in order to become licensed in this State. The remedial education requirement in these instances does not further the protection of the public and creates an unnecessary barrier to licensure for such out of state licensure candidates. This may adversely affect New Yorkers' access to dental hygiene services.

Additionally, as stated above, section 61.7(e) currently requires completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. However, there is a lack of places to send such candidates for the required remedial education because dental hygiene schools cannot take on the liability of having a candidate perform clinical procedures on a patient if they are not enrolled in the school.

The proposed amendment's removal of the remedial education requirements of section 61.7(e) would eliminate all of the aforementioned issues, as well as all the unnecessary barriers to dental hygiene licensure in this State.

The proposed amendment is applicable only to candidates for licensure as dental hygienists in New York State and does not impact entities in rural areas of New York State. Accordingly, no further steps were needed to ascertain the impact of the proposed amendment on entities in rural areas and none were taken.

Job Impact Statement

Presently, for licensing purposes, section 61.7(b) of the Regulations of the Commissioner of Education states that, inter alia, the Department may accept satisfactory performance on the clinical examination administered by the Northeast Regional Board of Dental Examiners or another acceptable clinical testing agency for Part II of the licensing examination for dental hygiene candidates. However, on January 9, 2015, the Northeast Regional Board of Dental Examiners (NERB) changed its name to the Commission on Dental Competency Assessments (CDCA). The proposed amendment to paragraph (b) of section 61.7 of the Regulations of the Commissioner of Education will eliminate the need to amend this section in the future, should CDCA or another clinical testing agency change its name. Instead of specifically naming the acceptable testing agency, the proposed amendment states that the Department may accept satisfactory performance on a clinical examination administered by a clinical testing agency acceptable to the Department for Part II of the licensing examination.

The CDCA Examination in Dental Hygiene consists of two components – the Computer Simulated Clinical Examination (CSCE) and the Patient Treatment Clinical Examination (PTCE). Currently, under section 61.7(e) of the Regulations of the Commissioner of Education, a candidate who fails any component of Part II retains credit for components of that part passed for two subsequent examination administrations. However, before admission to a third administration of the Part II examination may be granted, the candidate must present evidence satisfactory to the Department of completion of remedial education subsequent to the second failure, in a school of dental hygiene registered by the Department, or accredited by an accrediting organization acceptable to the Department. Such remedial education must include completion of 20 clock hours of instruction in each subject failed in the Dental Hygiene Comprehensive component of Part II and completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. In addition, CDCA requires that candidates failing either the CSCE or the PTCE on three successive attempts must begin the entire examination process again and retake both of these examination components. However, due to changes in the examination, candidates who have failed a component of the Part II examination cannot satisfy the remedial education requirements of section 61.7(e) because they have no way of knowing what topic area or areas they failed. In addition, a remediation curriculum does not exist for either the CSCE or the PTCE. This situation has created undue hardship for some candidates for dental hygiene licensure.

Moreover, section 61.7(e) has adversely affected numerous candidates for New York State licensure, who have practiced dental hygiene out of state and are seeking to relocate to this State. There have been instances where out of state candidates who have failed the examination twice and then eventually passed it, and had been practicing dental hygiene in other states for years, have been required to take remedial education to satisfy the requirements of section 61.7(e) for an examination they passed years

ago, in order to become licensed in this State. The remedial education requirement in these instances does not further the protection of the public and creates an unnecessary barrier to licensure for such out of state licensure candidates. This may adversely affect New Yorkers' access to dental hygiene services.

Additionally, as stated above, section 61.7(e) currently requires completion of 40 clock hours of clinical instruction for failure in the clinical component of Part II. However, there is a lack of places to send such candidates for the required remedial education because dental hygiene schools cannot take on the liability of having a candidate perform clinical procedures on a patient if they are not enrolled in the school.

The proposed amendment's removal of the remedial education requirements of section 61.7(e) would eliminate all of the aforementioned issues, as well as all the unnecessary barriers to dental hygiene licensure in this State.

Because it is evident from the nature of the proposed amendment that it will have no adverse impact on jobs or employment opportunities, or only 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.

Department of Environmental Conservation

NOTICE OF ADOPTION

Parts 243, 244, and 245 Implement Cap-and-Trade Programs That Reduce NO_x and SO₂ Emissions from EGUs Larger Than 25 MWe

I.D. No. ENV-37-15-00013-A

Filing No. 971

Filing Date: 2015-11-12

Effective Date: 30 days after filing

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

Action taken: Amendment of Part 200; repeal of Parts 243, 244 and 245; and addition of new Parts 243, 244 and 245 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105

Subject: Parts 243, 244, and 245 implement cap-and-trade programs that reduce NO_x and SO₂ emissions from EGUs larger than 25 MWe.

Purpose: Repeal 6 NYCRR 243, 244, 245 CAIR. Replace with 6 NYCRR 243, 244, 245 CSAPR. Revise Part 200 to incorporate these changes.

Substance of final rule: The Department is adopting Parts 243, 244 and 245 to repeal the existing defunct CAIR program regulations and to implement an allocation protocol for the three Transport Rule programs that are more in line with the environmental and energy goals of New York. The 2015 New York State Energy Plan – The Energy to Lead, calls for increased energy efficiency and renewable energy. After setting aside 5% of New York's Transport Rule budget for new sources, Parts 243, 244 and 245 will allocate allowances based on recent emissions (the average of the 3 last years for which data are available) and provide the remaining allowances to New York State Energy Research and Development Authority (NYSERDA), who will use the proceeds of the sale of those excess allowances to promote energy efficiency and renewable energy technologies. This methodology provides sources with the amount of allowances needed to operate, while the sale of these excess allowances will aid New York in meeting the State Energy Plan goals for energy efficiency and renewable energy.

Proposed 6 NYCRR Part 243 establishes the Transport Rule NO_x Ozone Season Trading Program; proposed 6 NYCRR Part 244 establishes the Transport Rule NO_x Annual Trading Program; and proposed 6 NYCRR Part 245 establishes the Transport Rule SO₂ Group 1 Trading Program. These programs are designed to reduce ozone and particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (PM_{2.5}) in New York State and downwind states by limiting emissions of NO_x and SO₂ year-round from fossil fuel-fired electricity generating units.

Proposed Parts 243, 244, and 245 incorporate the United States Environmental Protection Agency's federal Cross-State Air Pollution Rule (CSAPR) and allow the Department to allocate allowances created under CSAPR to affected units in NYS.

Proposed Parts 243, 244, and 245 establish emission budgets for NO_x and SO₂, respectively. They also establish trading programs by allocating allowances that are limited authorizations to emit up to one ton of NO_x or SO₂ in the respective control periods or any control period thereafter. Affected units are required to hold allowances for compliance deduction at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

Proposed Part 243 applies to units that serve an electrical generator with a nameplate capacity greater than 25 megawatts of electrical output, sells any amount of electricity, and operates during the ozone season from May 1 through September 30. Under proposed Part 243, the Department would begin allocating New York's portion of the CSAPR ozone season budget beginning on May 1, 2017.

Proposed Parts 244 and 245 apply to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Proposed Parts 244 and 245 runs from January 1 to December 31. The Department would begin allocating New York's portion of the CSAPR annual budgets beginning on January 1, 2017.

New York's CSAPR budget are defined under 40 CFR Part 97 as follows:

40 CFR Part 97 Subpart AAAAA – Transport Rule NO_x Annual Trading Program. The NO_x annual trading budget for 2017 and thereafter is 21,722 tons.

40 CFR Part 97 Subpart BBBB – Transport Rule NO_x Ozone Season Trading Program. The NO_x ozone season trading budget for 2017 and thereafter is 10,369 tons.

40 CFR Part 97 Subpart CCCC – Transport Rule SO₂ Group 1 Trading Program. The SO₂ trading budget for 2017 and thereafter is 27,556 tons.

Under this proposal, the Department would determine the number of Transport Rule allowances to be allocated to each Transport Rule unit for the 2017 control period and beyond in the following manner:

(1) 5 percent of the Transport Rule Trading Program budget will be allocated to the new unit set-aside account.

(2) Allowances totaling the 3-year average emissions of all Transport Rule units for which data are available will be proportionally allocated to each of the existing individual Transport Rule units.

(3) After allocating based on paragraphs (1) and (2) of this subdivision, the Energy Efficiency and Renewable Energy Technology (EERET) account will receive the remainder of allowances from the Transport Rule Trading Program Budget.

(i) The EERET account will be allocated a minimum of 10 percent of the Transport Rule Trading Program budget.

(ii) If paragraphs (1)-(3) of this subdivision result in an EERET account allocation of less than 10 percent of the Transport Rule Trading Program budget, the allowances allocated under paragraph (2) of this paragraph will be reduced proportionally by the amounts necessary to ensure that 10 percent of the Trading Program budget is allocated to the EERET account.

Under this proposal, an authorized account representative of a new unit may submit a written request to the Department to reserve allowances for the new unit in an amount no greater than the unit's potential to emit. For proposed Part 243, the request must be made prior to May 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For proposed Parts 244 and 245, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. The unit must have all of its required permits for the Department to consider these requests.

If more than one Transport Rule unit requests the reservation of Transport Rule allowances and the number of requested allowances exceeds the allocation to the relevant Transport Rule new unit set-aside account, the Department would reserve Transport Rule allowances from the account for the units in the order in which the Transport Rule units submitted approvable reservation requests. Under this proposal, requests are considered simultaneous if they are made in the same calendar quarter. Should approvable reservation requests in excess of the allocation to the relevant Transport Rule new unit set-aside account be submitted in the same calendar quarter by different Transport Rule units, the Department will reserve Transport Rule allowances for those units on a basis proportional to the number of Transport Rule allowances requested by each Transport Rule unit. Unused new unit set-aside allowances would be transferred to the EERET account. Allowances transferred to the EERET account would be completed at the end of the control period and would be available for sale by NYSERDA beginning in the control period immediately following the allocation transfer.

Under this proposal, New York's Transport Rule Trading Program Budgets are designed to allocate a minimum of 10% of each trading

program's allowance budget to the EERET account. The EERET account would be administered by NYSERDA and the allowances in the account may be sold or distributed in order to help achieve the emissions reduction goals of the Transport Rule Trading Programs by promoting or rewarding investments in energy efficiency and renewable technologies, and/or innovative abatement technologies.

This proposed rulemaking allows NYSERDA to open an EERET account from which NYSERDA may sell allowances allocated to the EERET account by the Department. NYSERDA would be required to promptly sell or distribute the allowances as part of a fair, open and transparent process. NYSERDA may use proceeds of the allowance sales to fund energy efficiency projects, renewable energy, or clean energy technology. NYSERDA currently administers similar energy efficiency and clean energy technology programs, and the addition of the EERET Account would be easily accomplished. If for any reason the EERET allowances are not sold or distributed by NYSERDA, the allowances would flow back to the Department and be redistributed to the affected units.

Table 1 in section 200.9 cites the portions of federal statute and regulations that are incorporated by reference into Parts 243, 244, and 245.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 243.3(b), 243.5(a)(3), 244.3(b), 244.5(a)(3), 245.3(b), 245.5(a)(3) and 200.9.

Text of rule and any required statements and analyses may be obtained from: Michael Miliani, P.E., New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: Michael.Miliani@dec.ny.gov

Additional matter required by statute: Pursuant to Article 8 of 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.

Revised Regulatory Impact Statement

INTRODUCTION

The New York State Department of Environmental Conservation (Department) proposes to repeal 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6 NYCRR Part 245, CAIR SO₂ Trading Program (collectively, the New York State Clean Air Interstate Rules or NYS CAIR) and replace them with three new rules, 6 NYCRR Part 243, Transport Rule NO_x Ozone Season Trading Program, 6 NYCRR Part 244, Transport Rule NO_x Annual Trading Program, and 6 NYCRR Part 245, Transport Rule SO₂ Trading Program. These proposed rules incorporate the United States Environmental Protection Agency's (EPA) federal Cross-State Air Pollution Rule (CSAPR) and allow the Department to allocate CSAPR allowances to regulated entities in New York.

The Department is proposing this rulemaking because NYS CAIR allowances are obsolete and superseded by CSAPR. CSAPR regulates regional cap-and-trade programs that regulate emissions from large fossil fuel-fired electricity generating units (EGUs) that have a nameplate capacity greater than 25 megawatts electrical (MWe) and produce electricity for sale. To administer the New York State components of the regional cap-and-trade program, the Department must incorporate CSAPR into regulation.

STATUTORY AUTHORITY

The statutory authority for this action is found in the Environmental Conservation Law (ECL), Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105.

ECL section 1-0101 makes it the policy of New York State to conserve, improve and protect natural resources, the environment, and control air pollution in order to enhance the health, safety, and welfare of the people of New York State and their overall economic and social wellbeing and coordinate the State's environmental plans, functions, powers and programs with those of the federal government and other regions and manage air resources. This section also makes it the policy of the State to foster, promote, create and maintain conditions for air resources that are shared with other states.

ECL section 3-0301 grants the Department power to adopt, formulate, promulgate, amend and repeal regulations for preventing, controlling, or prohibiting air pollution and to include in such regulations provisions prescribing the degree of air pollution or air contamination and the extent to which air contaminants may be emitted to the air by any source in any area of the State.

ECL section 19-0103 declares that it is the policy of New York State to maintain a reasonable degree of purity of air resources, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the State, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

ECL section 19-0105 declares that it is the purpose of ECL Article 19 to safeguard the air resources of New York State under a program that is

consistent with the policy expressed in section 19-0103 other provisions of Article 19.

ECL section 19-0301 declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution and shall include in such regulations provisions prescribing the degree of air pollution that may be emitted to the air by any source in any area of the State. ECL section 19-0303 provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution and air contamination sources.

ECL section 19-0305 authorizes the Department to enforce the codes, rules and regulations established in accordance with Article 19.

ECL section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA. Section 19-0311 specifically requires that complete permit applications must include, among other things, compliance plans and schedules of compliance. This section further expresses that any permits issued must include, among other things, terms setting emissions limitations or standards, terms for detailed monitoring, record keeping and reporting, and terms allowing Department inspection, entry, and monitoring to assure compliance with the terms and conditions of the permit.

ECL Sections 71-2103 and 71-2105 describe the civil and criminal penalty structures for violations of Article 19.

LEGISLATIVE OBJECTIVES

The legislative objectives of ECL Article 19 are made clear in section 19-0301 and 19-0303, outlined above. ECL Article 19 was enacted to safeguard the air resources of New York from pollution and ensure protection of public health and welfare, natural resources of the State, and integrating industrial development and sound environmental practices. This proposal furthers the statutory and public policy objectives because it would allow the Department to control emissions of NO_x and SO₂ that contribute to local and regional nonattainment of the ozone and PM_{2.5} National Ambient Air Quality Standards (NAAQS). State regulation of these pollutants protect New York's air resources, public health and welfare.

NEEDS AND BENEFITS

The Department is proposing to repeal existing Parts 243, 244, and 245, NYS CAIR, and replace them with allocation methodologies for New York's portion of the CSAPR emissions budgets for the NO_x ozone season and NO_x and SO₂ annual programs. This will enable the state to control how CSAPR allowances are allocated beginning with the 2017 control periods. The Department is making this proposal because CSAPR affects numerous sources within New York State and because the Department is best equipped to address needs and inquiries of affected or interested parties within New York. The responsibility for implementing all other aspects of CSAPR would remain with EPA under a Federal Implementation Plan (FIP). The Department's proposed action is considered a partial State Implementation Plan (SIP).

CSAPR requires 23 states, including New York, to reduce annual SO₂ and NO_x emissions to help downwind areas attain the 24-hour and/or annual PM_{2.5} NAAQS. The rule addresses all upwind states' transport obligations under the 1997 annual PM_{2.5} and 2006 24-hour PM_{2.5} standards. Twenty-five states, including New York, are required to reduce ozone season NO_x emissions to help downwind areas attain the 1997 8-hour ozone NAAQS.

New York's CSAPR budgets are defined under 40 CFR Part 97 as follows:

40 CFR Part 97 Subpart AAAAA – Transport Rule NO_x Annual Trading Program. The NO_x annual trading budget for 2017 and thereafter is 21,722 tons.

40 CFR Part 97 Subpart BBBBB – Transport Rule NO_x Ozone Season Trading Program. The NO_x ozone season trading budget for 2017 and thereafter is 10,369 tons. The ozone season is the period between May 1 and September 30, inclusive, of each year.

40 CFR Part 97 Subpart CCCCC – Transport Rule SO₂ Group 1 Trading Program. The SO₂ trading budget for 2017 and thereafter is 27,556 tons.

Under NYS CAIR, a 10 percent portion of the allowance pool was set aside to be administered by NYSERDA. The allowances in that account were sold to help achieve the emission reduction goals of the CAIR NO_x Trading Programs by promoting or rewarding investments in energy efficiency and renewable technologies, and/or innovative abatement technologies. Proceeds from the sale of set-aside allowances could be used to support clean energy programs that reduce NO_x emissions. The Department proposes to implement a similar set-aside for allocation of CSAPR allowances under each of the CSAPR control programs and will require that NYSERDA make the allowances held in their accounts available for sale in the open market at the time they are allocated into NYSERDA's accounts.

This proposal bases the quantity of allowances allocated to NYSERDA

on the difference between the CSAPR control period budgets established by EPA and the most recently available historic actual emission levels experienced by the affected units in each control program. The Department would use available data to allocate allowances to each affected unit as closely as possible to the average number of tons typically emitted by each unit in order to provide each facility with the number of allowances they will likely need to operate within the CSAPR program budgets.

This proposal grants the Department responsibility for allocating CSAPR allowances to ensure that New York facilities receive sufficient allowances to operate. The Department would review allocations every year in order to account for any operational changes. Operational changes include, but are not limited to shifting new sources to the main CSAPR accounts, facility shutdowns, addition of pollution control systems and fuel switching. By adjusting allocations on a periodic basis, the Department can adapt to an ever-changing electricity marketplace and regulatory environment. This approach is more flexible than EPA's allocation strategy in which allocations do not change over time.

COSTS

CSAPR allowances are currently sold in the market for approximately \$125/ton NO_x and \$40/ton SO₂. Based on a 25% to 40% NYSEERDA set-aside, there would be a potential shift of more than \$1.3 million annually away from affected EGUs within the CSAPR programs as compared to the allocation strategy developed by the EPA. The NYSEERDA account is expected to hold allowances that are in excess of what EGUs in NY have typically emitted under normal operation in previous years.

New York's CSAPR rules impose no additional costs on the Department. These rules will not impose additional costs to local government entities.

PAPERWORK

The proposed rule will not impose any new paperwork requirements for regulated parties.

LOCAL GOVERNMENT MANDATES

This proposal is not expected to result in any additional recordkeeping, reporting, or other requirement for any local government entity.

DUPLICATION

The proposed regulations do not duplicate, overlap, or conflict with any other State or federal requirements.

ALTERNATIVES

The Department considered two alternatives before submitting a proposal for repeal and subsequent replacement of Part 243, 244, and 245:

First, the Department could take no action. EPA would continue to run the program under the FIP. EPA would retain the responsibility of allocating allowances. The Department would have no influence or control over any part of the program. EPA's allocation strategy does not change over time and may not reflect operational changes within the mix of sources that generate electricity in New York. The Department is proposing this rule because it would allow it to control how New York's allowances are distributed to affected units, including considering changes in generation.

Second, the Department can do a rulemaking to replace the FIP. This would require a greater effort to incorporate the entire federal program into State regulation and would allow the Department to implement all aspects of the CSAPR program for NY's sources including allocating allowances and ensuring compliance with the CSAPR rules. The deadline set by EPA for completing this rulemaking is December 1, 2015. A rulemaking to replace the FIP with a full SIP would be difficult to complete in such a short period of time.

FEDERAL STANDARDS

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 need for a specific compliance schedule because it does not impose any new compliance obligations on regulated entities. The EPA is still responsible for implementing and enforcing the provisions of the federal program until such time that the FIP is replaced with a full SIP. This rulemaking would only change the method by which allowances are allocated to regulated entities. Affected facilities must have sufficient allowances in their CSAPR accounts on the compliance dates in the federal program. Facility representatives will be provided with the number of allowances they will receive by the Department at least 1-year in advance of the 2017 control periods. All of the compliance obligations for the affected facilities will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods.

Revised Regulatory Flexibility Analysis

EFFECT OF RULE

There are no small businesses affected by this rulemaking. The only local government potentially affected by this rulemaking is the Jamestown Board of Public Utilities (JBPU) operator of the Samuel A. Carlson Generating Station. S.A. Carlson is a coal-fired power station located in Jamestown, New York. S.A. Carlson operates 3 units that regulated under the Cross-State Air Pollution Rule (CSAPR).

COMPLIANCE REQUIREMENTS

This rulemaking does not impose any new compliance obligations on regulated entities. The EPA is still responsible for implementing and enforcing the provisions of the federal program until such time that the Federal Implementation Plan (FIP) is replaced with a full State Implementation Plan (SIP). This rulemaking would only change the method by which allowances are allocated to regulated entities. Affected facilities must have sufficient allowances in their CSAPR accounts on the compliance dates in the federal program. Facility representatives will be provided with the number of allowances they will receive by the Department at least 1-year in advance of the 2017 control periods. All of the compliance obligations for the affected facilities will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods.

PROFESSIONAL SERVICES

The Department does not expect that any type of professional service will be required for a small business or local government to comply with this rule.

COMPLIANCE COSTS

Under the Department's proposed allocation method, the affected units at S.A. Carlson units are expected to receive CSAPR allowances for the 2017 NO_x control periods that are very close to what the average actual emissions have been in recent years. S.A. Carlson has switched fuel from coal to primarily natural gas. This will essentially eliminate the need for SO₂ allowances. CSAPR allowances are currently sold in the market for approximately \$125/ton NO_x and \$40/ton SO₂.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

S.A. Carlson no longer burns coal in any of the electricity generating units at their facility. Units #11 and #12 have been shut down. Unit #20 continues to burn natural gas. The remaining units at the facility (#9, #10) have switched fuel types from coal to natural gas. This will minimize the need for NO_x allowances and virtually eliminate the need for SO₂ allowances. The Department expects that S.A. Carlson will be provided with an adequate number of allowances to operate within the emissions cap. As a result of the switch from coal to natural gas for units #9 and #10, these changes will have only minimal impact on economics (thousands of dollars) and no impact on technical feasibility.

MINIMIZING ADVERSE IMPACT

The Department does not expect this rule to impose any adverse economic impact on small businesses or local governments. CSAPR regulates NO_x and SO₂ emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. This rulemaking would only change the method by which allowances are allocated to affected units within New York State. All of the compliance obligations for the affected facilities are currently governed by EPA's FIP and will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods. The Department would review the allocations every year in order to account for any operational changes. By adjusting allocations on a periodic basis, the Department can adapt to an ever-changing electricity marketplace and regulatory environment. This approach is more flexible than EPA's allocation strategy in which allocations do not change over time.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department held a stakeholder meeting on April 27, 2015 in which facility representatives of affected CSAPR sources, including local governments, were provided an opportunity to provide pre-proposal input to the rule making process.

The Department plans on holding a public hearing during the proposal stage. The location of this hearing would be convenient for persons from local governments and small businesses to participate. Additionally, there would be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments on the proposed regulation.

Revised Rural Area Flexibility Analysis

A RAFA is not required for this rulemaking. The Department is proposing this rulemaking because the CAIR trading programs, incorporated in existing Part 243, 244, and 245, are obsolete and superseded by CSAPR. CSAPR regulates NO_x and SO₂ emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. This rulemaking would only change the method by which allowances are allocated to affected units within NYS. The Department does not expect this rule to impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. All of the compliance obligations for the affected facilities are currently governed by EPA's federal program and will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods.

Revised Job Impact Statement

A JIS is not required. The Department is proposing this rulemaking because the CAIR trading programs, incorporated in existing Part 243, 244, and 245, are obsolete and superseded by CSAPR. CSAPR regulates NO_x and SO₂ emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. This rulemaking would only change the method by which allowances are allocated to affected units within NYS. The Department does not expect this rule to have a substantial adverse impact on jobs and employment opportunities. All of the compliance obligations for the affected facilities are currently governed by EPA's federal program and will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The New York State Department of Environmental Conservation (Department) is repealing 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6 NYCRR Part 245, CAIR SO₂ Trading Program and replacing them with 6 NYCRR Part 243, Transport Rule NO_x Ozone Season Trading Program, 6 NYCRR Part 244, Transport Rule NO_x Annual Trading Program, and 6 NYCRR Part 245, Transport Rule SO₂ Trading Program. The Department is repealing and replacing these rules because the previous rules have been made obsolete by the United States Environmental Protection Agency's federal Cross-State Air Pollution Rule (CSAPR), which the Department is incorporating into 6 NYCRR Part 200 and will allow the Department to allocate CSAPR allowances to regulated entities in New York. The Department proposed Parts 244, 245, and 246 on September 16, 2015. A public hearing was held in Albany on October 19, 2015 in Albany. The Department received comments from 3 commentators during the comment period of September 16 through October 26, 2015, all of which have been reviewed, summarized and responded to by the Department.

Comments Submitted by the Environmental Energy Alliance of New York (EEANY)

1. Comment: "The Alliance is in general agreement with most of the rule. The Alliance supports the SEQR Act Negative Declaration stating that the proposed actions will not have a significant effect on the environment because there will be no impact on emissions themselves. We also strongly support the concept that the rule revisions be developed such that future revisions will be minimized. The proposed revisions meet that concept well."

Response: The Department thanks the commenter for their support of issues cited in the comment.

2. Comment: "(T)he Alliance does have some concerns with the proposed revisions. In the last ten years, New York State electric generating units have reduced annual SO₂ emissions by 89% and NO_x emissions by 67%. Although the heat input (mmBtu/year) decreased by 19%, the SO₂ rate (lb/mmBtu) decreased by 87% and the NO_x rate by 59%. While fuel switching accounts for part of the observed decrease, these significant reductions also reflect the fact that New York generating companies have invested heavily in pollution control."

Against that backdrop, the Alliance requests that the DEC adopt an allocation methodology that demonstrates an appreciation of the investments made that resulted in those reductions by allocating all the allowances in the Federal Implementation Plan to the source owners. The Regulatory Impact Statement projects a potential shift of more than \$1.3 million annually away from affected EGUs if these proposed Parts are finalized when compared to the EPA's original allocation, and presuming that current allowance prices do not change dramatically. The EPA allocation will be higher than what is necessary to operate under average conditions and provides necessary margin to operate units to provide reliable electric power to the state in unexpected situations. In the event the allowances are not needed then the sale of those excess allowances will allow source owners and ratepayers an opportunity to recoup some of their pollution control investments."

Response: In the opinion of the Department, the allowance strategy adopted in the final rules will provide affected facilities with adequate allowances to operate. If the manner of operation for any given facility changes over time, then the quantity of allowances allocated will change accordingly.

3. Comment: "EEANY would like to propose an alternate allocation calculation methodology. In the past, DEC has allocated allowances based on a look-back at the maximum heat input over the last three years.

However, in the proposed rule, allowances totaling the 3-year average emissions will be proportionally allocated to each of the existing affected units. As proposed, DEC will allocate allowances for future years based on the 3-year average. Emissions vary primarily due to changes in demand resulting from weather extremes, unit and intertie outages, and relative fuel cost differences. By averaging recent emissions, there is no margin for a higher emitting year that results from circumstances beyond the source's control.

The Alliance notes that there are ways to mitigate this impact. The simplest approach is to use the maximum as in previous programs. As with the DEC proposal, all remaining allowances would flow to NYSERDA. This is the approach that EEANY first recommends. As an alternative, EEANY has another approach to recommend. This equitable approach would be to set-aside the difference between the maximum and average allocation methodologies. If any affected sources emitted more than the DEC allocation but less than the three year maximum then allowances from this "averaging set-aside" would be given to those sources up to the three year maximum. On an annual basis, remaining allowances in the averaging set-aside account could be transferred to the Energy Efficiency and Renewable Energy Technology Account."

Response: As stated in the response to Comment #2, the allowance strategy adopted in the final rules will provide affected facilities with adequate allowances to operate. The first alternative presented would provide more allowances than needed and may be a deterrent to reducing emissions. The second alternative would be very difficult to initiate programmatically considering the short time-frame available to complete this rule making.

4. Comment: "Finally, the Alliance believes there is a compliance aspect to the rule revisions that has to be recognized. The EPA Cross-State Air Pollution Rule includes a Compliance Assurance Mechanism that we believe has to be based on the EPA unit allocations, not the DEC unit allocations. If New York exceeds its assurance level (State budget plus the variability), then the sources that exceed their allocation and variability limit are subject to penalty. A source's assurance level is based on its allocation. By only allocating a portion of the State budget to sources, the DEC is effectively reducing the compliance margin that would be available under the EPA allocation methodology. Fortunately, New York emissions have improved so much that it is very unlikely that the State assurance levels would be exceeded in the near future. However, because the rule has been written such that it will not need to be revised and it is very likely that future EPA transport rules will further reduce allowable emissions, it is possible that at some time in the future this could be an issue. Should the DEC decline to address this concern in the current rulemaking, we request that the DEC commit to revisit this issue in the future should new EPA rulemakings raise the concern. Such a commitment could be inserted into DEC's "Response to Comments" document that will be prepared as part of this proceeding."

Response: Any penalty under the Compliance Assurance Mechanism will be determined by EPA, applying the terms of the Federal regulations. The Department agrees that it is very unlikely that the State assurance levels will be exceeded. If EPA reduces allowable emissions in the future, making this an issue for affected units in New York, the Department will revisit this issue at that time.

Comments Submitted by Environmental Advocates of New York, Natural Resources Defense Council, Pace Energy and Climate Center, and the Sierra Club

5. Comment: "New York State should instead allocate 100 percent of the CSAPR allowances through an auction or secondary market sale."

Response: The approach set forth in the final rules is modeled after the allocation strategy DEC used for the Clean Air Interstate Rule (CAIR), which is being repealed in this rulemaking. DEC is continuing to use this approach for the time being. This approach allocates allowances equal to historical emissions and provides the remaining to NYSERDA to be exercised for the public good.

6. Comment: "The rationale for auctioning allowances created under CSAPR is exactly the same as New York's rationale for auctioning RGGI allowances... auctioning the CSAPR allowances creates consistent policy with other establish emissions reduction efforts, ensures that the value of selling the allowances accrues to the public, reduces overall compliance costs, benefits consumers, and is sound public policy. We urge DEC to amend its proposal and auction all CSAPR allowances."

Response: The Department took steps to reasonably ensure, as much as possible, that affected units within CSAPR are allocated the number of allowances they are expected to need to operate based on recent historical operation. The Department believes that this is a fair and equitable approach for distributing allowances to affected generating entities (including new units that may enter into the program). Unlike under the RGGI program, where all States have chosen to auction most of their allowances, under CSAPR, DEC knows of no other State that is auctioning any of its allowances. DEC may reconsider this approach in the future if other states in the region choose to auction some or all allowances.

Comments Submitted by the Independent Power Producers of New York, Inc. (IPPNY)

7. "IPPNY supports the DEC's intention to allocate CSAPR allowances directly to facility owners in the amount that affected units need to operate based on historical emissions. IPPNY urges the DEC to ensure that enough allowances will be available to cover emissions if unit capacity factors increase above their prior three years."

Response: The Department thanks the commenter for their support of issues cited in the comment. The Department will continue to work with the regulated to community to ensure that compliance with the new regulations is feasible.

8. "IPPNY urges the DEC to allow affected units to continue to be able to use previous years' vintage banked allowances for compliance in future years of the program. More specifically, the DEC should ensure that vintage 2015 and 2016 allowances will remain 1:1 for use to cover emissions in 2017 and beyond."

Response: Under the EPA Federal Implementation Plan, previous years' vintage banked allowances are allowed to be used for compliance in future years of the program at a 1:1 ratio.

Department of Financial Services

EMERGENCY RULE MAKING

Title Insurance Agents, Affiliated Relationships, and Title Insurance Business

I.D. No. DFS-48-15-00001-E

Filing No. 970

Filing Date: 2015-11-10

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 Parts 20 (Regulations 9, 18 and 29), 29 (Regulation 87), 30 (Regulation 194) and 34 (Regulation 125); and addition of Part 35 (Regulation 206) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 107(a)(54), 301, 2101(k), 2109, 2112, 2113, 2119, 2120, 2122, 2128, 2129, 2132, 2139, 2314 and 6409

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

Specific reasons underlying the finding of necessity: Long-sought and critically needed legislation to license title insurance agents was enacted as part of Chapter 57 of the New York Laws of 2014, which was signed into law by the governor on March 31, 2014. Chapter 57 took effect on September 27, 2014.

A number of existing regulations that apply to insurance producers generally are amended to make them applicable to title insurance agents. Specifically, Part 20 addresses temporary licenses (Insurance Regulation 9), addresses appointment of insurance agents (Insurance Regulation 18), and regulates premium accounts and fiduciary responsibilities of insurance agents and insurance brokers (Insurance Regulation 29), and are amended to include references to title insurance agents. Part 29 (Insurance Regulation 87) addresses special prohibitions regarding sharing compensation with other licensees with respect to certain governmental entities and is amended to address a limited exception for title insurance business insuring State of New York Mortgage Agency and certain other circumstances. Part 30 (Insurance Regulation 194) addresses insurance producer compensation transparency and is amended to reflect specific requirements in new Insurance Law section 2113 for title insurance agents. Part 34 (Insurance Regulation 125) governs insurance agents and brokers that maintain multiple offices and is amended to clarify the applicability of the regulation to title insurance agents. In addition, a new Part 35 (Insurance Regulation 206) is added that address unique circumstances regarding title insurance agents.

It is critical for the protection of the public that appropriate rules and regulations are in place on and after the effective date of Chapter 57 to apply to newly-licensed title insurance agents and the title insurance business generated. Although the Department has diligently developed regulations to implement Chapter 57, due to the short time frame, it is necessary to promulgate the rules on an emergency basis for the furtherance of the general welfare.

Subject: Title insurance agents, affiliated relationships, and title insurance business.

Purpose: To implement requirements of chapter 57 of Laws of 2014 re: title insurance agents and placement of title insurance business.

Substance of emergency rule: The following sections are amended:

Section 20.1, which specifies forms for temporary licenses, is amended to make technical changes and to add references to title insurance agents.

Section 20.2, which specifies forms of notice for termination of agents, is amended to make technical changes and to add references to title insurance agents.

Section 20.3, which governs fiduciary responsibility of insurance agents and brokers, including maintenance of premium accounts, is amended to make technical changes and to add references to title insurance agents.

Section 20.4, which governs insurance agent and broker recordkeeping requirements for fiduciary accounts, is amended to make technical changes and to add references to title insurance agents.

Section 29.5, which implements Insurance Law section 2128, governing placement of insurance business by licensees with governmental entities, is amended to make technical changes and to conform to amendments to section 2128, with respect to title insurance agents.

Section 29.6 is amended to remove language regarding return of disclosure statements.

Section 30.3, which governs notices by insurance producers regarding the amount and extent of their compensation, is amended by adding a new subdivision that modifies the requirements of the section with respect to title insurance agents, in order to conform to new Insurance Law section 2113(b).

Section 34.2, which governs satellite offices for insurance producers, is amended by adding a new subdivision that exempts from certain provisions of that section a title insurance agent that is a licensed attorney transacting title insurance business from the agent's law office.

A new Part 35 is added governing the activities of title insurance agents and the placement of title insurance business. The new sections are:

Section 35.1 contains definitions for new Part 35.

Section 35.2 specifies forms for title insurance agent licensing applications.

Section 35.3 specifies change of contact information required to be filed with the Department.

Section 35.4 addresses affiliated business relationships.

Section 35.5 addresses referrals by affiliated persons and the required disclosures in such circumstances.

Section 35.6 addresses minimum disclosure requirements for title insurance corporations and title insurance agents with respect to fees charged by such corporation or agent, including discretionary or ancillary fees.

Section 35.7 provides certain other minimum disclosure requirements.

Section 35.8 governs the use of title closers by title insurance agents and title insurance corporations.

Section 35.9 establishes record retention requirements for title insurance agents.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 7, 2016.

Text of rule and any required statements and analyses may be obtained from: Paul Zuckerman, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5286, email: paul.zuckerman@dfs.ny.gov

Consolidated Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority to promulgate these amendments and the new Part derives from sections 202 and 302 of the Financial Services Law ("FSL") and sections 107(a)(54), 301, 2101(k), 2109, 2112, 2113, 2119, 2120, 2122, 2128, 2129, 2132, 2139, 2314, and 6409 of the Insurance Law.

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

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

Insurance Law section 107(a)(54) defines title insurance agent.

Insurance Law section 2101(k) defines insurance producer to include title insurance agent.

Insurance Law section 2109 addresses temporary licenses for title insurance agents and other insurance producers.

Insurance Law section 2112 addresses appointments by insurers of insurance agents and title insurance agents.

Insurance Law section 2113 requires that title insurance agents and persons affiliated with such title insurance agents provide certain disclosures to applicants for insurance when referring such applicants to

persons with which they are affiliated. Section 2113 also requires the Superintendent to promulgate regulations to enforce the affiliated person disclosure requirements and to consider any relevant disclosures required by the federal real estate settlement procedures act of 1974 (“RESPA”), as amended.

Insurance Law section 2119 permits title insurance agents to charge fees for certain ancillary services not encompassed within the rate of premium provided its pursuant to a written memorandum.

Insurance Law section 2120 addresses the fiduciary responsibility of title insurance agents and other producers.

Insurance Law section 2122 addresses advertising by title insurance agents and other insurance producers.

Insurance Law section 2128 prohibits fee sharing with respect to business placed with governmental entities.

Insurance Law section 2132 governs continuing education for title insurance agents and other insurance producers.

Insurance Law section 2139 is the licensing section for title insurance agents.

Insurance Law section 2314 prohibits title insurance corporations and title insurance agents from deviating from filed rates.

Insurance Law section 2324 prohibits rebating, improper inducements and other discriminatory behavior with respect to most kinds of insurance, including title insurance.

Insurance Law section 6409 contains specific prohibitions against rebating, improper inducements and other discriminatory behavior with respect to title insurance.

2. Legislative objectives: Long-sought and critically needed legislation to license title insurance agents was enacted as part of Chapter 57 of the New York Laws of 2014, which was signed into law by the governor on March 31, 2014 and took effect on September 27, 2014. By way of background, title insurance agents in New York: (a) handle millions of dollars of borrowers’ and sellers’ funds, (b) record documents, and (c) pay off mortgages. Yet for years, title insurance agents have conducted business in New York without licensing or other regulatory oversight, standards or guidelines. Because, as a matter of practice in New York, the title insurance agents control the bulk of the title insurance business, including bringing in customers, conducting the searches and other title work, the title insurance corporations often have little choice but to deal with title insurance agents who they may otherwise consider questionable or unscrupulous. Without licensing or regulatory oversight, an unscrupulous title insurance agent who was fired by one title insurer could simply take the business to another title insurer, who is usually more than willing to appoint that title insurance agent.

This lack of State regulation over title insurance agents made for an alarming weakness in New York law, and specifically New York law addressing title insurance rebating and inducement. For example, lack of regulatory oversight and licensing created a gaping loophole, which led to serious breaches of fiduciary duties and exploitation by unscrupulous actors to commit fraud in the mortgage origination and financing process. Over the years, this gap in New York law and lack of regulatory oversight allowed these actors to freely engage in theft, abuse, charging of excessive fees, and illegal rebates and inducements to the detriment of consumers, with little fear of prosecution. These abuses cost consumers of the State millions of dollars and at least one New York title insurer became insolvent because of the activities of its title insurance agents.

3. Needs and benefits: Now that New York law requires title insurance agents to be licensed, a number of existing regulations governing insurance producers need to be amended in order include title insurance agents or to address unique circumstances involving them, including affiliated persons’ arrangements and required consumer disclosures. Specifically, Insurance Regulation 9 addresses temporary licenses; Insurance Regulation 18 addresses appointment of insurance agents; and Insurance Regulation 29 regulates premium accounts and fiduciary responsibilities of insurance agents and insurance brokers; and each is amended to include references to title insurance agents. Insurance Regulation 87 addresses special prohibitions regarding sharing compensation with other licensees with respect to certain governmental entities and is amended to address a limited exception for title insurance business insuring State of New York Mortgage Agency and certain other circumstances. Insurance Regulation 194 addresses insurance producer compensation transparency and is amended to reflect specific requirements in new Insurance Law section 2113 for title insurance agents. Insurance Regulation 125 governs insurance agents and brokers that maintain multiple offices and is amended to clarify the applicability of the regulation to title insurance agents. Regulation 125 also is amended to address unique circumstances involving title insurance agents who are also licensed attorneys.

New Insurance Regulation 206 addresses a number of miscellaneous issues involving title insurance agents. Some of these changes simply add provisions that are similar to those that apply to other insurance producers; for example, it prescribes the form of applications and requires licensees

to notify the Department of any change of business or residence address. Other provisions of Regulation 206 set forth the new disclosure requirements; require title insurance agents to comply with a rate service organization’s annual statistical data call; and address the obligation of title insurance agents and title insurance corporations with respect to title closers. Of particular significance are provisions of the regulations that codify Department opinions regarding affiliated business relations with respect to the applicability of Insurance Law section 6409, which prohibits rebates, inducements and certain other discriminatory behaviors.

4. Costs: Regulated parties impacted by these rules are title insurance agents, which heretofore were not licensed by the Department, and title insurance corporations. They may need to provide new disclosures in accordance with the regulation if they are not already making such disclosures but they already have an obligation to make changes to notices pursuant to the legislation. There are also new reporting requirements to the Department but these are the same that apply with respect to other licensees. In any event, although the cost impact will likely vary among the agents and insurers affected by this regulation, the costs of these new disclosures and reporting requirements should not be significant.

Although the Department already was handling complaints and investigating matters regarding title insurance, because licensing title insurance agents is a new responsibility for the Department, anticipated costs to the Department are at this time uncertain. Existing personnel and line titles will handle any new licensing applications or enforcements issues initially.

These rules impose no compliance costs on any state or local governments.

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

6. Paperwork: The amendments and new rules now apply certain requirements that are applicable to other insurance producers to title insurance agents as well. For example, title insurance agents are made subject to the same reporting requirements as other insurance producers when changing addresses, maintaining records, and submitting applications, and title insurers are required to file certificates of appointment of their title insurance agents with the Department. In addition, to reflect the specific notice requirements of Insurance Law section 2113, the disclosure requirements to insureds under Insurance Regulation 194 are modified for title insurance agents to reflect the statutory requirements. The new law also contains certain new disclosure requirements and the new rules implement those changes, and require certain other disclosures to applicants for insurance, such as a notice advising insureds or applicants for insurance about the different kinds of title policies available to them.

7. Duplication: The amendments do not duplicate any existing laws or regulations.

8. Alternatives: Prior to proposing the consolidated rules in July, 2014, the Department circulated drafts of the proposed rules to a number of interested parties and, as a result, the Department made a number of changes to the initial proposed new Regulation 206, particularly with respect to affiliated business relationships, and title insurance corporation or title insurance agent responsibility for title insurance closers. The Department initially submitted the regulation as a proposed rulemaking that was published in the State Register on July 23, 2014. Because of the critical need to have regulations in effect on and after the September 27, 2014 effective date of Chapter 57, the Department promulgated emergency regulations effective on that date. In response to comments received during the public comment period, the Department made additional changes that were incorporated into the emergency rules, in order to clarify or eliminate unnecessary requirements. Because the proposed regulation has expired, the Department anticipates submitting a new, revised proposal in 2015 that will incorporate additional public comments that the Department has received regarding the initial proposal. To prevent disruption and confusion in the industry until the rules are finalized, however, the emergency regulation is continued unchanged from the versions in effect since September 27, 2014.

9. Federal standards: RESPA, and regulations thereunder, contain certain requirements and disclosures that apply to residential real estate settlement transactions. These requirements are minimum requirements and do not preempt state laws that provide greater consumer protection. The amendments and new rules are not inconsistent with RESPA and, consistent with New York law, provide greater consumer protection to the public.

10. Compliance schedule: Chapter 57 of the New York Laws of 2014 took effect on September 27, 2014. In order to facilitate the orderly implementation of the new law, the Superintendent was authorized to promulgate regulations in advance of the effective date, but to make such regulations effective on that date. The emergency rules have continued unchanged since September 27, 2014.

Consolidated Regulatory Flexibility Analysis

1. Effect of the rule: These rules affect title insurance corporations authorized to do business in New York State, title insurance agents and persons affiliated with such corporations and agents.

No title insurance corporation subject to the amendment falls within the definition of “small business” as defined in State Administrative Procedure Act section 102(8), because no such insurance corporation is both independently owned and has less than one hundred employees.

It is estimated that there are about 1,800 title insurance agents doing business in New York currently. Since they are not currently licensed by the Department of Financial Services (“Department”), it is not known how many of them are small businesses, but it is believed that a significant number of them may be small businesses.

Persons affiliated with title insurance agents or title insurance corporations would not, by definition, be independently owned and would thus not be small businesses.

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

2. Compliance requirements: The proposed rules conform and implement requirements regarding title insurance agents and placement of title insurance business with Chapter 57 of the Laws of 2014, which made title insurance agents subject to licensing in New York for the first time. A number of the rules will make title insurance agents subject to the same requirements that apply to other insurance producers. There are also disclosure requirements unique to title insurance.

3. Professional services: This amendment does not require any person to use any professional services.

4. Compliance costs: Title insurance agents will need to provide new disclosures in accordance with the regulation if they are not already making such disclosures but they already have an obligation to make changes to notices pursuant to the legislation. There are also new reporting requirements to the Department but these are the same that apply with respect to other licensees. In any event, the costs of these new disclosures and reporting requirements should not be significant. The proposed rules now subject title insurance agents to requirements regarding the maintenance of fiduciary accounts that already apply to other insurance producers. The cost impact on title insurance agents will likely vary from agent to agent but should not be significant.

5. Economic and technological feasibility: Small businesses that may be affected by this amendment should not incur any economic or technological impact as a result of this amendment.

6. Minimizing adverse impact: This rule should have no adverse impact on small businesses.

7. Small business participation: The Department initially submitted the regulation as a proposed rulemaking on July 23, 2014. Prior to submission, interested parties, including an organization representing title insurance agents, were given an opportunity to comment on a draft version of these rules, in addition to their opportunity to review and comment on the proposed rulemaking when it was published. The proposed regulation has now expired and the Department anticipates submitting a new, revised proposal in 2015 that will incorporate additional public comments that the Department has received regarding the initial proposal. However, to prevent disruption and confusion in the industry until the rules are finalized, the emergency regulation is continued unchanged from the versions in effect since September 27, 2014.

Consolidated Rural Area Flexibility Analysis

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

Rural area participation: The Department initially submitted the regulation as a proposed rulemaking on July 23, 2014. Prior to submission, interested parties, including those located in rural areas, were given an opportunity to review and comment on a draft version of these rules, in addition to their opportunity to review and comment on the proposed rulemaking when it was published. The proposed regulation has now expired and the Department anticipates submitting a new, revised proposal in 2015 that will incorporate additional public comments that the Department has received regarding the initial proposal. However, to prevent disruption and confusion in the industry until the rules are finalized, the emergency regulation is continued unchanged from the versions in effect since September 27, 2014.

Consolidated Job Impact Statement

The Department of Financial Services finds that these rules should have no negative impact on jobs and employment opportunities. The rules conform to and implement the requirements of, with respect to title insurance agents and the placement of title insurance business, Chapter 57 of the Laws of 2014, which make title insurance agents subject to licensing in New York for the first time and, by establishing a regulated marketplace, may lead to increased employment opportunity.

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. DFS-48-15-00002-E

Filing No. 972

Filing Date: 2015-11-13

Effective Date: 2015-11-16

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

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

Statutory authority: Banking Law, art. 12-D

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

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

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

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

Purpose: The rule implements provisions of the Subprime Lending Reform Law (Ch. 472, Laws of 2008) amending Article 12-D of the Banking Law to require that persons or entities which service mortgage loans on residential real property on or after July 1, 2009 be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). Part 418 sets forth application, exemption and approval procedures for registration as a mortgage loan servicer (MLS) and financial responsibility requirements for applicants, registrants and exempted persons. Supervisory Procedure MB 109 sets forth the details of the application procedure. Supervisory Procedure MB 110 sets forth the procedure for approval of a change of control of a registered MLS.

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

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

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

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

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

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

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

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

Section 418.9 sets forth the grounds for revocation of a servicer registra-

tion and authorizes the Superintendent, for good cause or where there is substantial risk of public harm, to suspend a registration for 30 days without a hearing. The section also provides for suspension of a servicer registration without notice or hearing upon non-payment of the required assessment. The Superintendent can also suspend a registration when a servicer fails to file a required report, when its surety bond is cancelled, or when it is the subject of a bankruptcy filing. If the registrant cures the deficiencies its registration can be reinstated. The section further provides that in all other cases, suspension or revocation of a registration requires notice and a hearing.

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

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

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

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

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

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

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

SUMMARY OF NEW SUPERVISORY PROCEDURE MB 109

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

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

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

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

SUMMARY OF NEW SUPERVISORY PROCEDURE MB 110

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

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

Section 110.3 lists the documents to be included in an application for approval of a change of control of a servicer, including the required fees. It sets forth the time within which the Superintendent of Financial Services (formerly the Superintendent of Banks) must approve or disapprove an application. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can

require additional information or an in person conference, and that the applicant can submit additional pertinent information. Last, the section lists the types of changes in a servicer's operations resulting from a change of control which should be notified to the Department of Financial Services (formerly the Banking Department).

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires February 10, 2016.

Text of rule and any required statements and analyses may be obtained from: Hadas A. Jacobi, New York State Department of Financial Services, One State Street, New York, NY 10004-1417, (212) 480-5890, email: hadas.jacobi@dfs.ny.gov

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Subprime Law to cover mortgage loan servicers (Subdivision (1) of

Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

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

2. Legislative Objectives.

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

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

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

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

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

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

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

3. Needs and Benefits.

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

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

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

rowers; and erroneously force-placing insurance when borrowers already have insurance.

While minimum standards for the business conduct of servicers is the subject of another emergency regulation which has been promulgated by the Department. (3 NYCRR Part 419) Section 418.2 makes it clear that persons exempted from the registration requirement must notify the Department that they are servicing mortgage loans and must otherwise comply with the regulations.

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

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

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

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

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

7. Duplication.

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

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

8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been

cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimis amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

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

9. Federal Standards.

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

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

10. Compliance Schedule.

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

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

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

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

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

3. Professional Services:

None.

4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the

registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of \$3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

Of the servicers which operate in rural areas, it is believed that most are

mortgage bankers, mortgage brokers or exempt organizations. Additionally, in the case of servicers that operate in rural areas and are not otherwise exempted, the Superintendent has the authority to reduce, waive or modify the financial responsibility requirements for individuals that do a de minimis amount of servicing.

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

Job Impact Statement

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

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

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

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Per Se Thresholds and Related Rule Amendments for Cobalt, Ketoprofen, Isoflupredone and Albuterol

I.D. No. SGC-48-15-00006-P

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

Proposed Action: Amendment of sections 4043.2(i), 4043.3 and 4120.3 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1), (19), 301(1), (2) and 902(1)

Subject: Per Se thresholds and related rule amendments for cobalt, ketoprofen, isoflupredone and albuterol.

Purpose: To preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

Text of proposed rule: Subdivision (i) of section 4043.2 of 9 NYCRR would be amended as follows:

§ 4043.2. Restricted use of drugs, medication and other substances.

Drugs and medications are permitted to be used only in accordance with the following provisions.

* * *

(i) In addition, a horse may not race for the following periods of time:
(1) for at least five days following a systemic administration of a prednisolone or dexamethasone;

(2) for at least seven days following a joint injection of a corticosteroid; and the following corticosteroids may be administered only by means of a joint injection: betamethasone, *isoflupredone*, any formulation of methylprednisolone and any formulation of triamcinolone;

(3) for at least 14 days following an administration of clenbuterol or *firocoxib*.

* * *

Section 4043.3 of 9 NYCRR would be amended as follows:

§ 4043.3. Equine drug thresholds; per se.

(a) A horse shall have raced in violation of this section if any of the following substances is found, by the laboratory conducting tests for the commission, to be present in a race-day urine or blood sample taken from such horse at a concentration in excess of a threshold listed below. The test result of such laboratory shall include an assessment of the measurement uncertainty and imprecision of the quantitative threshold for the substance.

(1) Acepromazine: 10 ng/ml HEPS in urine;

(2) *Albuterol*: 1 ng/ml in urine;

[(2)] (3) Betamethasone: 10 pg/ml in plasma;

[(3)] (4) Butorphanol:

(i) 300 ng/ml of total butorphanol in urine; or

(ii) 2 ng/ml of free butorphanol in plasma;

[(4)] (5) Clenbuterol:

(i) 140 pg/ml in urine; or

(ii) any clenbuterol in plasma;

(6) *Cobalt*: 50 ng/ml in plasma;

[(5)] (7) Dantrolene: 100 pg/ml of 5-hydroxydantrolene in plasma;

[(6)] (8) Detomidine:

(i) 1 ng/ml of any metabolite of detomidine in urine; or

(ii) any detomidine in plasma;

[(7)] (9) Dexamethasone: 5 pg/ml in plasma;

[(8)] (10) Diclofenac: 5 ng/ml in plasma;

[(9)] (11) DMSO: 10 mcg/ml in plasma;

[(10)] (12) *Firocoxib*: 20 ng/ml in plasma;

[(11)] (13) Flunixin: 20 ng/ml in plasma;

[(12)] (14) Furosemide: 100 ng/ml in plasma and a specific gravity of urine less than 1.010;

[(13)] (15) Glycopyrrolate: 3 pg/ml in plasma;

[(14)] (16) *Isoflupredone*: 100 pg/ml in plasma;

[(15)] (17) Ketoprofen: [10] 2 ng/ml in plasma;

[(16)] (18) Lidocaine: 20 pg/ml of total 3-hydroxylidocaine in plasma;

[(17)] (19) Mepivacaine:

(i) 10 ng/ml of total hydroxymepivacaine in urine; or

(ii) any hydroxymepivacaine in plasma;

[(18)] (20) Methocarbamol: 1 ng/ml in plasma;

[(19)] (21) Methylprednisolone: 100 pg/ml in plasma;

[(20)] (22) Omeprazole: 1 ng/ml of omeprazole sulfide in urine;

[(21)] (23) Phenylbutazone: 2 mcg/ml in plasma;

[(22)] (24) Prednisolone: 1 ng/ml in plasma;

[(23)] (25) Procaine penicillin: 25 ng/ml of procaine in plasma;

[(24)] (26) Triamcinolone acetonide: 100 pg/ml in plasma; and

[(25)] (27) Xylazine: 10 pg/ml of total xylazine and its metabolites in plasma.

(b) A laboratory finding that a horse has not exceeded a threshold set forth in this section shall not constitute a defense to a violation of any other section of this Subchapter.

(c) *Special provisions.*

(1) *Cobalt.* A person who is found responsible for a violation of this section for the substance cobalt, when the detected concentration of cobalt exceeds 300 ng/ml in plasma, shall incur the same penalty described in paragraph (2) of subdivision (b) of section 4043.12 of this Part.

(2) *Corticosteroid joint injection.* It shall not be a violation of this section for the drug betamethasone, isoflupredone or triamcinolone acetonide when:

(i) the laboratory positive resulted from an administration that was recorded in the contemporaneous veterinary records of the horse, reported to the commission in compliance with subdivision (b) of section 4043.4 of this Part before the horse raced, and administered to the horse in compliance with subdivision (i) of section 4043.2 of this Part at least seven days before the race; and

(ii) the commission had not previously issued a warning to the trainer that the commission laboratory reported finding such substance, in a urine or blood sample collected from any horse trained by such trainer, at a concentration in excess of the threshold set forth in subdivision (a) of this section.

Section 4120.3 of 9 NYCRR would be amended as follows:

§ 4120.3. Equine drug thresholds; per se.

(a) A horse shall have raced in violation of this section if any of the following substances is found, by the laboratory conducting tests for the commission, to be present in a race-day urine or blood sample taken from such horse at a concentration in excess of a threshold listed below. The test result of such laboratory shall include an assessment of the measurement uncertainty and imprecision of the quantitative threshold for the substance.

- (1) Acepromazine: 10 ng/ml HEPS in urine;
- (2) *Albuterol*: 1 ng/ml in urine;
- [(2)] (3) Butorphanol:
 - (i) 300 ng/ml of total butorphanol in urine; or
 - (ii) 2 ng/ml of free butorphanol in plasma;
- (4) *Cobalt*: 50 ng/ml in plasma;
- [(3)] (5) Dantrolene: 100 pg/ml of 5-hydroxydantrolene in plasma;
- [(4)] (6) Detomidine:
 - (i) 1 ng/ml of any metabolite of detomidine in urine; or
 - (ii) any detomidine in plasma;
- [(5)] (7) Diclofenac: 5 ng/ml in plasma;
- [(6)] (8) DMSO: 10 mcg/ml in plasma;
- [(7)] (9) Firocoxib: 20 ng/ml in plasma;
- [(8)] (10) Flunixin: 20 ng/ml in plasma;
- [(9)] (11) Furosemide: 100 ng/ml in plasma and a specific gravity of urine less than 1.010;
- [(10)] (12) Glycopyrrolate: 3 pg/ml in plasma;
- [(11)] (13) Ketoprofen: [10] 2 ng/ml in plasma;
- [(12)] (14) Lidocaine: 20 pg/ml of total 3-hydroxylidocaine in plasma;
- [(13)] (15) Mepivacaine:
 - (i) 10 ng/ml of total hydroxymepivacaine in urine; or
 - (ii) any hydroxymepivacaine in plasma;
- [(14)] (16) Methocarbamol: 1 ng/ml in plasma;
- [(15)] (17) Methylprednisolone: 100 pg/ml in plasma;
- [(16)] (18) Omeprazole: 1 ng/ml of omeprazole sulfide in urine;
- [(17)] (19) Phenylbutazone: 2 mcg/ml in plasma;
- [(18)] (20) Procaine penicillin: 25 ng/ml of procaine in plasma; and
- [(19)] (21) Xylazine: 10 pg/ml of total xylazine and its metabolites in plasma.

(b) A laboratory finding that a horse has not exceeded a threshold set forth in this section shall not constitute a defense to a violation of any other section of this Subchapter.

(c) *A person who is found responsible for a violation of this section for the substance cobalt, when the detected concentration of cobalt exceeds 300 ng/ml in plasma, shall incur the same penalty described in paragraph (2) of subdivision (d) of section 4120.17 of this Part.*

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.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 New York State Gaming Commission (“Commission”) is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law (“Racing Law”) Sections 103(2), 104(1, 19), 301(1, 2) and 902(1). Under Section 103(2), the Commission is responsible for supervising, regulating and administering all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. Under Section 301, which applies to only harness racing, the Commission is authorized to supervise generally all harness race meetings and to adopt rules to prevent the circumvention or evasion of its regulatory purposes and provisions and is directed to adopt rules to prevent horses from racing under the influence of substances affecting their speed. Section 902(1) authorizes the Commission to promulgate rules and regulations for an equine drug testing program that assures the public’s confidence and continues the high degree of integrity in pari-mutuel racing and to impose administrative penalties for racing a drugged horse.

2. Legislative objectives: To enable the Commission to preserve the integrity of pari-mutuel racing while generating reasonable revenue for the support of government.

3. Needs and benefits: This rule making is necessary to align the Commission’s laboratory “per se” thresholds for controlled therapeutic medi-

cations with the latest ones approved by the Association of Racing Commissioners International, Inc. (“ARCI”) and to ensure that the restricted time periods for equine drug use are consistent with such thresholds.

The proposal would amend sections 4043.3 (Thoroughbred) and 4120.3 (harness) of 9 NYCRR to add two more thresholds and to modify an existing threshold. ARCI recommends adding a threshold for albuterol, a bronchodilator, and lowering the existing threshold for ketoprofen, an approved non-steroidal anti-inflammatory drug (“NSAID”). Both recommendations are consistent with the Commission’s existing time restrictions for albuterol (96 hours) and NSAIDs (48 hours) that ensure a horseperson will not inadvertently commit threshold violations.

ARCI also recommends adding a Thoroughbred threshold for isoflupredone, a corticosteroid that is used in corticosteroid joint injections. The proposal would make various amendments corresponding to the Commission’s thoroughbred regulations for such corticosteroids: requiring their use be reported to the Commission before racing, under section 4043.4(b), and restricting use to only joint injections and permitting no administrations within seven days of a race, under section 4043.2(i). The Commission does not have similar regulations for harness racing.

In addition, the proposal would establish a requirement that the Commission first warn a Thoroughbred trainer whose horse tests in excess of corticosteroid thresholds when the corticosteroid joint injection causing the threshold violation is shown in documentary evidence (pre-race report to Commission, veterinary records) to have been administered safely in compliance with the Commission’s seven-day restricted time period for Thoroughbred racehorses. The purpose of this provision is to avoid having a restricted time period that fails to assure a regulated party that compliance will result in no threshold violation. This provision would be added in a new subdivision (c) for sections 4043.3 and 4120.3.

The proposal would also increase the Commission’s regulation of cobalt. ARCI’s Scientific Advisory Committee recommends adopting two thresholds for cobalt, a dietary element: one (50 ng/ml) detects the intentional overuse of cobalt, a practice that has no valid purpose and cannot occur without using refined products, and another (300 ng/ml) imposes a blood-doping level of penalty when the violation has occurred undeniably. Cobalt is reportedly misused in a manner that causes serious central nervous system distress and blood-doping to a horse. The proposal would amend subdivision (a) of section 4043.3 to create the lower threshold, and a new subdivision (c) of section 4043.3 would establish the consequences of a violation of the higher threshold.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendments will not add any new costs. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: N/A.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: No relevant rules or other legal requirements of the state and/or federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered the adoption of a third cobalt threshold (25 ng/ml) that would disqualify the horse from its race and prevent the horse from racing until testing below such threshold. In such cases, however, the Commission believes it is necessary to investigate whether a lawful vitamin administration was the cause, making a mandatory threshold inappropriate. In addition, the reported misuses of cobalt typically involve administrations that result in a higher concentration for several weeks.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rule making proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

The proposal revises the Commission’s horse racing rules that regulate the use of certain substances with per se thresholds and restricted time periods to conform to recent national recommendations. Trainers have

been meeting these thresholds for many years in New York by complying with the Commission's longstanding restricted time period rules that restrict how long a horse must not race after being treated with various equine drugs and other substances. All horsepersons will be able to comply with these rules and competitors will not be able to violate the thresholds to the detriment of others. The thresholds are common with those in other states, making it easier to prepare a horse to race in multiple states. Special provisions will protect trainers and veterinarians who rely on the corticosteroid joint-injection restricted time periods, which assist a horseperson to comply with the national thresholds, and impose a serious penalty in undeniable cases of mistreating a horse with extremely large cobalt administrations.

The rule amendments serve to enhance the integrity of racing, the health and safety of racehorses and the drivers and jockeys. This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

This proposal will not adversely impact small businesses, local governments, jobs, or rural areas. It does not require a Regulatory Flexibility Analysis (for Small Businesses and Local Governments), Rural Area Flexibility Analysis, or Job Impact Statement.

Department of Health

EMERGENCY RULE MAKING

Protection Against Legionella

I.D. No. HLT-48-15-00004-E

Filing No. 973

Filing Date: 2015-11-13

Effective Date: 2015-11-13

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

Action taken: Addition of Part 4 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 225(5)(a)

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

Specific reasons underlying the finding of necessity: Improper maintenance of cooling towers can contribute to the growth and dissemination of Legionella bacteria, the causative agent of legionellosis. Legionellosis causes cough, shortness of breath, high fever, muscle aches, headaches and can result in pneumonia. Hospitalization is often required, and between 5-30% of cases are fatal. People at highest risk are those 50 years of age or older, current or former smokers, those with chronic lung diseases, those with weakened immune systems from diseases like cancer, diabetes, or kidney failure, and those who take drugs to suppress the immune system during chemotherapy or after an organ transplant. The number of cases of legionellosis reported in New York State between 2005-2014 increased 323% when compared to those reported in the previous ten year period.

Outbreaks of legionellosis have been associated with cooling towers. A cooling tower is an evaporative device that is part of a recirculated water system incorporated into a building's cooling, industrial process, refrigeration, or energy production system. Because water is part of the process of removing heat from a building, these devices require biocides—chemicals that kill or inhibit bacteria (including Legionella)—as means of controlling bacterial overgrowth. Overgrowth may result in the normal mists ejected from the tower having droplets containing Legionella.

For example, in 2005, a cooling tower located at ground level adjacent to a hospital in New Rochelle, Westchester County resulted in a cluster of 19 cases of legionellosis and multiple fatalities. Most of the individuals were dialysis patients or companions escorting the patients to their dialysis session. One fatality was in the local neighborhood. The cooling tower was found to have insufficient chemical treatment. The entire tower was ultimately replaced by the manufacturer in order to maintain cooling for the hospital and to protect public health. In June and July of 2008, 12 cases of legionellosis including one fatality were attributed to a small evaporative condenser on Onondaga Hill in Syracuse, Onondaga County. An investigation found that the unit was not operating properly and this resulted in the growth of microorganisms in the unit. Emergency biocide treatment was initiated and proper treatment was maintained. No new cases were then detected thereafter.

Recent work has shown that sporadic cases of community legionellosis are often associated with extended periods of wet weather with overcast skies. A study conducted by the New York State Department of Health that included data from 13 states and one United States municipality noted a dramatic increase in sporadic, community acquired legionellosis cases in May through August 2013. Large municipal sites such as Buffalo, Erie County reported 2- to 3-fold increases in cases without identifying common exposures normally associated with legionellosis. All sites in the study except one had a significant correlation, with some time lag, between legionellosis case onset and one or more weather parameters. It was concluded that large municipalities produce significant mist (droplet) output from hundreds of cooling towers during the summer months. Periods of sustained precipitation, high humidity, cloud cover, and high dew point may lead to an "urban cooling tower" effect. The "urban cooling tower" effect is when a metropolitan area with hundreds of cooling towers acts as one large cooling tower producing a large output of drift, which is entrapped by humid air and overcast skies.

More recently, 133 cases of legionellosis, which included 16 fatalities, occurred in Bronx, NY (July-September, 2015). This event was preceded by an outbreak in Co-Op City in the Bronx, from December 2014 to January 2015, which involved 8 persons and no fatalities. Both of these outbreaks have been attributed to cooling towers, and emergency disinfection of compromised towers helped curtail these outbreaks. These events highlight the need for proper maintenance of cooling towers.

The heating, ventilation, and air-conditioning (HVAC) industry has issued guidelines on how to seasonally start a cooling tower; treat it with biocides and other chemicals needed to protect the components from scale and corrosion; and set cycles of operations that determine when fresh water is needed; and how to shut down the tower at the end of the cooling season. The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has recently released a new Standard entitled Legionellosis: Risk Management for Building Water Systems (ANSI/ASHRAE Standard 188-2015). Section 7.2 of that document outlines components of the operations and management plan for cooling towers. The industry also relies on other guidance for specific treatment chemicals, emergency disinfection or decontamination procedures and other requirement.

However, none of the guidance is obligatory. Consequently, poor practice in operation and management can result in bacterial overgrowth, increases in legionellae, and mist emissions that contain a significant dose of pathogenic legionellae. This regulation requires that all owners of cooling towers ensure proper maintenance of the cooling towers, to protect the public and address this public health threat.

Further, these regulations require all general hospitals and residential health care facilities (i.e., nursing homes) to develop a sampling plan, report the results, and take necessary actions to protect the safety of their patients or residents. The details of each facility's sampling plan and remedial measures will depend on the risk factors for acquiring Legionnaires' disease in the population served by the hospital or nursing home.

Most people in nursing homes should be considered at risk, as residents are typically over 50 years of age. In general hospitals, persons at risk include those over 50 years of age, as well as those receiving chemotherapy, those undergoing transplants, and other persons housed on healthcare units that require special precautions. Additional persons who might be at increased risk for acquiring Legionnaires' disease include persons on high-dose steroid therapy and persons with chronic lung disease. Certain facilities with higher risk populations, such as those with hematopoietic stem-cell transplant (HSCT) and solid organ transplant units, require more protective measures.

An environmental assessment involves reviewing facility characteristics, hot and cold water supplies, cooling and air handling systems and any chemical treatment systems. The purpose of the assessment is to discover any vulnerabilities that would allow for amplification of Legionella spp. and to determine appropriate response actions in advance of any environmental sampling for Legionella. Initial and ongoing assessment should be conducted by a multidisciplinary team that represents the expertise, knowledge and functions related to the facility's operation and service. A team should include, at a minimum, representatives from the following groups: Infection Control; Physical Facilities Management; Engineering; Clinicians; Laboratory; and Hospital Management.

These regulations, which originally became effective on August 17, 2015, implemented important requirements that protect the public from the threat posed by Legionella. To ensure that protection is maintained, the Commissioner of Health and the Public Health and Health Planning Council have determined it necessary to file these regulations on an emergency basis. Public Health Law § 225, in conjunction with State Administrative Procedure Act § 202(6) empowers the Council and the Commissioner to adopt emergency regulations when necessary for the preservation of the public health, safety or general welfare and that compliance with routine administrative procedures would be contrary to the public interest.

Subject: Protection Against Legionella.

Purpose: To protect the public from the immediate threat posed by Legionella.

Text of emergency rule: Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by section 225(5)(a) of the Public Health Law, Part 4 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is added, to be effective upon filing with the Secretary of State, to read as follows:

4.1 Scope.

All owners of cooling towers, and all general hospitals and residential health care facilities as defined in Article 28 of the Public Health Law, shall comply with this Part.

4.2 Definitions.

As used in this Part, the following terms shall have the following meanings:

(a) **Building.** The term "building" means any structure used or intended for supporting or sheltering any use or occupancy. The term shall be construed as if followed by the phrase "structure, premises, lot or part thereof" unless otherwise indicated by the text.

(b) **Commissioner.** The term "commissioner" means the New York State Commissioner of Health.

(c) **Cooling Tower.** The term "cooling tower" means a cooling tower, evaporative condenser or fluid cooler that is part of a recirculated water system incorporated into a building's cooling, industrial process, refrigeration or energy production system.

(d) **Owner.** The term "owner" means any person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of the premises.

4.3 Registration.

All owners of cooling towers shall register such towers with the department within 30 days after the effective date of this Part. Thereafter, all owners of cooling towers shall register such towers with the department prior to initial operation, and whenever any owner of the cooling tower changes. Such registration shall be in a form and manner as required by the commissioner and shall include, at a minimum, the following information:

(a) street address of the building at which the cooling tower is located, with building identification number, if any;

(b) intended use of the cooling tower;

(c) name(s), address(es), telephone number(s), and email address(es) of all owner(s) of the building;

(d) name of the manufacturer of the cooling tower;

(e) model number of the cooling tower;

(f) specific unit serial number of the cooling tower;

(g) cooling capacity (tonnage) of the cooling tower;

(h) basin capacity of the cooling tower;

(i) whether systematic disinfection is maintained manually, through timed injection, or through continuous delivery;

(j) the contractor or employee engaged to inspect and certify the cooling tower; and

(k) commissioning date of the cooling tower.

4.4 Culture sample collection and testing; cleaning and disinfection.

(a) All owners of cooling towers shall collect samples and obtain culture testing:

(1) within 30 days of the effective date of this Part, unless such culture testing has been obtained within 30 days prior to the effective date of this Part, and shall take immediate actions in response to such testing, including interpreting Legionella culture results, if any, as specified in Appendix 4-A.

(2) in accordance with the maintenance program and plan, and shall take immediate actions in response to such testing as specified in the plan, including interpreting Legionella culture results, if any, as specified in Appendix 4-A; provided that if a maintenance program and plan has not yet been obtained in accordance with section 4.6 of this Part, bacteriological culture samples and analysis (dip slides or heterotrophic plate counts) to assess microbiological activity shall be obtained, at intervals not exceeding 90 days while the tower is in use, and any immediate action in response to such testing shall be taken, including interpreting Legionella culture results, if any, as specified in Appendix 4-A.

(b) Any person who performs cleaning and disinfection shall be a commercial pesticide applicator or pesticide technician who is qualified to apply biocide in a cooling tower and certified in accordance with the requirements of Article 33 of the Environmental Conservation Law and 6 NYCRR Part 325, or a pesticide apprentice under the supervision of a certified applicator.

(c) Only biocide products registered by the New York State Department of Environmental Conservation may be used in disinfection.

(d) All owners shall ensure that all cooling towers are cleaned and disinfected when shut down for more than five days.

4.5 Inspection and certification.

(a) **Inspection.** All owners of cooling towers shall inspect such towers within 30 days of the effective date of this Part, unless such tower has been inspected within 30 days prior to the effective date of this Part. Thereafter, owners shall ensure that all cooling towers are inspected at intervals not exceeding every 90 days while in use. All inspections shall be performed by a: New York State licensed professional engineer; certified industrial hygienist; certified water technologist; or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015, as incorporated by section 4.6 of this Part.

(1) Each inspection shall include an evaluation of:

(i) the cooling tower and associated equipment for the presence of organic material, biofilm, algae, and other visible contaminants;

(ii) the general condition of the cooling tower, basin, packing material, and drift eliminator;

(iii) water make-up connections and control;

(iv) proper functioning of the conductivity control; and

(v) proper functioning of all dosing equipment (pumps, strain gauges).

(2) Any deficiencies found during inspection will be reported to the owner for immediate corrective action. A person qualified to inspect pursuant to paragraph (a) of this section shall document all deficiencies, and all completed corrective actions.

(3) All inspection findings, deficiencies, and corrective actions shall be reported to the owner, recorded, and retained in accordance with this Part, and shall also be reported to the department in accordance with section 4.10 of this Part.

(b) **Certification.** Each year, the owner of a cooling tower shall obtain a certification from a person identified in paragraph (a) of this section, that such cooling tower was inspected, tested, cleaned, and disinfected in compliance with this Part, that the condition of the cooling tower is appropriate for its intended use, and that a maintenance program and plan has been developed and implemented as required by this Part. Such certification shall be obtained by November 1, 2016, and by November 1 of each year thereafter. Such certification shall be reported to the department.

4.6 Maintenance program and plan.

(a) By March 1, 2016, and thereafter prior to initial operation, owners shall obtain and implement a maintenance program and plan developed in accordance with section 7.2 of Legionellosis: Risk Management for Building Water Systems (ANSI/ASHRAE 188-2015), 2015 edition with final approval date of June 26, 2015, at pages 7-8, incorporated herein by reference. The latest edition of ASHRAE 188-2015 may be purchased from the ASHRAE website (www.ashrae.org) or from ASHRAE Customer Service, 1791 Tullie Circle, NE, Atlanta, GA 30329-2305. E-mail: orders@ashrae.org. Fax: 678-539-2129. Telephone: 404-636-8400, or toll free 1-800-527-4723. Copies are available for inspection and copying at: Center for Environmental Health, Corning Tower Room 1619, Empire State Plaza, Albany, NY 12237.

(b) In addition, the program and plan shall include the following elements:

(1) a schedule for routine bacteriological sampling and analysis (dip slides or heterotrophic plate counts) to assess microbiological activity and a schedule for Legionella sampling and culture analysis; provided that where the owner is a general hospital or residential health care facility, as defined in Article 28 of the Public Health Law, routine testing shall be performed at a frequency in accordance with the direction of the department.

(2) emergency sample collection and submission of samples for Legionella culture testing to be conducted in the case of events including, but not limited to:

(i) power failure of sufficient duration to allow for the growth of bacteria;

(ii) loss of biocide treatment sufficient to allow for the growth of bacteria;

(iii) failure of conductivity control to maintain proper cycles of concentration;

(iv) a determination by the commissioner that one or more cases of legionellosis is or may be associated with the cooling tower, based upon epidemiologic data or laboratory testing; and

(v) any other conditions specified by the commissioner.

(3) immediate action in response to culture testing, including interpreting Legionella culture results, if any, as specified in Appendix 4-A; provided that where the owner is a general hospital or residential health care facility, as defined in Article 28 of the Public Health Law, the provisions shall additionally require immediately contacting the department for further guidance, but without any delay in taking any action specified in Appendix 4-A.

(c) An owner shall maintain a copy of the plan required by this subdivi-

sion on the premises where a cooling tower is located. Such plan shall be made available to the department or local health department immediately upon request.

4.7 Recordkeeping.

An owner shall keep and maintain records of all inspection findings, deficiencies, corrective actions, cleaning and disinfection, and tests performed pursuant to this Part, and certifications, for at least three years. An owner shall maintain a copy of the maintenance program and plan required by this Part on the premises where a cooling tower is located. Such records and plan shall be made available to the department or local health department immediately upon request.

4.8 Discontinued use.

The owner of a cooling tower shall notify the department within 30 days after removing or permanently discontinuing use of a cooling tower. Such notice shall include a statement that such cooling tower has been disinfected and drained in accordance with the same procedures as set forth in the shutdown plan, as specified in the maintenance program and plan required pursuant to this Part.

4.9 Enforcement.

(a) An officer, employee or agent of the department or local health department may enter onto any property to inspect the cooling tower for compliance with the requirements of this Part, in accordance with applicable law.

(b) Where an owner does not register, obtain certification, clean or disinfect, culture test or inspect a cooling tower within the time and manner set forth in this Part, the department or local health department may determine that such condition constitutes a nuisance and may take such action as authorized by law. The department or local health department may also take any other action authorized by law.

(c) A violation of any provision of this Part is subject to all civil and criminal penalties as provided for by law. Each day that an owner remains in violation of any provision of this Part shall constitute a separate and distinct violation of such provision.

4.10 Electronic registration and reporting.

(a)(1) Within 30 days of the effective date of this Part, and thereafter within 10 days after any action required by this Part, owners shall electronically input the following information in a statewide electronic system designated by the commissioner:

- (i) registration information;
- (ii) date of last routine culture sample collection, sample results, and date of any required remedial action;
- (iii) date of any legionella sample collection, sample results, and date of any required remedial action;
- (iv) date of last cleaning and disinfection;
- (v) dates of start and end of any shutdown for more than five days;
- (vi) date of last certification and date when it was due;
- (vii) date of last inspection and date when it was due;
- (viii) date of discontinued use; and
- (ix) such other information as shall be determined by the department.

(2) The commissioner may suspend this requirement in the event that the electronic system is not available.

(b) The data in the system referenced in paragraph (a) shall be made publicly available, and shall be made fully accessible and searchable to any local health department. Nothing in this Part shall preclude a local health department from requiring registration and reporting with a local system or collecting fees associated with the administration of such system.

4.11 Health care facilities.

(a) All general hospitals and residential health care facilities, as defined in Article 28 of the Public Health Law, shall, as the department may determine appropriate:

- (1) adopt a Legionella sampling plan for its facilities' potable water distribution system;
- (2) report the results of such sampling; and
- (3) take necessary responsive actions.

(b) With respect to such general hospitals and residential health care facilities, the department shall investigate to what extent, if any, requirements more stringent than those set forth in this Part are warranted.

4.12 Severability.

If any provisions of this Part or the application thereof to any person or entity or circumstance is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons, entities, and circumstances.

Appendix 4-A

Interpretation of Legionella Culture Results from Cooling Towers

Legionella Test Results in CFU ¹ /ml	Approach
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No detection (< 10 CFU /ml)

For levels at ≥ 10 CFU /ml but < 1000

CFU /ml perform the following:

For levels ≥ 1000 CFU /ml perform the following:

Maintain treatment program and Legionella monitoring.

o Review treatment program.
o Institute immediate online disinfection² to help with control

o Retest the water in 3 – 7 days.

o Continue to retest at the same time interval until two consecutive readings show acceptable improvement, as determined by a person identified in 10 NYCRR 4.5(a). Continue with regular maintenance strategy.

o If < 100 CFU /ml repeat online disinfection² and retest.

o If ≥ 100 CFU /ml but < 1000 CFU /ml further investigate the water treatment program and immediately perform online disinfection.² Retest and repeat attempts at control strategy.

o If ≥ 1000 CFU /ml undertake control strategy as noted below.

o Review the treatment program

o Institute immediate online decontamination³ to help with control

o Retest the water in 3 – 7 days.

o Continue to retest at the same time interval until two consecutive readings show acceptable improvement, as determined by a person identified in 10 NYCRR 4.5(a). Continue with regular maintenance strategy.

o If < 100 CFU /ml repeat online disinfection² and retest;

o If ≥ 100 CFU /ml but < 1000 CFU /ml further investigate the water treatment program and immediately perform online disinfection.² Re-test and repeat attempts at control strategy.

o If ≥ 1000 CFU /ml carry out system decontamination⁴

¹ Colony forming units.

² Online disinfection means – Dose the cooling tower water system with either a different biocide or a similar biocide at an increased concentration than currently used.

³ Online decontamination means – Dose the recirculation water with a chlorine-based compound equivalent to at least 5 mg/l (ppm) free residual chlorine for at least one hour; pH 7.0 to 7.6.

⁴ System decontamination means – Maintain 5 to 10 mg/l (ppm) free residual chlorine for a minimum of one hour; drain and flush with disinfected water; clean wetted surface; refill and dose to 1 – 5 mg/l (ppm) of free residual chlorine at pH 7.0 – 7.6 and circulate for 30 minutes. Refill, re-establish treatment and retest for verification of treatment.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 10, 2016.

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

Regulatory Impact Statement

Statutory Authority:

The Public Health and Health Planning Council (PHHPC) is authorized by Section 225 of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC) subject to the approval of the Commissioner of Health. PHL Section 225(5)(a) provides that the SSC may deal with any matter affecting the security of life or health, or the preservation or improvement of public health, in the state of New York.

Legislative Objectives:

This rulemaking is in accordance with the legislative objective of PHL

Section 225 authorizing the PHHPC, in conjunction with the Commissioner of Health, to protect public health and safety by amending the SSC to address issues that jeopardize health and safety. Specifically, these regulations establish requirements for cooling towers relating to: registration, reporting and recordkeeping; testing; cleaning and disinfection; maintenance; inspection; and certification of compliance. Additionally, these regulations require general hospitals and nursing homes to implement a Legionella sampling plan and take necessary responsive actions, as the department may deem appropriate.

Needs and Benefits:

Improper maintenance of cooling towers can contribute to the growth and dissemination of Legionella bacteria, the causative agent of legionellosis. Optimal conditions for growth of Legionella include warm water that is high in nutrients and protected from light. People are exposed to Legionella through inhalation of aerosolized water containing the bacteria. Person-to-person transmission has not been demonstrated. Symptoms of legionellosis may include cough, shortness of breath, high fever, muscle aches, and headaches, and can result in pneumonia. Hospitalization is often required and between 5-30% of cases are fatal. People at highest risk are those 50 years of age or older; current or former smokers; those with chronic lung diseases; those with weakened immune systems from diseases like cancer, diabetes, or kidney failure; and those who take drugs to suppress the immune system during chemotherapy or after an organ transplant. The number of cases of legionellosis reported in New York State between 2005-2014 increased 323% when compared to those reported in the previous ten year period.

Outbreaks of legionellosis have been associated with cooling towers. A cooling tower is an evaporative device that is part of a recirculated water system incorporated into a building's cooling, industrial process, refrigeration, or energy production system. Because water is part of the process of removing heat from a building, these devices require disinfectants—chemicals that kill or inhibit bacteria (including Legionella)—as means of controlling bacterial overgrowth. Overgrowth may result in the normal mists ejected from the tower having droplets containing Legionella.

For example, in 2005, a cooling tower located at ground level adjacent to a hospital in New Rochelle, Westchester County resulted in a cluster of 19 cases of legionellosis and multiple fatalities. Most of the individuals were dialysis patients or companions escorting the patients to their dialysis session. One fatality was in the local neighborhood. The cooling tower was found to have insufficient chemical treatment. The entire tower was ultimately replaced by the manufacturer in order to maintain cooling for the hospital and to protect public health. In June and July of 2008, 12 cases of legionellosis including one fatality were attributed to a small evaporative condenser on Onondaga Hill in Syracuse, Onondaga County. An investigation found that the unit was not operating properly and this resulted in the growth of microorganisms in the unit. Emergency biocide treatment was initiated and proper treatment was maintained. No new cases were then detected thereafter.

Recent work has shown that sporadic cases of community legionellosis are often associated with extended periods of wet weather with overcast skies. A study conducted by the New York State Department of Health that included data from 13 states and one United States municipality noted a dramatic increase in sporadic, community acquired legionellosis cases in May through August 2013. Large municipal sites such as Buffalo, Erie County reported 2- to 3-fold increases in cases without identifying common exposures normally associated with legionellosis. All sites in the study except one had a significant correlation, with some time lag, between legionellosis case onset and one or more weather parameters. It was concluded that large municipalities produce significant mist (droplet) output from hundreds of cooling towers during the summer months. Periods of sustained precipitation, high humidity, cloud cover, and high dew point may lead to an "urban cooling tower" effect. The "urban cooling tower" effect is when a metropolitan area with hundreds of cooling towers acts as one large cooling tower producing a large output of drift, which is entrapped by humid air and overcast skies.

More recently, 133 cases of legionellosis, which included 16 fatalities, occurred in Bronx, NY (July-September, 2015). This event was preceded by an outbreak in Co-Op City in the Bronx, from December 2014 to January 2015, which involved 8 persons and no fatalities. Both of these outbreaks have been attributed to cooling towers, and emergency disinfection of compromised towers helped curtail these outbreaks. These events highlight the need for proper maintenance of cooling towers.

The heating, ventilation, and air-conditioning (HVAC) industry has issued guidelines on how to: seasonally start a cooling tower; treat it with biocides and other chemicals needed to protect the components from scale and corrosion; set cycles of operations that determine when fresh water is needed; and shut down the tower at the end of the cooling season. The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has recently released a new Standard entitled Legionellosis: Risk Management for Building Water Systems (ANSI/

ASHRAE Standard 188-2015). Section 7.2 of that document outlines components of the operations and management plan for cooling towers. The industry also relies on other guidance for specific treatment chemicals, emergency disinfection or decontamination procedures, and other requirements.

However, none of the guidance is obligatory. Consequently, maintenance deficiencies such as poor practice in operation and management can result in bacterial overgrowth, increases in Legionella, and mist emissions that contain pathogenic legionellae. This regulation requires that all owners of cooling towers ensure proper maintenance of the cooling towers, to protect the public and address this public health threat.

Further, these regulations require that all owners of cooling towers ensure proper maintenance of the cooling tower Legionella sampling plan for their potable water system, report the results, and take necessary actions to protect the safety of their patients or residents, as the Department may deem appropriate. The details of each facility's sampling plan and remedial measures will depend on the risk factors for acquiring Legionnaires' disease in the population served by the hospital or nursing home.

Most people in nursing homes should be considered at risk, as residents are typically over 50 years of age. In general hospitals, persons at risk include those over 50 years of age, as well as those receiving chemotherapy, those undergoing transplants, and other persons housed on healthcare units that require special precautions. Additional persons who might be at increased risk for acquiring Legionnaires' disease include persons on high-dose steroid therapy and persons with chronic lung disease. Certain facilities with higher risk populations, such as those with hematopoietic stem-cell transplant (HSCT) and solid organ transplant units, require more protective measures.

An environmental assessment involves reviewing facility characteristics, hot and cold water supplies, cooling and air handling systems, and any chemical treatment systems. The purpose of the assessment is to discover any vulnerabilities that would allow for amplification of Legionella and to determine appropriate response actions in advance of any environmental sampling for Legionella. Initial and ongoing assessment should be conducted by a multidisciplinary team that represents the expertise, knowledge, and functions related to the facility's operation and service. A team should include, at a minimum, representatives from the following groups: Infection Control, Physical Facilities Management, Engineering, Clinicians, Laboratory, and Hospital Management.

Costs:

Costs to Private Regulated Parties:

Building owners already incur costs for routine operation and maintenance of cooling towers. This regulation establishes the following new requirements:

- Routine Bacteriological Culture Testing – The regulations require routine bacteriological testing pursuant to their cooling tower maintenance program and plan. The cost per dip slide test is \$3.50. Assuming that some plans may require tests be performed twice a week, this could result in an annual cost of \$364. If heterotrophic plate count analysis is used the cost per sample on average is \$25.
- Emergency Legionella Culture Testing – Owners of cooling towers are required to conduct additional testing for Legionella in the event of disruption of normal operations or process control, or when indicated by epidemiological evidence. The average cost of each sample analysis is estimated to be approximately \$125.00.
- Maintenance Program and Plan Development – The formulation of a cooling tower program and sampling plan would require 4 to 8 hours at \$150 per hour (\$600 to \$1200). The range represents the cost for reviewing and modifying an existing plan versus the preparation of a new plan.
- Inspection – Owners of cooling towers shall obtain the services of a professional engineer (P.E.), certified industrial hygienist (C.I.H.), certified water technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015, for inspection of the cooling towers at intervals not exceeding 90 days while in use. The cost of such services is estimated to be approximately \$150.00 per hour and estimated to take approximately eight (8) hours.
- Annual Certification – The same persons qualified to perform inspections are qualified to perform annual certifications. The certification can follow one of the required inspections and requires some additional evaluation and considerations. The cost of such services is estimated to be approximately \$150.00 per hour and is estimated to take approximately four (4) hours.
- Emergency Cleaning and Disinfection – If emergency cleaning and disinfection is required, owners of cooling towers are required to obtain the services of a certified commercial pesticide applicator or pesticide technician who is qualified to apply biocide in a cooling tower, or a pesticide apprentice under the supervision of a certified applicator. The cost of such services is estimated to be approximately \$5,000.00 for labor, plus the cost of materials.

- Recordkeeping and Electronic Reporting – Owners of cooling towers are required to maintain certain specified records and to electronically report certain specified information. The costs of these administrative activities are predicted to be minimal.

- Health Care Facilities – The cost of adopting a sampling plan for Article 28 facilities is dependent upon any existing plan and the status of existing record keeping. It is estimated that with prior records and a maintenance plan the time required should a consultant be hired would be 6.5 hours at \$150 per hour (\$975). Without a prior plan and poor maintenance documentation the time required would be 13 hours at \$150 per hour (\$1950). It is anticipated that facilities may develop the plan using existing staff.

Costs to State Government and Local Government:

State and local governments will incur costs for administration, implementation, and enforcement. Exact costs cannot be predicted at this time. However, some local costs may be offset through the collection of fees, fines and penalties authorized pursuant to this Part. Costs to State and local governments may be offset further by a reduction in the need to respond to community legionellosis outbreaks.

Local Government Mandates:

The SSC establishes a minimum standard for regulation of health and sanitation. Local governments can, and often do, establish more restrictive requirements that are consistent with the SSC through a local sanitary code. PHL § 228. Local governments have the power to enforce the provisions of the State Sanitary Code, including this new Part, utilizing both civil and criminal options available. PHL § § 228, 229, 309(1)(f) and 324(1)(e).

Paperwork:

The regulation imposes new registration, reporting and recordkeeping requirements for owners of cooling towers.

Duplication:

This regulation does not duplicate any state requirements.

Alternatives:

The no action alternative was considered. Promulgating this regulation was determined to be necessary to address this public health threat.

Federal Standards:

There are no federal standards or regulations pertaining to registration, maintenance, operation, testing, and inspection for cooling towers.

Compliance Schedule:

On August 17, 2015, when this regulation first became effective, owners were given until September 16, 2015, to register their cooling towers and perform bacteriological sampling. Now that the deadline has past, all owners should have registered their cooling towers, and any owners that have not registered their cooling towers must come into compliance immediately. All owners must register such towers prior to initial operation.

By March 1, 2016, all owners of existing cooling towers must obtain and implement a maintenance program and plan. Until such plan is obtained, culture testing must be performed every 90 days, while the tower is in use.

All owners must inspect their cooling towers at least every 90 days while in use. All owners of cooling towers shall obtain a certification that regulatory requirements have been met by November 1, 2016, with subsequent annual certifications by November 1st of each year.

Owners must register cooling towers and report certain actions, using a statewide electronic system. Reportable events include date of sample collections; date of cleaning and disinfection; start and end dates of any shutdown lasting more than five days; dates of last inspection and when due; dates of last certification and when due; and date of discontinued use. These events must be reported to the statewide electronic system within 10 days of occurrence.

Regulatory Flexibility Analysis

Effect of Rule:

The rule will affect the owner of any building with a cooling tower, as those terms are defined in the regulation. This could include small businesses. At this time, it is not possible to determine the number of small businesses so affected. This regulation affects local governments by establishing requirements for implementing, administering, and enforcing elements of this Part. Local governments have the power to enforce the provisions of the State Sanitary Code, including this new Part. PHL § § 228, 229, 309(1)(f) and 324(1)(e).

Compliance Requirements:

Small businesses that are also owners of cooling towers must comply with all provisions of this Part. A violation of any provision of this Part is subject to all civil and criminal penalties as provided for by law. Each day that an owner remains in violation of any provision of this Part shall constitute a separate and distinct violation of such provision.

Professional Services:

To comply with inspection and certification requirements, small businesses will need to obtain services of a P.E., C.I.H., certified water

technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015. Small businesses will need to secure laboratory services for routine culture sample testing and, if certain events occur, emergency Legionella culture testing.

To comply with disinfection requirements, small businesses will need to obtain the services of a commercial pesticide applicator or pesticide technician, or pesticide apprentice under supervision of a commercial pesticide applicator. These qualifications are already required for the properly handling of biocides that destroy Legionella.

Compliance Costs:

Costs to Private Regulated Parties:

Building owners already incur costs for routine operation and maintenance of cooling towers. This regulation establishes the following new requirements:

- Routine Bacteriological Culture Testing – The regulations require routine bacteriological testing pursuant to industry standards. The cost per test is \$3.50. Assuming tests are performed twice a week, this would result in an annual cost of \$364.

- Emergency Legionella Culture Testing – Owners of cooling towers are required to conduct additional testing for Legionella in the event of disruption of normal operations. The average cost of each sample analysis is estimated to be approximately \$125.00.

- Inspection – Owners of cooling towers shall obtain the services of a professional engineer (P.E.), certified industrial hygienist (C.I.H.), certified water technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015; for inspection of the cooling towers at intervals not exceeding once every 90 days while the cooling towers are in use. The cost of such services is estimated to be approximately \$150.00 per hour and estimated to take approximately eight (8) hours.

- Annual Certification – The same persons qualified to perform inspections are qualified to perform annual certifications. The cost of such services is estimated to be approximately \$150.00 per hour and is estimated to take approximately four (4) hours.

- Emergency Cleaning and Disinfection – If emergency cleaning and disinfection is required, owners of cooling towers are required to obtain the services of a certified commercial pesticide applicator or pesticide technician who is qualified to apply biocide in a cooling tower, or a pesticide apprentice under the supervision of a certified applicator. The cost of such services is estimated to be approximately \$5,000.00 for labor, plus the cost of materials.

- Recordkeeping and Electronic Reporting – Owners of cooling towers are required to maintain certain specified records and to electronically report certain specified information. The costs of these administrative activities are predicted to be minimal.

- The formulation of a cooling tower program and sampling plan would require 4 to 8 hours at \$150 per hour (\$600 to \$1200). The range represents the cost for reviewing and modifying an existing plan versus the preparation of a new plan.

- Formulation of a sampling plan for Article 28 facilities is dependent upon any existing plan and the status of existing record keeping. It is estimated that with prior records and a maintenance plan the time required should a consultant be hired would be 6.5 hours at \$150 per hour (\$975). Without a prior plan and poor maintenance documentation the time required would be 13 hours at \$150 per hour (\$1950). It is anticipated that facilities may develop the plan using existing staff.

Costs to State Government and Local Government:

State and local governments possess authority to enforce compliance with these regulations. Exact costs cannot be predicted at this time. However, some local costs may be offset through the collection of fees, fines and penalties authorized pursuant to this Part. Costs to State and local governments may be offset by a reduction in the need to respond to community legionellosis outbreaks.

Economic and Technological Feasibility:

Although there will be an impact of building owners, including small businesses, compliance with the requirements of this regulation is considered economically and technologically feasible as it enhances and enforces existing industry best practices. The benefits to public health are anticipated to outweigh any costs. This regulation is necessary to protect public health.

Minimizing Adverse Impact:

The New York State Department of Health will assist local governments by providing a cooling tower registry and access to the database, technical consultation, coordination, and information and updates.

Small Business and Local Government Participation:

Development of this regulation has been coordinated with New York City.

Cure Period:

Violation of this regulation can result in civil and criminal penalties. In light of the magnitude of the public health threat posed by the improper maintenance and testing of cooling towers, the risk that some small businesses will not comply with regulations justifies the absence of a cure period.

Rural Area Flexibility Analysis

Pursuant to Section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas. The proposed rule will not impose an adverse economic impact on rural areas, nor will it impose any disproportionate reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

Nature of the Impact:

The Department of Health expects there to be a positive impact on jobs or employment opportunities. The requirements in the regulation generally coincide with industry standards and manufacturers specification for the operation and maintenance of cooling towers. However, it is expected that a subset of owners have not adequately followed industry standards and will now hire firms or individuals to assist them with compliance and to perform inspections and certifications.

Categories and Numbers Affected:

The Department anticipates no negative impact on jobs or employment opportunities as a result of the proposed regulations.

Regions of Adverse Impact:

The Department anticipates no negative impact on jobs or employment opportunities in any particular region of the state.

Minimizing Adverse Impact:

Not applicable.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management

I.D. No. PDD-38-15-00006-A

Filing No. 994

Filing Date: 2015-11-17

Effective Date: 2015-12-02

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

Action taken: Amendment of Parts 624, 633, 687; and addition of Part 625 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00; L. 2012, ch. 501

Subject: Implementation of the Protection of People with Special Needs Act and reforms to incident management.

Purpose: To enhance protections for people with developmental disabilities served in the OPWDD system.

Text or summary was published in the September 23, 2015 issue of the Register, I.D. No. PDD-38-15-00006-EP.

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

Text of rule and any required statements and analyses may be obtained from: Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, 3rd floor, Albany, NY 12229, (518) 474-7700, email: rau.unit@opwdd.ny.gov

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

Assessment of Public Comment

Implementation of the Protection of People with Special Needs Act and Reforms to Incident Management

This document contains responses to public comments submitted during the public comment period on emergency/proposed regulations concerning implementation of the Protection of People with Special Needs Act (PPSNA) and reforms to incident management.

Comment: A commenter noted that the inclusion of two separate sets of

definitions for reportable significant incidents and notable occurrences, with one set of definitions applicable before January 1, 2016 and a different set of definitions applicable on and after January 1, 2016, will cause confusion and make the regulations difficult to reference and comprehend. The commenter recommended removal of the definitions applicable to incidents that occurred prior to January 1, 2016 from the final regulations.

Response: The emergency adoption of the emergency/proposed regulations was effective on September 8, 2015 and will expire on December 6, 2015. Before September 8, 2015, OPWDD worked with the Justice Center for the Protection of People with Special Needs to modify definitions of reportable "significant incidents" and "notable occurrences," but OPWDD determined that the modified definitions would have to be phased in to allow sufficient time to update OPWDD's Incident Report and Management Application (IRMA) to accommodate new definitions and to allow sufficient time for provider agencies to train staff on them. OPWDD identified January 1, 2016 as the effective date for the modified significant incident and notable occurrence definitions. Because the final regulations will be effective before January 1, 2016, both sets of definitions (those applicable before January 1, 2016 and those applicable on and after January 1, 2016) must be included in the final regulations. OPWDD may consider amending the regulations to delete the definitions that were applicable before January 1, 2016 in the future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended elimination of Conduct between persons receiving services that would constitute abuse as a reportable significant incident. The commenter noted that providers have been waiting for clarification and guidance from OPWDD and the Justice Center, but that "it still remains ambiguous and inconsistent." The commenter also noted that any such conduct between individuals receiving services that results from a staff failure would already be reported as abuse or neglect, making this additional type of incident unnecessary and onerous. The commenter added that, at a minimum, guidance is needed.

Response: Conduct between persons receiving services that would constitute abuse is defined as a reportable significant incident in statute (PPSNA; Article 11 of State Social Services Law) and cannot be deleted from OPWDD's incident management regulations. OPWDD is developing guidance on the final regulations and plans to issue an updated Part 624 handbook in the near future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended deleting Choking with no known risk as a reportable significant incident or restoring it as a notable occurrence (effective January 1, 2016). The commenter noted that Choking with known risk should remain a reportable significant incident because custodial supervision could be a factor in these cases, but questioned the benefit of reporting the no known risk incidents to the Justice Center.

Response: OPWDD identified Choking with no known risk as a notable occurrence that places individuals receiving services at risk for death or injury, since adoption of the first emergency regulations on implementation of the PPSNA and reforms to incident management on June 30, 2013. However, OPWDD has since determined that choking, with or without known risk, meets the definition of a significant incident, "... an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services..." in accordance with the PPSNA. With this change, OPWDD expects to be better able to identify trends and consider systemic remedies for quality improvement where needed.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended that OPWDD should provide clear written guidance, with examples, for the definitions of Mistreatment, Other Significant Incident, and Sensitive Situation that are effective on January 1, 2016. The commenter specifically noted that:

(1) guidance is needed on the phrase "potential to impair [the health, safety, or welfare of an individual receiving services]" in the definition of Mistreatment (a reportable significant incident);

(2) the phrasing "An incident ..., but that does not involve conduct on the part of a custodian, and does not meet the definition of any other incident described in this subdivision, but that because of its severity or the sensitivity of the situation..." in the definition of Other significant incident (reportable significant incident) is ambiguous and subjective; and

(3) the phrasing "Those situations involving a person receiving services that do not meet the definitions of other incidents in section 624.3 of this Part or in this subdivision, but that may be of a delicate nature to the agency..." in the definition of a Sensitive Situation (notable occurrence) is subjective and overly broad.

Response: OPWDD is developing guidance on the final regulations and plans to issue an updated handbook on Part 624 in the near future. Providers are advised to contact the OPWDD Incident Management Unit's regional Incident Compliance Officers with any questions on these definitions in the meantime.

The statutory definition of a significant incident "... shall mean an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services, and shall include but shall not be limited to:..." can encompass many sorts of incidents, beyond those specifically identified by type in the PPSNA and OPWDD regulations. OPWDD created the categories of Mistreatment (involving action or inaction on the part of a custodian) and Other significant incident (incident under the auspices of an agency that does not involve action or inaction on the part of a custodian) so that OPWDD is better able to categorize the incidents for trending purposes.

OPWDD kept the long-standing definition of a Sensitive situation as a notable occurrence category, for reporting of events like crimes committed by individuals receiving services, or other incidents an agency chooses to report in accordance with agency policy, that do not meet any other incident definitions in sections 624.3 or 624.4.

OPWDD is adopting the regulations as proposed.

Comment: A commenter recommended that a custodian or provider should not be charged with Obstruction of reports of reportable incidents when that person made a good faith determination that an incident did not meet the definition of a reportable incident. The commenter recommended that OPWDD should work with the Justice Center to amend the definition of Obstruction of reports of reportable incidents in section 624.3 accordingly.

Response: Obstruction of reports of reportable incidents is defined as a reportable incident in statute (PPSNA; Article 11 of State Social Services Law) and cannot be deleted from or amended in OPWDD's incident management regulations. Providers are advised to contact the OPWDD Incident Management Unit's regional Incident Compliance Officers with any questions or concerns regarding specific incidents.

OPWDD is adopting the regulations as proposed.

Comment: A commenter noted that the form OPWDD 150 to report events and situations identified in Part 625, and IRMA, include nine preliminary classifications, which include the category "Other." The commenter noted that the Part 625 regulations do not include a definition for "other."

Response: OPWDD is developing guidance on the final regulations and plans to issue guidance on Part 625 in the near future. Guidance will advise that the category "other" was created to enable providers to use the system to report other events and situations that do not meet the definitions of events and situations defined in Part 625, but that providers choose to report to OPWDD.

OPWDD is adopting the regulations as proposed.

Comment: A commenter noted that although the Part 625 regulations require updates on events and situations in IRMA, there is no special tab or other updating mechanism in IRMA to enter the updates.

Response: OPWDD is developing guidance on the final regulations and plans to issue guidance on Part 625 in the near future. The guidance will advise that, although there is no "reporting update" available in IRMA for Part 625, updates are to be entered using the "conclusions" data field on the investigation tab. OPWDD will make a change in IRMA in 2016 to relabel the conclusions data field "Summary and Updates" to avoid confusion in the future.

OPWDD is adopting the regulations as proposed.

Comment: A commenter noted that the form OPWDD 148 is not as helpful or meaningful for the families/guardians/advocates of individuals receiving services and noted that the information contained in the form is essentially the same information provided to families/guardians/advocates during the initial required notification.

Response: The OPWDD 148 includes the following information: "This report includes any immediate corrective/protective actions taken in response to an incident to safeguard the health or safety of the person receiving services. This should include, but is not limited to, a general description of any initial first aid, medical/dental treatment, or counseling provided. Please note that the investigation may still be ongoing and additional actions may be taken pending the results and recommendations of the investigation." The form meets the requirements for the "Report on Actions Taken" in accordance with 14 NYCRR paragraph 624.6(f)(8).

Regulations in paragraph 624.6(f)(4) also require the agency to offer a person's guardian, parent, spouse, adult child, or correspondent an opportunity to meet with the chief executive officer or designee to discuss the incident further. Additional information can also be made available to eligible requesters in accordance with section 624.8.

OPWDD is adopting the regulations as proposed.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Agency Name Change and Terminology Updates

I.D. No. PDD-48-15-00003-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 Parts 602 - 606, 620 - 622, 633, 635, 643, 671, 676, 679 - 681, 686, 687 and 690 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, section 13.09(b)

Subject: Agency Name Change and Terminology Updates.

Purpose: To update the agency name and other terminology in the Title 14 NYCRR Part 600 series.

Substance of proposed rule: The proposed regulations update terminology in Title 14 NYCRR to 1) change the agency's name from "Office of Mental Retardation (OMRDD)" to "Office for People With Developmental Disabilities (OPWDD)" and 2) replace outdated and unacceptable terminology with people first language. For example, "mental retardation," "client," "consumer," and "service recipient," are replaced with "person," "individual," "individual or person receiving services" and "individual or person with developmental disabilities."

The parts within Title 14 NYCRR that are revised by the proposed amendments are as follows:

Part 602 – Uniform Hearing Procedures

Part 603 – Public Access to Records Pursuant to the Freedom of Information Law

Part 604 – Access to or Correction/Amendment of Records of the Office of Mental Retardation and Developmental Disabilities Subject to the Personal Privacy Protection Law

Part 605 – Operational Procedures Governing Implementation of the Youth Opportunity Program in the Office of Mental Retardation and Developmental Disabilities

Part 606 – Availability and Access to Incorporated by Reference Materials Contained in 14 NYCRR Parts 600-699 and 14 NYCRR Parts 1-500 Applicable to Services and Programs Certified and/or Operated by the Office of Mental Retardation and Developmental Disabilities

Part 620 – Certification of Need for Administrative Review Projects, Substantial Review Projects and Terms of Approval for Acquisition of Property or Construction

Part 621 – Financial Assistance for Capital Construction and Financing

Part 622 – Implementation of State Environmental Quality Review Act

Part 633 – Protection of Individuals Receiving Services in Facilities Operated and/or Certified by OMRDD

Part 635 – General Quality Control and Administrative Requirements Applicable to Programs, services or Facilities Funded or Certified by the Office of Mental Retardation and Developmental Disabilities

Part 643 – Certificate of Relief from Disabilities (Prohibitions) Related to Firearms Possession

Part 671 – HCBS Waiver Community Residential Habilitation Services for Persons with Developmental Disabilities

Part 676 – Diagnostic and Research Clinics

Part 679 – Clinic Treatment Facilities

Part 680 – Specialty Hospitals

Part 681 – Intermediate Care Facilities for Persons who are Developmentally Disabled

Part 686 - Community Residences

Part 687 – Family Care

Part 690 – Day Treatment Services

Those sections of Title 14 NYCRR that are not identified above are not included in the proposed amendments as they have already been updated to include people first terminology.

Text of proposed rule and any required statements and analyses may be obtained from: Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, 3rd Floor, Albany, NY 12229, (518) 474-7700, email: rau.unit@opwdd.ny.gov

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

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

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

Consensus Rule Making Determination

In conformance with Mental Hygiene Law, OPWDD is updating existing regulations in Title 14 NYCRR to 1) change the agency's name from

“Office of Mental Retardation (OMRDD)” to “Office for People With Developmental Disabilities (OPWDD)” and 2) replace outdated and unacceptable terminology with people first language.

OPWDD has determined that due to the nature and purpose of the amendments and the support for these amendments from individuals with developmental disabilities, family members, and other interested parties, no person is likely to object to the rule as written.

Job Impact Statement

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

The proposed regulations update terminology found in Title 14 NYCRR to 1) change the agency’s name from “Office of Mental Retardation (OMRDD)” to “Office for People With Developmental Disabilities (OPWDD)” and 2) replace outdated and unacceptable terminology with people first language. The amendments will not result in any increased costs, including staffing costs, or compliance activities. Consequently, the proposed regulations will not have a substantial adverse impact on jobs or employment opportunities.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Lightened and Incidental Regulation of a 55 MW Electric and Steam Generating Facility

I.D. No. PSC-48-15-00010-P

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

Proposed Action: The Commission is considering a Petition for lightened and incidental regulation filed by Fortistar North Tonawanda Inc. for its 55 MW electric and steam generating facility located in North Tonawanda.

Statutory authority: Public Service Law, sections 2(13), (22), (23), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 105-114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened and incidental regulation of a 55 MW electric and steam generating facility.

Purpose: Consider the lightened and incidental regulation of a 55 MW electric and steam generating facility.

Substance of proposed rule: The Public Service Commission is considering an Application for Certificate of Public Convenience and Necessity and Petition for an Order Providing for Lightened and Incidental Regulation (Petition) filed by Fortistar North Tonawanda Inc. (FNT) on November 2, 2015. FNT owns and operates a 55 MW steam and cogeneration facility (Facility) that currently is designated as a Qualifying Facility and qualifying cogeneration facility (QF) under the Public Utility Regulatory Policies Act of 1978 and within the meaning of the Public Service Law (PSL), respectively. FNT reports that the Facility will lose its QF status and it requests that its continued operation of the Facility be subject to lightened and incidental regulation and certification. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: 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-M-0642SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Proposal to Retire Huntley Units 67 and 68 on March 1, 2016

I.D. No. PSC-48-15-00011-P

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

Proposed Action: The Commission is considering a Notice of Intent from Huntley Power LLC to retire the 436 MW Huntley Units 67 and 68 located in Tonawanda, NY as of March 1, 2016.

Statutory authority: Public Service Law, sections 2(13), (23), 5(1)(b), 65(1), (2), (3), 66(1), (2), (3), (5), (12) and 70

Subject: Proposal to retire Huntley Units 67 and 68 on March 1, 2016.

Purpose: Consider the proposed retirement of Huntley Units 67 and 68.

Substance of proposed rule: The New York State Public Service Commission is considering a Notice of Intent to retire Huntley Units 67 and 68 (Retirement Notice) filed by Huntley Power, LLC (Huntley), a wholly-owned subsidiary of NRG Energy, Inc. The Retirement Notice asserts that Huntley electric generating Units 67 and 68 are uneconomic to operate, and are not expected to be economic. Accordingly, Huntley proposes to deactivate and retire both units on March 1, 2016. Huntley will provide further notice if changed circumstances lead the company to continue operating one or both units after the proposed retirement date. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: 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-0505SP1)

Department of State

NOTICE OF ADOPTION

Fixing the Time for Compliance with an Order to Remedy Violation(s) of the State Uniform Fire Prevention and Building Code

I.D. No. DOS-04-15-00004-A

Filing No. 1001

Filing Date: 2015-11-17

Effective Date: 2015-12-02

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

Action taken: Amendment of section 1203.1; and addition of section 1203.5 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 381(1) and 382(2)

Subject: Fixing the time for compliance with an order to remedy violation(s) of the State Uniform Fire Prevention and Building Code.

Purpose: Fix the time for compliance with an order to remedy any condition found to exist in buildings in violation of the Uniform Code.

Text or summary was published in the January 28, 2015 issue of the Register, I.D. No. DOS-04-15-00004-EP.

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

Revised rule making(s) were previously published in the State Register on August 26, 2015.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Suite 1120, Albany, NY 12231-0001, (518) 474-6740, email: joseph.ball@dos.ny.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 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The agency received no public comment.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP)

I.D. No. TDA-38-15-00005-A

Filing No. 1000

Filing Date: 2015-11-17

Effective Date: 2015-12-02

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

Action taken: Amendment of section 387.12 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 95; 7 United States Code, section 2014(e)(6)(C); 7 Code of Federal Regulations, section 273.9(d)(6)(iii)

Subject: Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP).

Purpose: These regulatory amendments set forth the federally mandated and approved SUAs as of 10/1/15.

Text or summary was published in the September 23, 2015 issue of the Register, I.D. No. TDA-38-15-00005-EP.

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

Text of rule and any required statements and analyses may be obtained from: Matthew L. Tulio, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243-0001, (518) 486-9568, email: matthew.tulio@otda.ny.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 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The agency received no public comment.

Department of Transportation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Updates to Various Household Goods Provisions

I.D. No. TRN-48-15-00005-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 repeal Part 814; and add new Part 814 to Title 17 NYCRR.

Statutory authority: Transportation Law, sections 14(18), 191 and 196

Subject: Updates to various household goods provisions.

Purpose: Updates various household goods provisions.

Substance of proposed rule (Full text is posted at the following State website: <https://www.dot.ny.gov/divisions/operating/oss/truck/regulations>):

The proposed rule amendments provide for the following changes. Part 814.0 is amended to contain a definition of

household goods; currently, there is no definition of the term. Subdivision 814.1(a) contains an outdated reference to the Public Service Commission, which is removed. Subdivision 814.1(e) allows for the provision of the Summary of Information booklet to shippers electronically. Subdivisions 814.2(a) and (c) now reference Transportation Law section 196 rather than section 172, reflecting statutory changes. A new Part 814.3 is added to allow for combination of a Non-Binding Estimate and Order for Service into one document, with the ability for electronic communication added. Part 814.4 is repealed. Part 814.5 is renumbered as 814.4, with the addition of e-mail addresses as a point of contact. Part 814.6 is renumbered as 814.5, with the removal of a requirement of the licensee to inform the Department in cases of reasonable dispatch, as defined. Part 814.7 is renumbered as 814.6, with the addition of all items of life sustenance to be delivered by licensee in instances of disputes as to charges. Part 814.8 is renumbered as 814.7. Part 814.9 is renumbered as 814.8, with the addition of electronic means of communication. The 120 day requirement for disposition of claims is reduced to 90 days. The 60 day requirement to satisfy a judgment is reduced to 30 days to harmonize with Civil Court requirements.

Text of proposed rule and any required statements and analyses may be obtained from: David E. Winans, Associate Counsel, New York State Department of Transportation, 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

NYSDOT has determined that no person is likely to object to the amendments to 17 NYCRR Part 814, regulating the transportation of household goods, as herein proposed. These rulemaking provisions add a definition of the term 'household goods', update correspondence and notice options to allow for electronic communication, update the references to the statutory authority for household goods regulations, correct out of date addresses, and specify what information must be provided to shippers via order for service documents. These changes were made with the cooperation and participation of the moving industry, as represented by the New York State Movers & Warehousemen's Association. This rulemaking does not represent a change in NYSDOT policy or practice or result in significant additional regulatory requirements for motor carriers.

Job Impact Statement

1. Nature of impact: The proposed rule changes are being advanced for the purpose of adding a definition of the term 'household goods', specifying the information that must be provided to shippers via order for service documents, updating the related statutory authority, allowing for electronic communications, and to correct addresses which have changed. The rule changes are not expected to have any impact on jobs, because the associated New York State Department of Transportation (NYSDOT) enforcement activity will be consistent with past practice.

2. Categories and numbers affected: NYSDOT participates in motor carrier enforcement with police agencies, and on its own initiative, performs inspections of vehicles and drivers and motor carrier compliance reviews. These reviews and inspections are performed using the standards that are found in the CFR regulations historically incorporated by reference in 17 NYCRR. Neither the frequency of inspections nor the basis for NYSDOT enforcement action is expected to change in a way that could affect employment.

3. Regions of adverse impact: Inspections and reviews are conducted pursuant to Department policy and there is no variance in the methodology across regions. No adverse impact on jobs in any region or regions is anticipated.

4. Minimizing adverse impact: The purpose of performing motor carrier enforcement activities is the advancement of public safety through verification of compliance with state and federal law and regulation pertaining to motor carrier safety; consequently, there are no adverse impacts.