

# 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.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

#### Empire Zones Reform

**I.D. No.** EDV-02-15-00001-E

**Filing No.** 1097

**Filing Date:** 2014-12-24

**Effective Date:** 2014-12-24

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

**Action taken:** Amendment of Parts 10 and 11; renumbering and amendment of Parts 12-14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

**Statutory authority:** General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; L. 2009, ch. 57

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

**Specific reasons underlying the finding of necessity:** Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

**Subject:** Empire Zones reform.

**Purpose:** Allow department to continue implementing zones reforms and adopt changes that would enhance program's strategic focus.

**Substance of emergency rule:** The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner").

Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute's deletion of the cate-

gory of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone's boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers' compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a non-manufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b) the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm's application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate or which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six years, all information related to the application and business annual reports.

15. The emergency rule clarifies the statutory requirement from Chapter 63 of the Laws of 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality.

16. The emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage

into three or six areas or use all of their allotted acreage; the rule removes the requirement that any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

17. The emergency rule clarifies the statutory requirement that certain defined "regionally significant" projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agri-business or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

20. The emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

The full text of the emergency rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 23, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Thomas P Regan, NYS Department of Economic Development, 625 Broadway, Albany NY 12245, (518) 292-5123, email: [tregan@esd.ny.gov](mailto:tregan@esd.ny.gov)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

##### **LEGISLATIVE OBJECTIVES:**

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

**COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State's administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

**LOCAL GOVERNMENT MANDATES:**

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

**PAPERWORK:**

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

**DUPLICATION:**

The emergency rule conforms to provisions of Article 18-B of the General Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

**ALTERNATIVES:**

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

**FEDERAL STANDARDS:**

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

**COMPLIANCE SCHEDULE:**

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

**Regulatory Flexibility Analysis**

1. Effect of rule

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and large businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in full compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small businesses and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

**Rural Area Flexibility Analysis**

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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**Department of Health**

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

**Rate Rationalization – Intermediate Care Facilities for Persons with Developmental Disabilities**

**I.D. No.** HLT-28-14-00015-ERP

**Filing No.** 1104

**Filing Date:** 2014-12-30

**Effective Date:** 2014-12-30

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

**Action Taken:** Amendment of Subpart 86-11 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201

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

**Specific reasons underlying the finding of necessity:** The emergency adoption of these amendments is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system.

The amendments are necessary to properly implement a new rate methodology for Intermediate Care Facilities for Persons with Developmental Disabilities (ICFs/DD).

On July 1, 2014, OPWDD and the Department of Health (DOH) implemented a new reimbursement methodology for ICFs/DD, which complements existing OPWDD requirements concerning this program, to satisfy commitments included in OPWDD's transformation agreement with the federal Centers for Medicare and Medicaid Services (CMS).

After July 1, CMS informed OPWDD and DOH that CMS would require changes in reimbursement for capital assets used in ICFs/DD. These changes are that capital costs for day habilitation property acquisitions must be depreciated over 25 years and that providers must submit information for each capital asset that is verified by an independent auditor and identifies the differences, by asset, between the amounts reported on the cost report and amounts that were approved by OPWDD. The emergency/proposed regulations are in response to these CMS requirements. The amendments change the depreciation period and reporting for capital costs.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

The Department was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes. The State Administrative Procedure Act (SAPA) sets forth timeframes for the promulgation of regulations (including mandatory public comment period) and prohibits the adoption of rules containing substantive changes in the terms of proposed regulations. SAPA requires additional rulemaking activities to make substantive changes through the regular rulemaking process which delays the effective date. The only way to adopt the substantive amendments necessary to implement the rate-setting methodology in accordance with CMS mandates and State law is through the emergency rulemaking process.

If the Department did not promulgate these regulations on an emergency basis, the Department would fail to meet its commitment to CMS and would risk loss of the substantial federal funding that is contingent upon this commitment. The loss of this federal funding could jeopardize the health, safety, and welfare of individuals receiving services in the OPWDD system, as without it, individuals would be at risk of receiving services that are inadequate or insufficient in meeting their needs.

**Subject:** Rate Rationalization – Intermediate Care Facilities for Persons with Developmental Disabilities.

**Purpose:** To amend the new rate methodology effective November 1, 2014.

**Substance of emergency/revise rule:** These emergency/proposed regulations amend the newly-adopted 10 NYCRR subpart 86-11 concerning the rate methodology for Intermediate Care Facilities for Persons with Developmental Disabilities (ICFs/DD). The amendments contain the methodology as described in the regulations adopted July 1, 2014 with changes required by the federal Centers for Medicare and Medicaid Services (CMS) subsequent to the adoption of those regulations. The amendments change reimbursement for capital assets used in ICFs/DD. The changes are:

1) The “capital component” sections were revised to require that capital costs must be depreciated over 25 years. The amendments require ICF/DD providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule.

2) The “capital component” section was revised to eliminate capital threshold schedules.

3) The amendments change the methodology to include funding for a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2014 for eligible programs.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 16, 2014, I.D. No. HLT-28-14-00015-P. The emergency rule will expire February 27, 2015.

**Revised rule making(s) were previously published in the State Register** on November 19, 2014.

**Emergency rule compared with proposed rule:** Substantive revisions were made in sections 86-11.6 and 86-11.9.

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

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

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

#### Revised Regulatory Impact Statement

##### Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law (PHL) section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State’s medical assistance (“Medicaid”) program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State’s Medicaid program. In addition, Part I of chapter 60 of the laws of 2014, which is part of the 2014-15 enacted budget, requires the Department to provide funding beginning January 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care staff, and also to provide funding beginning April 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care and clinical staff.

##### Legislative Objective:

These emergency/proposed amendments further the legislative objectives embodied in sections 363-a of the Social Services Law and section 201(1)(v) of the Public Health Law in Part I of chapter 60 of the laws of

2014. The emergency/proposed regulations amend the newly adopted methodology for reimbursement of Intermediate Care Facilities for Persons with Developmental Disabilities (ICFs/DD).

##### Needs and Benefits:

On July 1, 2014, OPWDD and the Department of Health (DOH) implemented a new reimbursement methodology for ICFs/DD to satisfy commitments included in OPWDD’s transformation agreement with the federal Centers for Medicare and Medicaid Services (CMS).

After July 1, CMS informed OPWDD and DOH that CMS would require changes in reimbursement for ICF/DD capital assets. These changes are that capital costs for property acquisitions must be depreciated over 25 years; that the provider must submit a schedule that identifies the differences, by capital asset, between the amounts reported on the cost report and the amounts that were prior approved by OPWDD; and that an independent auditor apply procedures to verify the accuracy and completeness of the schedule. The amendments are in response to these CMS requirements.

These changes will bring the methodology into compliance with current CMS policies regarding depreciation of capital assets and provide information on capital costs required by CMS.

In addition, in recognition of the key role that direct support staff play in delivering services to persons with disabilities in New York State, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015, and an additional 2% increase on April 1, 2015 for direct support staff, as well as a 2% increase for clinical staff beginning on April 1, 2015. OPWDD and DOH are revising the methodologies for affected residential and day habilitation programs to include funding to support these increases.

##### Costs:

##### Costs to the Agency and to the State and its local governments:

The amendments require OPWDD or DOH to give each provider a schedule identifying (for each capital asset for which OPWDD approved the costs prior to July 1, 2014) total actual costs, reimbursable costs, total financing cost, allowable depreciation and interest for the remaining useful life, and allowable reimbursement for each year of the remaining useful life.

The new methodology and these accompanying amendments do not apply to the state as a provider of services.

There will be no savings or costs to local governments as a result of these regulations because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. In addition, even if the amendments lead to an increase in Medicaid expenditures in a particular county, these amendments will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped. Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

##### Costs to private regulated parties:

The emergency/proposed regulations will change the new reimbursement methodology for ICFs/DD. Application of the changes in the methodology may result in lower capital cost reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period. In addition, providers will incur costs preparing capital assets schedules and having independent auditors apply procedures to verify the accuracy and completeness of the capital assets schedules.

##### Local Government Mandates:

There are no new requirements imposed by the rule on any county, city, town, village, school, fire or other special district.

##### Paperwork:

The amendments increase paperwork to be completed by providers. The amendments require providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition for the 2% compensation increase, each provider will have to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

##### Duplication:

The emergency/proposed regulations do not duplicate any existing State or federal requirements that are applicable to services for persons with developmental disabilities.

##### Alternatives:

Since certain of the methodology changes in these amendments are required by CMS and others are mandated by State law, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements.

**Federal Standards:**

The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

**Compliance Schedule:**

DOH is adopting the amendments on an emergency basis effective January 1, 2015. DOH expects to finalize the amendments as soon as possible within the timeframes established by the State Administrative Procedure Act.

**Revised Regulatory Flexibility Analysis****Effect of Rule:**

OPWDD and DOH have determined, through a review of the certified cost reports, that most services delivered in Intermediate Care Facilities for Persons with Developmental Disabilities (ICFs/DD) are provided by agencies that employ more than 100 people overall. However, some smaller agencies that employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 108 ICF/DD providers. OPWDD and DOH are unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014.

After July 1, 2014, CMS informed OPWDD and DOH that it would require changes in reimbursement for ICF/DD capital assets. These changes are that capital costs for property acquisitions must be depreciated over 25 years; that the provider must submit a schedule that identifies the differences, by capital asset, between the amounts reported on the cost report and the amounts that were prior approved by OPWDD; and that an independent auditor apply procedures to verify the accuracy and completeness of the schedule. The amendments change the depreciation period and reporting requirements for capital costs. Application of the changes in the methodology for capital costs may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

**Compliance Requirements:**

The amendments require ICF/DD providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

**Professional Services:**

Additional professional services will be required as a result of these regulations. The amendments require independent auditors to apply procedures to verify the accuracy and completeness of the capital assets schedule. However, the regulations will not add to the professional service needs of local governments.

**Compliance Costs:**

The amendments require ICF/DD providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

**Economic and Technological Feasibility:**

The amendments do not impose on regulated parties the use of any new technological processes.

**Minimizing Adverse Impact:**

Since the methodology changes in these amendments are required by CMS, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements.

The potential loss of federal funds that could result from non-compliance would have had far more serious consequences to providers than the minor decrease in annual reimbursement for capital costs that may result from this change.

For the 2% compensation increase, there is no adverse economic impact on providers. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

However, the attestation is required by the enacted budget and is needed to ensure that the compensation increases are used for their intended purpose.

**Small Business and Local Government Participation:**

OPWDD and DOH met with representatives of providers to discuss this change in methodology at a meeting held on October 6, 2014, and met with them to discuss the 2% compensation increase on December 15. The New York State Association of Community and Residential Agencies (NYSACRA), which represent some providers that have fewer than 100 employees, were included in these meetings.

**Revised Rural Area Flexibility Analysis****Effect on Rural Areas:**

Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange and Saratoga.

The proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014.

After July 1, 2014, CMS informed OPWDD and DOH that CMS would require changes in reimbursement ICF/DD capital assets. These changes are that capital costs for property acquisitions must be depreciated over 25 years; that the provider must submit a schedule that identifies the differences, by capital asset, between the amounts reported on the cost report and the amounts that were approved by OPWDD; and that an independent auditor apply procedures to verify the accuracy and completeness of the schedule. The amendments change the depreciation period and reporting for capital costs. Application of the changes in the methodology may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

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

There will be additional reporting, recordkeeping, and professional services imposed by these amendments. The amendments require ICF/DD providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

The amendments will have no effect on local governments.

No additional professional services will be required as a result of these regulations and the regulations will not add to the professional service needs of local governments.

**Costs:**

The amendments require ICF/DD providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

**Minimizing Adverse Impact:**

Since the methodology change in this amendment is required by CMS, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements.

The potential loss of federal funds that could result from non-compliance would have had far more serious consequences to providers than the minor decrease in annual reimbursement that results for capital costs that result from these changes.

For the 2% compensation increase, there is no adverse economic impact

on providers. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees. However, the attestation is required by the enacted budget and is needed to ensure that the compensation increases are used for their intended purpose.

The Department has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. The Department determined that the revision to reimbursement proposed in this amendment is the most optimal approach to instituting the necessary change in rate methodology while minimizing any adverse impact on providers.

#### Rural Area Participation:

Participation of public and private interests in rural areas: OPWDD and DOH met with representatives of providers to discuss the capital changes in new methodology October 6, 2014, and met with them to discuss the 2% compensation increase on December 15, 2014. The New York State Association of Community and Residential Agencies (NYSACRA), which represents some providers in rural areas, were included in these meetings.

#### Revised Job Impact Statement

A Job Impact Statement is not being submitted for this emergency/proposed rulemaking because this rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The emergency/proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014. In addition, the proposed regulations change the methodologies for rates and fees for the affected programs to provide funding to support a January 1, 2015 2% salary increase and an April 1, 2015 2% increase for direct support staff, as well as an April 1, 2015 2% increase for clinical staff for the affected residential and day programs, to include funding to support these increases.

All providers will experience an increase in funding as a result of the 2% compensation increase in these amendments. Application of the changes in the methodology may result in lower capital cost reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period. The impact of additional recordkeeping associated with verification of those capital costs will be negligible.

The amendments are therefore expected to have no significant adverse impact on jobs and employment opportunities with providers.

#### Assessment of Public Comment

The agency received no public comment.

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

#### Rate Rationalization for Community Residences/Individualized Residential Alternatives Habilitation and Day Habilitation

**I.D. No.** HLT-28-14-00016-ERP

**Filing No.** 1105

**Filing Date:** 2014-12-30

**Effective Date:** 2014-12-30

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

**Action Taken:** Amendment of Subpart 86-10 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201

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

**Specific reasons underlying the finding of necessity:** The emergency adoption of these amendments is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system.

The amendments are necessary to properly implement the rate methodology for residential habilitation provided in Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and day habilitation services.

On July 1, 2014, OPWDD and the Department of Health (DOH) implemented a new reimbursement methodology for residential habilitation in IRAs/CRs and day habilitation, which complements existing OPWDD requirements concerning these programs, to satisfy commitments included in OPWDD's transformation agreement with the federal Centers for Medicare and Medicaid Services (CMS).

After July 1, CMS informed OPWDD and DOH that the State could not use SSI benefits in excess of the room and board costs to offset the

Medicaid rate for residential habilitation, and that CMS would require changes in reimbursement for capital assets used in day habilitation programs. These changes are that capital costs for day habilitation property acquisitions must be depreciated over 25 years and that providers must submit information for each capital asset that is verified by an independent auditor and identifies the differences, by asset, between the amounts reported on the cost report and amounts that were approved by OPWDD.

The emergency/proposed regulations are in response to these CMS requirements. The regulations contain the methodology as described in the regulations adopted effective July 1, with changes to the SSI offset, day habilitation depreciation period and reporting for day habilitation capital costs, and with additional changes to the budget neutrality factor necessitated by the change in the SSI offset. The amendments also contain provisions to reimburse IRA and CR providers for July 1 through November 1, 2014 for the difference between the November 1 rate and the July 1 rate, if the November 1 rate is higher.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

The Department was not able to use the regular rulemaking process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations within the necessary timeframes. The State Administrative Procedure Act (SAPA) sets forth timeframes for the promulgation of regulations (including mandatory public comment period) and prohibits the adoption of rules containing substantive changes in the terms of proposed regulations. SAPA requires additional rulemaking activities to make substantive changes through the regular rulemaking process which delays the effective date. The only way to adopt the substantive amendments necessary to implement the rate-setting methodology in accordance with CMS mandates and State law is through the emergency rulemaking process.

If the Department did not promulgate these regulations on an emergency basis, the Department would fail to meet its commitment to CMS and would risk loss of the substantial federal funding that is contingent upon this commitment. The loss of this federal funding could jeopardize the health, safety, and welfare of individuals receiving services in the OPWDD system, as without it, individuals would be at risk of receiving services that are inadequate or insufficient in meeting their needs.

**Subject:** Rate Rationalization for Community Residences/Individualized Residential Alternatives Habilitation and Day Habilitation.

**Purpose:** To amend the new rate methodology effective November 1, 2014.

**Substance of emergency/revised rule:** The emergency/proposed regulations amend the newly-adopted 10 NYCRR Subpart 86-10, concerning the rate methodology for Residential Habilitation delivered in IRAs and Community Residences and Day Habilitation. The amendments contain the methodology as described in the regulations adopted July 1, 2014 with changes required by the federal Centers for Medicare and Medicaid Services (CMS) subsequent to the adoption of those regulations. The amendments change the SSI offset with additional changes to the budget neutrality factor necessitated by the change in the SSI offset. The changes are:

1) A definition was added for "state supplement." The definition state supplement is the amount paid to a provider to cover room and board costs in excess of SSI/SNAP payments.

2) The "budget neutrality" formula was changed for Supervised and Supportive Individualized Residential Alternatives (IRAs) and Community Residences (CRs). The method for calculating the budget neutrality factor for the "state supplement" was adjusted.

3) The "capital component" sections were revised to eliminate capital threshold schedules and require that capital costs must be depreciated over 25 years. The amendments require day habilitation providers to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule.

4) The amendments also contain provisions to reimburse IRA and CR providers for July 1 through November 1, 2014 for the difference between the November 1, 2014 rate and the July 1, 2014 rate, if the November 1 rate is higher.

5) The amendments change the methodology to include funding for a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs.

6) Several non-substantive technical corrections were added to correct reference errors and grammatical errors.

*This notice is intended* to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 16, 2014, I.D. No. HLT-28-14-00016-P. The emergency rule will expire February 27, 2015.

*Revised rule making(s) were previously published in the State Register* on November 19, 2014.

*Emergency rule compared with proposed rule:* Substantive revisions were made in sections 86-10.3, 86-10.5 and 86-10.8.

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

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

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

#### **Revised Regulatory Impact Statement**

##### Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law (PHL) section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program. In addition, Part I of chapter 60 of the laws of 2014, which is part of the 2014-15 enacted budget, requires the Department to provide funding beginning January 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care staff, and also to provide funding beginning April 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care and clinical staff.

##### Legislative Objective:

These emergency/proposed regulations further the legislative objectives embodied in section 363-a of the Social Services Law and section 201(1)(v) of the Public Health Law and in Part I of chapter 60 of the laws of 2014. The emergency/proposed regulations amend the newly adopted methodology for reimbursement of residential habilitation delivered in Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and day habilitation services.

##### Needs and Benefits:

On July 1, 2014, OPWDD and the Department of Health (DOH) implemented a new reimbursement methodology for residential habilitation in IRAs/CRs and day habilitation, which complements existing OPWDD requirements concerning these programs, to satisfy commitments included in OPWDD's transformation agreement with the federal Centers for Medicare and Medicaid Services (CMS).

After July 1, CMS informed OPWDD and DOH that the State could not use SSI benefits in excess of the room and board costs to offset the Medicaid rate for residential habilitation, and that CMS would require changes in reimbursement for capital assets used in day habilitation programs. These changes are that capital costs for day habilitation property acquisitions must be depreciated over 25 years and that providers must submit information for each capital asset that is verified by an independent auditor and identifies the differences, by asset, between the amounts reported on the cost report and the amounts that were prior approved by OPWDD. The emergency/proposed amendments are in response to these CMS requirements. The amendments contain the methodology as described in the regulations adopted effective July 1, with changes to the SSI offset, day habilitation depreciation period and reporting for day habilitation capital costs, and with additional changes to the budget neutrality factor necessitated by the change in the SSI offset. In addition, the amendments contain provisions to reimburse IRA and CR providers for July 1 through November 1, 2014 for the difference between the November 1 rate and the July 1 rate, if the November 1 rate is higher. These amendments also make technical and clarifying changes to the regulations effective July 1, 2014.

These changes will increase reimbursement to providers, bring the methodology into compliance with current CMS policies regarding depreciation of capital assets and the treatment of individual benefits in HCBS waiver programs and provide information on capital costs required by CMS.

In addition, in recognition of the key role that direct support staff play in delivering services to persons with disabilities in New York State, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015, and an additional 2% increase on April 1, 2015 for direct support staff, as well as a 2% increase for clinical staff beginning on April 1, 2015. OPWDD and the Department of Health (DOH) are revising the methodologies for affected residential and day habilitation programs to include funding to support these increases.

##### Costs:

Costs to the Agency and to the State and its local governments:

The emergency/proposed regulations will result in additional State share Medicaid costs of approximately \$34 million per year. The regulations also require OPWDD or DOH to give each provider a schedule identifying (for each capital asset for which OPWDD approved the costs prior to July 1, 2014) total actual costs, reimbursable costs, total financing cost, allowable depreciation and interest for the remaining useful life, and allowable reimbursement for each year of the remaining useful life.

The new methodology and the accompanying amendments do not apply to the state as a provider of services.

There will be no savings or costs to local governments as a result of these regulations because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. In addition, even if the amendments lead to an increase in Medicaid expenditures in a particular county, these amendments will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped. Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

##### Costs to private regulated parties:

The emergency/proposed regulations will amend the new reimbursement methodology for residential habilitation in IRAs/CRs and day habilitation. Application of the changes in the methodology for SSI and budget neutrality is expected to result in increased rates for all non-state operated providers. Overall reimbursement to providers will be increased by approximately \$29 million from July 2014 through June 2015 due to this changes. Application of the changes in the methodology for capital cost to day habilitation may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year amortization period.

##### Local Government Mandates:

There are no new requirements imposed by the rule on any county, city, town, village, school, fire or other special district.

##### Paperwork:

The emergency/proposed amendments increase paperwork to be completed by providers. The amendments require providers of day habilitation services to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition for the 2% compensation increase, each provider will have to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

##### Duplication:

The emergency/proposed regulations do not duplicate any existing State or federal requirements that are applicable to services for persons with developmental disabilities.

##### Alternatives:

Since certain of the methodology changes in these amendments are required by CMS and others are mandated by State law, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements.

##### Federal Standards:

The emergency/proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

##### Compliance Schedule:

DOH is adopting the amendments on an emergency basis effective January 1, 2015. DOH expects to finalize the amendments as soon as possible within the timeframes established by the State Administrative Procedure Act.

#### **Revised Regulatory Flexibility Analysis**

##### Effect of Rule:

OPWDD and DOH have determined, through a review of the certified cost reports, that most residential habilitation services delivered in Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and most day habilitation services are provided by agencies that employ more than 100 people overall. However, some smaller agencies that employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 348 providers of residential habilitation services delivered in IRAs and CRs and day habilitation services. OPWDD and DOH are unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014.

After July 1, 2014, CMS informed OPWDD and DOH that the State could not use SSI benefits in excess of the room and board costs to offset

the Medicaid rate for residential habilitation, and that CMS would require changes in reimbursement for capital assets used in day habilitation programs. These changes are that capital costs for day habilitation property acquisitions must be depreciated over 25 years; that providers must submit a schedule that identifies the differences, by capital asset, between the amounts reported on the cost report and the amounts that were approved by OPWDD; and that an independent auditor apply procedures to verify the accuracy and completeness of the schedule. The amendments contain the methodology as described in the regulations adopted in July 2014, with changes to the SSI offset, day habilitation depreciation period and reporting for day habilitation capital costs, and with additional changes to the budget neutrality factor necessitated by the change in the SSI offset. Application of the changes in the methodology regarding SSI offsets and budget neutrality is expected to result in increased rates for all providers, including providers that are small businesses. Overall reimbursement to providers will be increased by approximately \$29 million for July 2014 through June 2015. Application of the changes in the methodology for capital costs to day habilitation may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year amortization period.

The changes also include an amendment to reimburse IRA and CR providers, including providers that are small businesses, for the difference between the November 1 rate and the July 1 rate, if the November 1 rate is higher. These regulations also make technical and clarifying changes to the regulations effective July 1, 2014.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

#### Compliance Requirements:

The amendments require providers of day habilitation services to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

#### Professional Services:

Additional professional services will be required as a result of these regulations. The amendments require providers of day habilitation services to verify the accuracy and completeness of the capital assets schedule. However, the regulations will not add to the professional service needs of local governments.

#### Compliance Costs:

The amendments require providers of day habilitation services to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

#### Economic and Technological Feasibility:

The amendments do not impose on regulated parties the use of any technological processes.

#### Minimizing Adverse Impact:

Since the certain of the methodology changes in these amendments are required by CMS, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements. The potential loss of federal funds that could result from non-compliance would have had far more serious consequences to providers than the minor decrease in yearly reimbursement for day habilitation costs that may result from these changes.

For the 2% compensation increase, there is no adverse economic impact on providers. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees. However, the attestation is required by the enacted budget and is needed to ensure that the compensation increases are used for their intended purpose.

The Department has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. The Department determined that the revision to reimbursement proposed in this amendment is the most optimal approach to instituting the necessary change in rate methodology while minimizing any adverse impact on providers.

#### Small Business and Local Government Participation:

OPWDD and DOH met with representatives of providers to discuss the SSI offset changes in the new methodology (including provider concerns) on July 21, August 18, and September 15. OPWDD and DOH also met with representatives of providers to discuss the capital changes on October 6, 2014, and met with them to discuss the 2% compensation increase on December 15. The New York State Association of Community and Residential Agencies (NYSACRA), which represents some providers that have fewer than 100 employees, was included in these meetings.

#### Revised Rural Area Flexibility Analysis

##### Effect on Rural Areas:

Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, certain townships in 10 counties have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange and Saratoga.

The proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014.

After July 1, 2014, CMS informed OPWDD and DOH that the State could not use SSI benefits in excess of the room and board costs to offset the Medicaid rate for residential habilitation, and that CMS would require changes in reimbursement for capital assets used in day habilitation programs. These changes are that capital costs for day habilitation property acquisitions must be depreciated over 25 years; that providers must submit a schedule that identifies the differences, by capital asset, between the amounts reported on the cost report and amounts that were approved by OPWDD; and that an independent auditor apply procedures to verify the accuracy and completeness of the schedule. The amendments contain the methodology as described in the regulations adopted in July 2014, with changes to the SSI offset, day habilitation depreciation period and reporting for day habilitation capital costs, and with additional changes to the budget neutrality factor necessitated by the change in the SSI offset. Application of the changes in the methodology regarding SSI offsets and budget neutrality is expected to result in increased rates for all providers, including providers in rural areas. Overall reimbursement to providers will be increased by approximately \$29 million for July 2014 through June 2015. Application of the changes in the methodology for capital costs to day habilitation may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period.

The changes also include an amendment to reimburse IRA and CR providers, including providers in rural areas, for the difference between the November 1 rate and the July 1 rate, if the November 1 rate is higher. These regulations also make technical and clarifying changes to the regulations effective July 1, 2014.

In addition, the 2014-15 enacted budget included funding to support a 2% increase for direct support staff on January 1, 2015 and April 1, 2015, as well as a 2% increase for clinical staff on April 1, 2015 for eligible programs. This change to the methodology will increase rates for all providers of the eligible services.

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

There will be additional reporting, recordkeeping, and professional services imposed by these amendments. The amendments require providers of day habilitation services to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

The amendments will have no effect on local governments.

No additional professional services will be required as a result of these regulations and the regulations will not add to the professional service needs of local governments.

#### Costs:

The amendments require providers of day habilitation services to submit a capital assets schedule to OPWDD as part of the annual cost report, to identify the differences, by asset, between the amount on the cost report and the amount prior approved by OPWDD, and to have an independent

auditor apply procedures to verify the accuracy and completeness of the capital assets schedule. In addition, for the 2% compensation increase, each provider will be required to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

**Minimizing Adverse Impact:**

Since certain of the methodology changes in these amendments are required by CMS, OPWDD and DOH did not consider any alternatives, because any alternatives would not be in compliance with recently articulated CMS policy and requirements. The potential loss of federal funds that could result from non-compliance would have had far more serious consequences to providers than the minor decrease in annual reimbursement for day habilitation capital costs that may result from these changes.

For the 2% compensation increase, there is no adverse economic impact on providers. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees. However, the attestation is required by the enacted budget and is needed to ensure that the compensation increases are used for their intended purpose.

The Department has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. The Department determined that the revision to reimbursement proposed in this amendment is the most optimal approach to instituting the necessary change in rate methodology while minimizing any adverse impact on providers.

**Rural Area Participation:**

Participation of public and private interests in rural areas: OPWDD and DOH met with representatives of providers to discuss the SSI offset changes in the new methodology (including provider concerns) on July 21, August 18, and September 15. OPWDD and DOH met with representatives of providers to discuss the capital changes on October 6, 2014, and met with them to discuss the 2% compensation increase on December 15, 2014. The NYS Association of Community and Residential Agencies (NYSACRA), which represents some providers in rural areas, was included in these meetings.

**Revised Job Impact Statement**

A job impact statement is not being submitted for this emergency/proposed rulemaking because this rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The emergency/proposed regulations amend the rate-setting methodology that was adopted in July 2014 in conformance with changes mandated by CMS after July 1, 2014. In addition, the proposed regulations change the methodologies for rates and fees for the affected programs to provide funding to support a January 1, 2015 2% salary increase and an April 1, 2015 2% increase for direct support staff, as well as an April 1, 2015 2% increase for clinical staff for the affected residential and day programs, to include funding to support these increases.

All providers will experience an increase in funding as a result of the changes to the SSI offset, budget neutrality factor and 2% compensation increase in these amendments. Application of the changes in the methodology for capital costs to day habilitation may result in lower reimbursement per year, but full approved capital costs will be reimbursed over the 25 year depreciation period.

The amendments are therefore expected to have no significant adverse impact on jobs and employment opportunities with providers.

**Assessment of Public Comment**

The agency received no public comment.

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## State Liquor Authority

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Signage, Services and Gifts to Retailers**

**I.D. No.** LQR-02-15-00002-P

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

**Proposed Action:** Amendment of sections 83.3, 86.2, 86.3, 86.4, 86.5 and 86.6 of Title 9 NYCRR.

**Statutory authority:** Alcoholic Beverage Control Law, sections 101(1)(c) and 105(7)

**Subject:** Signage, Services and Gifts to Retailers.

**Purpose:** To enact business friendly amendments; eliminate interior sign restrictions; and increase annual dollar limits for advertising.

**Public hearing(s) will be held at:** 10:00 a.m., March 10, 2015 at State Liquor Authority, 317 Lenox Ave., New York, NY.

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

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

**Text of proposed rule:** Title 9, Subtitle B, of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), is hereby amended to include amendments to sections 83.3, 86.2, 86.3, 86.4, 86.5, and 86.6 as follows:

§ 83.3 Interior signs

Signs may be displayed in the interior of:

- (a) premises licensed to sell alcoholic beverages for on-premises consumption;
- (b) premises licensed to sell liquor or wine for off-premises consumption; or
- (c) in the window display of such premises, provided that:

(1) Such signs do not have a utility or secondary use or value aside from their actual advertising value. Signs which have a utility or secondary use or value are covered by Part 86 of this subtitle.

(2) Such signs shall not contain:

- (i) any statement, illustration, design, device or representation that is false or misleading;
- (ii) any statement that is disparaging of a competitor's product;
- (iii) any statement, design, device, matter or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste;
- (iv) the words "bond", "bonded", "bottled in bond", "aged in bond" or phrases containing these or synonymous terms, unless the distilled spirits so advertised were in fact bottled in bond under the Bottling in Bond Act of the United States;
- (v) the terms "double distilled", "triple distilled" or any similar term;
- (vi) any statement which is inconsistent with the label on the product;
- (vii) any statement, design or device which represents or which tends to create or give the impression that the use of the alcoholic beverage has curative or therapeutic effects;
- (viii) any statement of, or reference to, price which is deceptive or misleading or tends to deceive or mislead;
- (ix) any illustration which is not dignified, modest and in good taste;

(x) any scene in which is portrayed a child or objects (such as toys) suggestive of the presence of a child or in any manner portrays the likeness of a child or contains the use of figures or symbols which are traditionally associated with children;

(xi) except as otherwise provided in Part 86 of this Subtitle, any statement, design, device or representation relating to any refund, exchange or money-back guarantee, irrespective of truth or falsity;

(xii) any portrayal of an athlete or athletes or athletic events in such manner as to imply that the consumption of alcoholic beverages improves athletic prowess or physical stamina, or any portrayal or suggestion that athletes recommend drinking alcoholic beverages;

(xiii) the name of or depiction of any biblical characters;

(xiv) any reference by name or other identification to any retailer selling the products advertised;

(xv) any statement, design, device or representation of or relating to analyses, standards or tests irrespective of falsity which the Authority finds to be likely to mislead the consumer.

[ (3) Such signs are not hung or displayed in a manner which obstructs a clear and full view into the interior of said premises from the street.

(4) Such signs, when relating to alcoholic beverages, shall not exceed 1,200 square inches. If the sign is made up of two or more parts, the area of each part shall be included when computing the total of square inches in the sign as a whole. Any increase in the depth of the sign which does not extend beyond the perimeter thereof shall not be included in the size or the area of such sign.]

§ 86.2 Advertising and promotions generally

(a) Sections 86.3 through and including 86.6 of this Part describe the kinds of advertising and promotional materials that manufacturers or wholesalers may give, sell or install in a licensed retail premises. Unless specifically stated otherwise, such sections apply both to on-premises and off-premises licensees.

[(b) All of the dollar limitations contained in sections 83.3 through 86.6 will be adjusted annually by a cost adjustment factor, equal to the percentage change in the Bureau of Labor Statistics, Consumer Price Index. By using the cost adjustment factor, it is intended that the dollar limitations will remain identical to the dollar limitations established and adjusted annually by the Director, Federal Bureau of Alcohol, Tobacco & Firearms, and described in 27 Code of Federal Regulations, Part 6.82.]

#### § 86.3 Product displays

(a) A product display means any wine racks, bins, barrels, casks, shelving, and the like, from which alcoholic beverages are displayed and sold, and which bears conspicuous and prominent advertising matter.

(b) A manufacturer or wholesaler may give, rent, loan or sell product displays to a retail licensee. The total value of all product displays furnished by a manufacturer or wholesaler under this section may not exceed \$[1]300 per brand, [or such other dollar limitation as may be established pursuant to section 86.2(b) of this Part.] in use at any one time in any one retail establishment. The value of a product display is the actual cost to the manufacturer or wholesale licensee who initially purchased it. Transportation and installation costs are excluded. *Provision of a product display to a retailer may be conditioned upon the purchase of sufficient product for initial setup of the display.*

(c) Manufacturers and wholesalers may not pool or combine their dollar limitations in order to provide a retailer a product display valued in excess of such dollar limitation.

#### § 86.4 Inside signs

(a) Inside signs include such things as posters, placards, designs, mechanical devices, *digital displays* and window decorations which bear advertising matter, and have no secondary value and are of value to the retailer only as advertising.

(b) A manufacturer or wholesaler may furnish, give, rent, loan or sell inside signs to a retailer, provided that (i) the inside sign shall be used only in the windows or other internal portions of the retail establishment, and (ii) the manufacturer or wholesaler may not directly or indirectly pay or credit the retailer for displaying the inside sign or for any expense incidental to its operation.

#### § 86.5 Retailer advertising specialties

(a) A retailer advertising specialty is an item which bears advertising matter and is primarily valuable to the retailer as point of sale advertising, but which has some secondary value to the retailer in connection with the operation of the business. Examples of retailer advertising specialties include trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, thermometers, clocks, *shirts, hats, visors* and calendars. The manufacturer or wholesaler may add the name or address of the retailer to the retailer advertising specialty.

(b) The total value of all retailer advertising specialties furnished by a manufacturer or wholesaler to a retailer may not exceed \$[5]200 per brand, [or such other dollar limitation as may be established pursuant to section 86.2(b) of this Part.] in any one calendar year per retail establishment. The value of a retailer advertising specialty is the actual cost of that item to the manufacturer or wholesaler who initially purchased it. Transportation and installation costs are excluded.

(c) Manufacturers and wholesalers may not pool or combine their dollar limitations in order to provide a retailer with retailer advertising specialties valued in excess of such dollar limitation.

#### § 86.6 Consumer advertising specialties

(a) A consumer advertising specialty is an item which bears advertising matter and which is designed for unconditional distribution by the retailer to the general public. Examples of consumer advertising specialties include ashtrays, bottle or can openers, cork screws, shopping bags, matches, printed recipes, pamphlets, cards, leaflets, blotters, postcards, *shirts, hats, visors* and pencils.

[(b) A manufacturer or wholesaler may furnish, give or sell consumer advertising specialties to on-premises retail licensees and off-premises beer licensees. The only consumer advertising specialties which may be furnished, given or sold to off-premises retail liquor or wine licensees are recipe books and matchbooks, which cannot contain the name or address of the retail licensee.]

[(c)]b The retail licensee may not be paid or credited in any manner, directly or indirectly, for the distribution of consumer advertising specialties.

[(d)]c There is no limitation on the amount or value of consumer advertising specialties which may be given to any retail licensee.

**Text of proposed rule and any required statements and analyses may be obtained from:** Paul Karamanol, Senior Attorney, State Liquor Authority, 80 South Swan Street, Suite 900, Albany, NY 12210, (518) 474-3114, email: paul.karamanol@sla.ny.gov

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

### Regulatory Impact Statement

#### Statutory authority:

These proposed regulations concerning permissible advertising, signage, and services or gifts to retailers are being issued by the State Liquor Authority and will appear as amendments to Parts 83.3, 86.2, 86.3, 86.4, 86.5 and 86.6 of Title 9 of the New York Codes, Rules and Regulations.

These regulations are issued pursuant to the following:

Alcoholic Beverage Control Law section 101(1)(c), which authorizes the State Liquor Authority to determine at what point any gift or service provided to a retailer is intended to influence the retailer to purchase the alcoholic beverages of a given manufacturer or wholesaler;

Alcoholic Beverage Control Law section 105(7), which authorizes the State Liquor Authority to approve or disapprove any advertising sign whether printed, painted, electric or otherwise on the exterior or interior of any retail off-premises licensee;

State Administrative Procedure Act section 201, which authorizes all agencies to adopt by rule additional procedures not inconsistent with statute.

#### Legislative objectives:

Changing the public policy underpinnings of the Alcoholic Beverage Control Law to be more business friendly where possible was recommended by the New York State Law Revision Commission in their 2009 Report on the Alcoholic Beverage Control Law and its Administration, which included recommendations of “supporting economic growth, job development, and the state’s alcoholic beverage production industries and its tourism and recreation industry...provided that such activities do not conflict with the primary regulatory objectives of [promoting the health, welfare and safety of the people of the state, and promoting temperance in the consumption of alcoholic beverages.]” Along those lines, a recent legislative change put into effect the recommendations of the Law Revision Commission via Chap. 406 of the Laws of 2014. The policy underpinnings of the Alcoholic Beverage Control Law (“ABCL”) have been updated to include supporting, where possible, the economic development and job opportunities for New York residents when making decisions related to the regulation of alcoholic beverages.

It was from the Law Revision Commission recommendations that these regulatory proposals were conceived, to be used by the State Liquor Authority to promote economic growth and job opportunities for New York by liberalizing advertising and signage restrictions on licensed premises, and increasing annual per brand dollar limitations for certain advertising and promotion materials to adjust for inflation since the original enactment of Parts 86.3 (product displays) and 86.5 (retailer advertising specialties), thereby eliminating several outdated and anachronistic regulatory restrictions for alcoholic beverage manufacturers, wholesalers and marketing agencies alike.

#### Needs and benefits:

These regulatory proposals will help modernize administration of the ABCL in keeping with the new public policy goals of supporting economic growth and job development by liberalizing various advertising and signage restrictions on licensed premises, specifically authorizing digital signs for the first time, and increasing annual per brand dollar limitations for certain advertising and promotional materials to match the inflation adjusted numbers that the alcoholic beverage industry in New York is currently operating with.

#### Costs:

There will be no additional costs to regulated parties or to local governments resulting from these proposals. In an effort to comply with the Consumer Price Index cost of living adjustments required pursuant to Part 86.2, the State Liquor Authority has already been advising industry members to utilize the increased per brand dollar limitations as inflation adjusted numbers via both verbal advice at open meetings and written advice in the form of a website posting of proposed rule amendments and as part of an overall effort to provide inflation adjusted numbers to the industry in a transparent and business friendly manner. As a result, the alcoholic beverage industry in New York has already been operating with an effective \$300 per brand per year limit on product displays and a \$200 per brand per year limit on retailer advertising specialties for some time. Due to the above, there will be no added costs to the State Liquor Authority, to regulated parties or to local governments as a result of the implementation of the proposed rule amendments.

#### Local government mandates:

None. Local governments are not involved in the manufacture, distribution or retail sale of alcoholic beverages or the marketing of same, and therefore would not be impacted by the proposed rule amendments.

#### Paperwork:

The proposed rule amendments impose no new recordkeeping or reporting requirements to industry members.

#### Duplication:

The federal Alcohol and Tobacco Tax and Trade Bureau rules no lon-

ger draw a distinction between point of sale advertising that either does or does not have a secondary use for the retailer, and there is no longer any annual dollar limitations for either under the federal rules. In New York, several industry members have cautioned the Authority that they would prefer to see the annual dollar limitations for retailer advertising specialties codified to match the currently enforced inflation adjusted numbers of \$200 per brand per year and that they would be reluctant to see the New York dollar limitations done away with entirely to match the federal rules. With regard to product displays, the Alcohol and Tobacco Tax and Trade Bureau rules also caps spending at \$300 per brand per year per retailer, except that manufacturers and wholesalers have the ability under federal rules to combine their annual dollar amounts for different brands to exceed the annual \$300 limitation. New York has never allowed this and does not propose to do so via the instant proposed amendments.

#### Alternatives/federal standards:

As noted above, the State Liquor Authority could have chosen to propose removal of the dollar limitations on retailer advertising specialties altogether to match the federal rules on point but, after consulting with various industry representatives, chose to propose matching the inflation adjusted numbers currently being utilized by the industry.

#### Compliance schedule:

The period of time the industry will require to enable compliance is likely to be negligible as they are already likely in compliance with several of the proposals. The State Liquor Authority expects to be compliant immediately upon adoption.

#### Regulatory Flexibility Analysis

##### Effect of rule:

The proposed amendments to Parts 83.3, 86.2, 86.3, 86.4, 86.5, and 86.6 would affect approximately all 3000 wholesalers, manufacturers, and marketing permit holders and tens of thousands of on and off-premises retailers currently licensed or permitted by the State Liquor Authority.

##### Compliance requirements:

The proposed rule amendments would not impose any additional compliance requirements on small businesses or local governments.

##### Professional services:

No new professional services would be needed to comply with the proposed rule amendments.

##### Compliance costs:

The proposed rule amendments would not impose any initial capital costs or continuing compliance costs for regulated businesses or local governments.

##### Economic and technological feasibility:

Compliance with the proposed rule amendments by small businesses and local governments would be economically and technically feasible because the amendments would not impose any additional compliance requirements but would either relieve regulatory burdens on regulated businesses or conform regulations to current industry practices.

##### Minimizing adverse impact:

Since the proposed rule amendments would either relieve regulatory burdens on regulated businesses by liberalizing signage restrictions and increasing annual per brand dollar limitations on advertising materials or merely conform regulations to current industry practices, there is expected to be no adverse impact to regulated small businesses. It is anticipated that the rule amendments would have no impact on local governments.

##### Small business and local government participation:

Comments on the proposed rule amendments were solicited from all affected segments of the industry with generally favorable comments including from the executives of the three retail package store associations in New York who were unanimously in favor of the proposed amendments. The Authority did not engage with any local governments because it is anticipated that the proposed amendments would have no impact on local governments.

#### Rural Area Flexibility Analysis

##### Types and estimated numbers of rural areas:

The proposed amendments to 9 N.Y.C.R.R. Parts 83.3, 86.2, 86.3, 86.4, 86.5, and 86.6 would affect businesses throughout the state.

Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed rule amendments would not impose any additional compliance requirements on small businesses or local governments. No new professional services would be needed to comply with the proposed rule amendments.

##### Costs:

The proposed rule amendments would not impose any initial capital costs or continuing compliance costs for regulated businesses or local governments.

##### Minimizing adverse impact:

Since the proposed rule amendments would either relieve regulatory burdens on regulated businesses by liberalizing signage restrictions and

increasing annual per brand dollar limitations on advertising materials or merely conform regulations to current industry practices, there is expected to be no adverse impact to rural areas.

##### Rural area participation:

Among the businesses that would be positively affected by the proposed amendments would be bars, restaurants and package stores in rural areas. Authority staff shared the proposed rule amendments with all effected segments of the industry with generally favorable comments including from the executives of the three retail package store associations in New York who were unanimously in favor of the proposed amendments. Rural area businesses will be afforded the opportunity to directly participate in public hearings regarding the proposed amendments via webcast from either of the Authority's upstate offices in Albany or Buffalo.

#### Job Impact Statement

The proposed amendments to 9 N.Y.C.R.R. Parts 83.3, 86.2, 86.3, 86.4, 86.5, and 86.6 would relieve regulatory burdens on regulated businesses by liberalizing signage restrictions and increasing annual per brand dollar limitations on advertising materials or conform existing regulations to current industry practices. As a result, the proposed amendments will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendments that they will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken by the Authority. Accordingly, a job impact statement is not required for any of the proposed amendments and none has been prepared.

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## Long Island Power Authority

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Provisions of LIPA's Tariff for Adjustment to Rates and Changes of Service Classifications

I.D. No. LPA-02-15-00006-P

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

**Proposed Action:** The Long Island Power Authority ("LIPA") is considering a proposal to modify its Tariff for Electric Service ("Tariff") to update delivery charges, authorize reconciliation of energy efficiency revenues, and introduce a revenue decoupling mechanism.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Provisions of LIPA's Tariff for adjustment to rates and changes of service classifications.

**Purpose:** To modify and add to the Tariff in order to implement revenue-neutral changes required to maintain the 3-year LIPA rate freeze.

**Public hearing(s) will be held at:** 10:00 a.m., March 4, 2015 at H. Lee Dennison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; and 2:00 p.m., March 4, 2015 at 333 Earle Ovington Blvd., 4th Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority ("the Authority") Staff proposes to modify the Tariff for Electric Service ("Tariff") effective April 1, 2015 to: (1) update Delivery Charges consistent with the approved LIPA budget for 2015; (2) authorize the reconciliation of revenue to be recovered through the Energy Efficiency Cost Recovery Rate; and (3) introduce a Revenue Decoupling Mechanism.

The approved LIPA budget for 2015 incorporates a level of revenues that assumes no increase in rates, other than changes to the Power Supply Charge (also known as the Fuel and Purchased Power Cost Adjustment). As presented in the budget, however, a number of revenue-neutral changes are required to extend the rate freeze for 2015, align the components of the rates with their underlying costs, and bring the Tariff more into line with Public Service Commission policies for the regulated, investor-owned utilities. These proposed changes will not materially change the rates paid by customers in the aggregate for delivery service. The Power Supply Charge will continue to fluctuate with market conditions.

**Text of proposed rule and any required statements and analyses may be obtained from:** Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: jbell@lipower.org

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

**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.

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## Office of Mental Health

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

#### Clinic Treatment Programs

**I.D. No.** OMH-02-15-00003-P

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

**Proposed Action:** Amendment of Part 599 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.04, 43.01 and 43.02

**Subject:** Clinic Treatment Programs.

**Purpose:** Amend reimbursement structure for delivery of psychotherapy services; eliminate utilization threshold for court-mandated services.

**Text of proposed rule:** 1. Subdivision (e) of Section 599.13 of Title 14 NYCRR is amended to read as follows:

(e) Payments for procedures will be determined by multiplying the assigned weight for the appropriate procedure code set forth at 10 NYCRR Part 86 by the base fee, and adjusting such fee for modifiers and discounts, as appropriate. When a modifier or discount is expressed as a percentage, it will adjust the payment by its percentage of the procedure weight. When more than one procedure applies to a visit, the highest value procedure shall be paid at its full fee value.

(1) Payments for additional procedures related to the visit will be discounted by 10 percent.

(2) Payments will be reduced by 25 percent for any visit in excess of 30, excluding crisis visits, off-site visits, complex care management, and any services that are counted as health services, provided during a state fiscal year to any individual who is 21 years of age or older on the first day of such fiscal year, and 50 percent for any visit in excess of 50, excluding crisis visits, off-site visits, complex care management, and any services counted as health services, provided during such fiscal year to any recipient, for fiscal years commencing on or after April 1, 2011, *except that effective January 1, 2015, this reduction in payment will not apply to court-mandated services.*

2. Subparagraph (i) of paragraph (6) of subdivision (d) of Section 599.14 of Title 14 NYCRR is amended to read as follows:

(6) Psychotherapy services. Psychotherapy services consist of the following levels of billable service.

(i) Psychotherapy services - individual shall be reimbursed as follows:

(a) brief individual psychotherapy service: [requires face-to-face service with the recipient of a minimum duration of 30 minutes; or]

(1) *service provided face to face with the recipient with a documented duration of 30 minutes shall receive full reimbursement; or*

(2) *effective January 1, 2015, service provided face to face with the recipient with a documented duration of 20 minutes shall receive a 30 percent reduction in reimbursement.*

(b) extended individual psychotherapy service: [requires documented face-to-face service with the recipient of a minimum duration of 45 minutes.]

(1) *service provided face to face with the recipient requires a documented duration of 45 minutes; or*

(2) *effective January 1, 2015, service provided face to face with the recipient requires a documented duration of 30 minutes (with or without a collateral), with the remaining 15 minutes spent with the collateral (with or without the recipient);*

(3) For school-based services, the duration of such services may be that of the school period provided the school period is of a duration of at least 40 minutes.

(c) Brief or Extended Psychotherapy Services provided on or after October 1, 2010, to a child off-site shall be reimbursable on a Federally-non-participating basis and only for children up to age 19.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

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

#### Regulatory Impact Statement

1. Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction, and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for adults diagnosed with mental illness or children diagnosed with emotional disturbance, pursuant to an operating certificate.

Section 43.01 of the Mental Hygiene Law gives the Commissioner the authority to set rates for outpatient services at facilities operated by the Office of Mental Health.

Section 43.02 of the Mental Hygiene Law provides that payments under the Medical Assistance Program for outpatient services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget.

Section 43.02(b) of the Mental Hygiene Law authorizes the Commissioner to request from operators of facilities licensed by the Office of Mental Health such financial, statistical and program information as the Commissioner may determine to be necessary.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The proposed rule furthers the legislative policy of providing high quality outpatient mental health services to individuals with mental illness in a cost-effective manner. Part 599 of Title 14 NYCRR sets forth standards for the certification, operation and reimbursement of clinic treatment programs serving adults and children. In the four years since the Office of Mental Health (OMH) adopted Part 599 to establish a new, redesigned clinic structure, provider feedback has provided valuable insight into suggested changes to the regulation. As a result, OMH has amended its clinic regulations on several occasions; these technical changes are a continuation of this process.

3. Needs and Benefits: Under existing regulations, reimbursement is discounted for certain services provided in excess of established thresholds. Currently, payments are reduced by 25 percent for any visit in excess of 30 (excluding crisis visits, off-site visits, complex care management and services counted as health services) provided during a state fiscal year to any individual who is 21 years of age or older on the first day of such fiscal year, and 50 percent for any visit in excess of 50 (excluding crisis visits, off-site visits, complex care management, and any services counted as health services) provided during such fiscal year to any recipient. To provide regulatory relief and ensure that providers are not penalized by a reduction in reimbursement when visits have been required by the court, the Office is proposing to eliminate these utilization thresholds for court-mandated services. Therefore, effective January 1, 2015, the reduction in payment for visits in excess of the stated amounts will not apply to court-mandated services.

In addition, the proposal amends the reimbursement structure for "brief individual psychotherapy services" and "extended individual psychotherapy services." Under existing regulations, brief individual psychotherapy services must be provided face to face with the recipient for a minimum duration of 30 minutes. Under this proposal, clinics would have the option of providing brief individual psychotherapy services for a duration of 20 minutes. Clinics would then receive a 30 percent reduction in reimbursement for these services provided for 20 minutes. Extended individual psychotherapy services currently require documented face-to-face services with the recipient for a minimum duration of 45 minutes. Under this proposal, clinics would have the option of providing extended individual psychotherapy services to the recipient for a documented duration of 30 minutes (with or without a collateral), with the remaining 15 minutes being spent with the collateral (with or without the recipient). These adjustments serve to provide flexibility and regulatory relief and, based on provider feedback, more accurately reflect the needs of recipients of service and standards of good clinical care. These amendments would be effective as of January 1, 2015.

4. Costs:
- (a) cost to State government: The costs to State government as a result of these regulatory amendments are estimated to be \$4.375 million. The funding source for these changes is part of the funding in the Behavioral Health Transformation Initiative made available to OMH to preserve critical access.
  - (b) cost to local government: There are no new costs to local government as a result of these regulatory amendments.
  - (c) cost to regulated parties: There are no new costs to regulated parties as a result of these regulatory amendments.
5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.
6. Paperwork: No increased paperwork is anticipated as a result of these regulatory amendments. Under existing regulations, regulated parties are required to supply the necessary documentation with respect to services provided. Under the amendment, providers will be required to use a modifier or an additional rate code when billing for court-mandated services over the threshold limits and psychotherapy services provided for a 20-minute duration. OMH will provide billing guidance to assist in this process.
7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.
8. Alternatives: OMH is proposing these amendments based on provider feedback. The only alternative to the regulatory amendment would be inaction, which would be contrary to the recommendations of providers to allow flexibility in the delivery of services to more accurately reflect the needs of recipients and standards of good clinical care.
9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.
10. Compliance Schedule: The regulatory amendments will be effective immediately upon adoption.

**Regulatory Flexibility Analysis**

The amendments to 14 NYCRR Part 599 are intended to provide regulatory relief to mental health clinic providers and allow flexibility in the delivery of services to more accurately reflect the needs of recipients and standards of good clinical care. As there will be no adverse economic impact on small businesses or local governments as a result of these amendments, a regulatory flexibility analysis is not submitted with this notice.

**Rural Area Flexibility Analysis**

The amendments to 14 NYCRR Part 599 are intended to provide regulatory relief to mental health clinic providers and allow flexibility in the delivery of services to more accurately reflect the needs of recipients and standards of good clinical care. The proposed rule will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

**Job Impact Statement**

The amendments to 14 NYCRR Part 599 are intended to provide regulatory relief to clinic providers and allow flexibility in the delivery of mental health services to more accurately reflect the needs of recipients and standards of good clinical care. As it is evident from the subject matter that there will be no adverse impact on jobs and employment opportunities as a result of these amendments, a Job Impact Statement is not submitted with this notice.

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## Office for People with Developmental Disabilities

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**EMERGENCY/PROPOSED  
RULE MAKING  
HEARING(S) SCHEDULED**

**Direct Care and Clinical Compensation Payments**

**I.D. No.** PDD-02-15-00007-EP

**Filing No.** 1102

**Filing Date:** 2014-12-30

**Effective Date:** 2015-01-01

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

**Proposed Action:** Amendment of Part 641 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b), 41.24, 41.36(c) and 43.02

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

**Specific reasons underlying the finding of necessity:** The emergency adoption of these regulations, which amend rates and fees for eligible programs and services, is necessary to protect the health, safety, and welfare of individuals receiving services. The amendments support increases in salaries and related fringe benefits for direct care professionals and clinical staff providing residential habilitation services in community residences and family care homes; ICF/DD services; Specialty Hospital services; and day treatment, community habilitation, day habilitation, supported employment, prevocational and respite services.

The emergency adoption of these amendments is necessary in order to provide vital services and to comply with recently enacted state law.

Part I of chapter 60 of the laws of 2014, which is part of the 2014 – 15 enacted budget, requires OPWDD to provide funding beginning January 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care staff, and also to provide funding beginning April 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care and clinical staff.

Direct care professionals and clinical staff provide vital supports and services to protect the health, safety, and welfare of individuals with developmental disabilities in these eligible programs and services. The programs affected by these regulations have not received trend factors, COLAs or other across the board increases for several years. As a result, many providers operating these programs have been unable increase salaries or fringe benefits for direct care, support and clinical staff. Without such increases, it is more difficult for providers to maintain sufficient staffing to operate programs, and staff turnover is more likely. Without the emergency amendments, the funding for these compensation increases would be delayed and stable and sufficient staffing for the services affected by these amendments would be jeopardized.

**Subject:** Direct Care and Clinical Compensation Payments.

**Purpose:** To amend rate-setting for eligible services in order to implement increases in direct care and clinical compensation.

**Public hearing(s) will be held at:** 12:30 p.m., March 2, 2015 at Office for People with Developmental Disabilities, Counsel’s Office Conference Rm., 44 Holland Ave., Albany, NY; 12:30 p.m., March 3, 2015 at Office for People with Developmental Disabilities, Counsel’s Office Conference Rm., 44 Holland Ave., Albany, NY.

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

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

**Text of emergency/proposed rule:** • 14 NYCRR Part 641 is amended by the addition of a new Subpart 641-3 to read as follows:

*Subpart 641-3. Direct Support and Clinical Compensation Increases.*

*641-3.1. Applicability. On or after January 1, 2015, rates of reimbursement for providers that operate eligible programs as defined in this Subpart will be revised to incorporate funding for compensation increases to their direct support professional employees. Such rate increases will be effective January 1, 2015. The compensation increase funding will be included in the provider’s rate issued for January 1, 2015 or in a subsequent rate with the inclusion of funding in the amount necessary to achieve the same funding impact as if the rate had been issued on January 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits.*

*641-3.2. Definitions. As used in this Subpart, the following terms shall have the following meanings:*

*(a) Direct support professionals are those defined as Direct Care and Support per Consolidated Fiscal Report (CFR) Appendix R and reported on the CFR under the Position Title code identifiers of 100 or 200. Contracted staff salary information will not be utilized.*

*(b) Clinical staff are those defined as Clinical per CFR Appendix R and reported on the CFR under the Position Title code identifier of 300. Contracted staff salary information will not be utilized.*

*(c) Eligible Rate Based Programs shall mean any of the following services: supervised community residences (including supervised IRAs), supportive community residences (including supportive IRAs), ICFs/DD or group day habilitation programs.*

*(d) Other Eligible Programs shall mean community habilitation, day treatment, supported employment, agency sponsored family care, respite and free standing respite, and prevocational services.*

**641-3.3. Increases for Eligible Rate Based Programs**

(a) January 1, 2015 Increase. Rates for Eligible Rate Based Programs will be revised to incorporate funding for compensation increases to direct support professional employees. Such rate increases will be effective January 1, 2015. The compensation increase funding will be included in the provider's rate issued for January 1, 2015 or in a subsequent rate with the inclusion of funding in the amount necessary to achieve the same funding impact as if the rate had been issued on January 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits.

(b) April 1, 2015 Increase. In addition to the compensation funding effective January 1, 2015, providers that operate supervised IRAs, including supervised community residences, supportive IRAs, including supportive community residences, ICFs/DD or group day habilitation will receive a compensation increase targeted to direct support professional and clinical employees to be effective April 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits. The April 1, 2015 direct support professional compensation funding will be the same, on an annualized basis, as that which was calculated for the January 1, 2015 compensation increase and will be an augmentation to the January 1, 2015 increase.

(c) Calculations. The basis for the calculation of provider and regional direct care, support and clinical salary averages and associated fringe benefit percentages will be the data in providers' July 1, 2010 - June 30, 2011 or January 1, 2011 - December 31, 2011 CFRs.

(1) The January 1, 2015 and April 1, 2015 Direct Support Professionals compensation increase funding formula will be as follows:

(i) The annual impact of a two percent increase to 2010-11 or 2011 salaried direct care, salaried support dollars and associated fringe benefits will be calculated.

(ii) The annual impact of the two percent increase for salaried direct care dollars, salaried support dollars and associated fringe will be added to the appropriate operating components in the rate methodology. This will result in a recalculation of provider and regional average direct care wages, provider and regional average employee-related components, provider and regional average program support components, and provider and regional average direct care hourly rates.

(iii) The provider direct care hourly rate - adjusted for a wage equalization factor will be recalculated to utilize the provider average direct care hourly rate and regional average direct care hourly rate (as calculated in (ii) above).

(iv) An identification will be made of the dollar difference between the provider direct care hourly rate - adjusted for a wage equalization factor, which is in the rate in effect on 12/31/2014, and the provider direct care hourly rate - adjusted for a wage equalization factor, as calculated in (iii) above.

(v) The rate difference identified in (iv) above will be multiplied by the calculated direct care hours in the rate in effect on 12/31/2014 to calculate the additional funding generated by the direct care compensation adjustment.

(vi) The rate add-on for the compensation increase shall be determined by dividing the additional funding, as calculated in (v) above by the rate sheet units in effect on January 1, 2015.

(2) The April 1, 2015 Clinical compensation increase funding formula will be as follows:

(i) The annual impact of a two percent increase to 2010-11 or 2011 salaried clinical dollars and associated fringe benefits will be calculated.

(ii) The annual impact of the two percent increase for salaried clinical dollars and associated fringe will be added to the appropriate operating components in the rate methodology. This will result in a recalculation of provider and regional average employee-related components, and provider and regional average clinical hourly wages.

(iii) The provider clinical hourly wage - adjusted for a wage equalization factor will be recalculated to utilize the provider average clinical hourly wage and the regional average clinical hourly wage (as calculated in (ii) above).

(iv) An identification will be made of the dollar difference between the provider clinical hourly wage - adjusted for a wage equalization factor, which is in the rate in effect on 12/31/2014, and the provider clinical hourly wage - adjusted for a wage equalization factor, as calculated in (iii) above.

(v) The rate difference identified in (iv) above will be multiplied by the provider salaried clinical hours in the rate in effect on 12/31/2014 to calculate the additional funding generated by the clinical compensation adjustment.

(vi) The rate add-on for the compensation increase shall be determined by dividing the additional funding, as calculated in (v) above by the rate sheet units in effect on January 1, 2015.

(3) Rates for individuals identified by OPWDD as qualifying for specialized template populations funding shall be adjusted as follows:

(i) January 1, 2015 Increase. The fees for specialized template

populations funding will be revised to incorporate funding for compensation increases to direct support professional employees. Such fee increases will be effective January 1, 2015. The compensation increase funding will be included in the provider's fee issued for January 1, 2015 or in a subsequent fee with the inclusion of funding in the amount necessary to achieve the same funding impact as if the fee had been issued on January 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits.

(ii) April 1, 2015 Increase. In addition to compensation funding effective January 1, 2015, the fees for specialized template population funding will be revised to incorporate funding for a compensation increase to direct support professional and clinical employees to be effective April 1, 2015. The April 1, 2015 direct support compensation funding will be the same, on an annualized basis, as that which was calculated for the January 1, 2015 compensation increase and will be an augmentation to the January 1, 2015 increase.

(iii) Calculations.

(a) The portion of the fee that is identified as direct care and support will be increased by 2% and multiplied by the fee sheet fringe benefit percentage to calculate the additional direct support compensation increases for January first, two thousand fifteen and April first, two thousand fifteen.

(b) The portion of the fee that is identified as clinical will be increased by 2% and multiplied by the fee sheet fringe benefit percentage to calculate the additional clinical compensation increase for April first, two thousand fifteen.

**641-3.4 Rates and Fees for Other Eligible Programs**

(a) For a provider that operates any Other Eligible Programs, the provider's rate or fee for each such program will be revised to incorporate funding for compensation increases to their direct support professional employees. Such rate or fee increases will be effective January 1, 2015. The compensation increase funding will be included in the provider's rate or fee issued for January 1, 2015 or in a subsequent rate with the inclusion of funding in the amount necessary to achieve the same funding impact as if the rate or fee had been issued on January 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits.

(b) April 1, 2015 Increase. In addition to the compensation funding effective January 1, 2015, a provider that operates any Other Eligible Programs will receive a compensation increase targeted to direct support professional and clinical employees to be effective April 1, 2015. The April 1, 2015 direct care compensation funding will be the same, on an annualized basis, as that which was calculated for the January 1, 2015 compensation increase and will be an augmentation to the January 1, 2015 increase.

(c) Calculations.

(1) The portion of the rate or fee that is identified as direct care and support will be increased by 2% and multiplied by the rate or fee sheet fringe benefit percentage to calculate the additional direct care compensation increases for January 1, 2015 and April 1, 2015.

(2) The portion of the rate or fee that is identified as clinical will be increased by 2% and multiplied by the rate or fee sheet fringe benefit percentage to calculate the additional clinical compensation increase for April 1, 2015.

**641-3.4 Rates and Fees for Specialty Hospitals**

(a) January 1, 2015 Increase. The rates of reimbursement for specialty hospitals as defined in Part 680 of this Title will be revised to incorporate funding for compensation increases to direct support professional employees. Such rate increases will be effective January 1, 2015. The compensation increase funding will be included in the provider's rate issued for January 1, 2015 or in a subsequent rate with the inclusion of funding in the amount necessary to achieve the same funding impact as if the rate had been issued on January 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits.

(b) April 1, 2015 Increase. In addition to the compensation funding effective January 1, 2015, providers that operate specialty hospitals will receive a compensation increase targeted to direct support professional and clinical employees to be effective April 1, 2015. The compensation increase funding will be inclusive of associated fringe benefits. The April 1, 2015 direct support professional compensation funding will be the same, on an annualized basis, as that which was calculated for the January 1, 2015 compensation increase and will be an augmentation to the January 1, 2015 increase.

(c) Calculations. The basis for the calculation of direct care, support and clinical salary averages will be the data from the provider's January 1, 2011 - December 31, 2011 CFR. The fringe benefit percentage will be that fringe benefit percentage utilized in the provider's December 31, 2014 specialty hospital rate.

(1) The January 1, 2015 and April 1, 2015 Direct Support Professional compensation increase funding formula will be:

(i) The annual impact of a two percent increase to 2011 salaried direct care and salaried support dollars and associated fringe benefits will be calculated.

(ii) The annual impact of the two percent increase for salaried direct care dollars, salaried support dollars and associated fringe will be added to the appropriate operating components in the provider's specialty hospital rate.

(iii) The rate add-on, as calculated in (ii) above, shall be added to total allowable costs and those allowable costs shall be divided by the total patient days in the December 31, 2014 rate.

(2) The April 1, 2015 Clinical compensation increase funding formula will be:

(i) The annual impact of a two percent increase to 2011 clinical dollars and associated fringe benefits will be calculated.

(ii) The annual impact of the two percent increase for salaried clinical dollars, and associated fringe will be added to the appropriate operating components in the provider's specialty hospital rate.

(iii) The rate add-on, as calculated in (ii) above, shall be added to total allowable costs and those allowable costs shall be divided by the total patient days in the December 31, 2014 rate.

**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 March 29, 2015.

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

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

**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.

#### Regulatory Impact Statement

##### 1. Statutory Authority:

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for other services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

c. Part I of chapter 60 of the laws of 2014, which is part of the 2014 – 15 enacted budget, requires OPWDD to provide funding beginning January 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care staff, and also to provide funding beginning April 1, 2015 to support a 2% increase in annual salary and salary-related fringe benefits for direct care and clinical staff.

2. Legislative Objective: These emergency/proposed regulations further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law, and in Part I of chapter 60 of the laws of 2014. The regulations amend the methodology for determining rates and fees for ICFs/DD, residential habilitation provided in community residences and family care homes, day treatment, community habilitation, day habilitation, supported employment, prevocational, respite services and specialty hospitals.

3. Needs and Benefits: Direct support staff play an essential role in delivering services to persons with developmental disabilities in New York State. In recognition of the key role these workers play, the 2014 – 15 enacted budget included funding to support a 2% increase for direct support staff in January 1, 2015, and an additional 2% increase in April 1, 2015 for direct support staff, as well as a 2% increase for clinical staff beginning on April 1, 2015. OPWDD and the Department of Health (DOH) are revising the methodologies for the affected residential and day programs to include funding to support these increases.

##### 4. Costs:

a. Costs to the Agency and to the State and its local governments: The proposed regulations result in additional costs of approximately \$34.6 million per year. Of this amount, approximately \$17.3 million will be State costs, and \$17.3 will be federal costs.

The new methodologies do not apply to the state as a provider of services.

There will be no savings or costs to local governments as a result of these regulations because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. In addition, even if the amendments lead to an increase in Medicaid expenditures in a particular county, these amendments will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped. Chapter 58 of

the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

b. Costs to private regulated parties: The proposed regulations will increase rates and fees for ICFs/DD, residential habilitation provided in community residences and family care homes, day treatment, community habilitation, day habilitation, supported employment, prevocational and respite services.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village, or school, fire, or other special district.

6. Paperwork: The amendments will increase paperwork to be completed by providers. Each provider will have to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: Since the increases in rates and fees are mandated by State law, OPWDD and DOH did not consider any alternatives.

9. Federal Standards: The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The emergency/proposed regulations are effective January 1, 2015. OPWDD expects to permanently adopt the regulations at the end of the public comments period. OPWDD and DOH expect to increase the January 1 rates and fees as soon as possible and to increase the April 1 rates and fees on April 1, 2015.

#### Regulatory Flexibility Analysis

1. Effect on small business: The emergency/proposed regulations amend the methodology for determining rates and fees for ICFs/DD, residential habilitation provided in community residences and family care homes, day treatment, community habilitation, day habilitation, supported employment, prevocational, respite services and specialty hospitals. OPWDD has determined, through a review of the certified cost reports, that all specialty hospital services, and most of the other services listed above, are provided by agencies that employ more than 100 people overall. However, some smaller agencies that employ fewer than 100 employees overall would be classified as small businesses. The number of providers for each of the eligible programs are as follows:

IRAs and CRs: 398  
day habilitation services: 370  
ICFs/DD: 120  
family care homes: 32  
day treatment: 16  
community habilitation: 273  
supported employment: 165  
prevocational services: 94  
respite services: 295

OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed regulations change the methodologies for rates and fees for the eligible programs to provide funding to support a January 1, 2015 2% salary increase and an April 1, 2015 2% increase for direct support staff, as well as an April 1, 2015 2% increase for clinical staff. The new methodologies will increase rates and fees for all providers of the eligible services.

2. Compliance requirements: The proposed regulations will require each provider to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

3. Professional services: No additional professional services will be required as a result of these regulations and the regulations will not add to the professional service needs of local governments.

4. Compliance costs: The emergency/proposed regulations will increase paperwork to be completed by providers. Each provider will have to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

5. Economic and technological feasibility: The emergency/proposed regulations do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse impact: Because the emergency/proposed regulations increase funding to providers, they have no adverse economic impact. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees. However, the attestation is required by the enacted budget and is needed to ensure that the compensation increases are used for their intended purpose.

OPWDD has also reviewed and considered the approaches for minimiz-

ing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. OPWDD determined that the revision to reimbursement proposed in this amendment is the most optimal approach to instituting the necessary change in rate methodology while minimizing any adverse impact on providers.

7. Small business participation: Participation of public and private interests in rural areas: The proposed methodologies for the direct care and clinical compensation payments were described to providers in a December 8, 2014 letter, and were discussed with representatives of providers at a meeting held on December 15, 2014. This meeting included representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA) (which represents some providers who have fewer than 100 employees).

OPWDD will be mailing these proposed regulations to all providers, including providers that are small businesses, and will be holding public hearings on the proposed regulations.

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

1. Description of the types and estimation of the number of rural areas in which the rule will apply: With the exception of specialty hospital services, which are only provided in New York County, OPWDD services are provided in every county in New York State. 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, certain townships in 10 other counties have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The proposed regulations change the methodologies for rates and fees for the affected programs to provide funding to support January 1 and April 1, 2015 2% salary increases for direct support staff, as well as an April 1, 2015 2% increase for clinical staff. The new methodologies will increase rates and fees for all providers of the eligible services.

2. Compliance requirements: The emergency/proposed regulations will require each provider to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

The amendments will have no effect on local governments.

3. Professional services: No additional professional services will be required as a result of these regulations and the regulations will not add to the professional service needs of local governments.

4. Compliance costs: The proposed regulations will require each provider to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees.

5. Minimizing adverse impact: Because the emergency/proposed regulations increase funding to providers, they have no adverse economic impact. Each provider will need to submit an attestation, signed by members of the board of directors, stating how the provider will distribute the direct care and clinical compensation payments to its employees. However, the attestation is required by the enacted budget.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD determined that the revision to reimbursement proposed in this amendment is the most optimal approach to instituting the necessary change in rate methodology while minimizing any adverse impact on providers.

6. Participation of public and private interests in rural areas: The proposed methodologies for the direct care and clinical compensation payments were described to providers in a December 8, 2014 letter, and were discussed with representatives of providers at a meeting held on December 15, 2014. This meeting included providers in rural areas, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS.

OPWDD will be mailing these proposed regulations to all providers, including providers from rural areas, and will be holding public hearings on the proposed regulations.

#### **Job Impact Statement**

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full time annual jobs State wide. The proposed regulations change the methodologies for rates and fees for the affected programs to provide funding to support a January 1, 2015 2% salary increase and an April 1, 2015 2% increase for direct support staff, as well as an April 1, 2015 2% increase for clinical staff for the affected residential and day programs, to include funding to support these increases. The new methodologies will

increase rates and fees for all providers of the affected services, and all providers must spend the increase on compensation for direct care and clinical staff. Therefore, OPWDD expects that there will be no overall effect on jobs and employment opportunities as a result of these amendments.

## **EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED**

### **Updates to SSI Offset and SNAP Benefit Offset**

**I.D. No.** PDD-02-15-00008-EP

**Filing No.** 1103

**Filing Date:** 2014-12-30

**Effective Date:** 2015-01-01

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

**Proposed Action:** Amendment of Subpart 641-1, sections 671.7 and 686.17 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b), 41.24, 41.36(c) and 43.02

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

**Specific reasons underlying the finding of necessity:** The emergency adoption of these amendments, which update the rent allowance offset for Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and the Supplemental Nutrition Assistance Program (SNAP) benefit offset for supervised IRAs and supervised CRs, is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system.

The figures found in the emergency amendments were not available to OPWDD within a timeframe that would have allowed OPWDD to propose the amendments through the regular rulemaking process. Without the emergency amendments, reimbursement established by OPWDD for rent and food costs would not have been properly offset by the actual amount of rent or reimbursement for food costs received by providers.

The State would have overpaid providers by amounts equivalent to the increase in the SSI and SNAP benefits. The amount overpaid by the State would likely have been recovered by imposing a reduction in reimbursement to providers for the delivery of services to individuals with developmental disabilities. This reduction in reimbursement would have adversely affected the health, safety, and/or welfare of the individuals receiving those services. In addition, the amendments change the rent allowance offset from a daily amount to a monthly amount, in conformance with methodology changes made as part of rate reform effective July 1, 2014.

The emergency adoption of these amendments is necessary in order to avoid an overall reduction in reimbursement to providers and to preserve the health, safety, and welfare of individuals receiving services in the OPWDD system.

**Subject:** Updates to SSI offset and SNAP benefit offset.

**Purpose:** To adjust reimbursement to affected providers for rent and food costs.

**Public hearing(s) will be held at:** 11:00 a.m., March 2, 2015 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., 44 Holland Ave., Albany, NY; and 11:00 a.m., March 3, 2015 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., Holland Ave., Albany, NY.

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

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

**Text of emergency/proposed rule:** • Subparagraphs 641-1.3(c)(6)(ii) and (iii) are amended as follows:

(ii) Supplemental security income, as determined by section 671.7(b)(9)[(xxi)] (xxii) of this Title, annualized and multiplied by a provider's initial period rate sheet capacity.

(iii) Supplemental nutrition assistance, as determined by section 671.7(b)(10)(i)[(c)] (e) of this Title, and multiplied by twelve, such product to be multiplied by a provider's initial period rate sheet capacity.

Note: rest of paragraph (6) remains unchanged.

• Subparagraph 641-1.3(d)(6) (ii) is amended as follows:

(ii) Supplemental security income, as determined by section 671.7(b)(9)[(xxi)] (xxii) of this Title, annualized and multiplied by a provider's initial period rate sheet capacity.

Note: rest of paragraph (6) remains unchanged.

• Section 671.7(b)(9) is amended by the addition of a new subparagraph (xxii) as follows:

(xxii) *Effective January 1, 2015:*

*NYC, Nassau, Rockland, Suffolk, and Westchester Counties \$1005.00 per month*

*Rest of State \$975.00 per month*

Note: Rest of paragraph (9) remains unchanged.

• Subparagraph 671.7(b)(10)(i) is amended by the addition of clause (e) as follows:

(e) *Effective January 1, 2015, the offset shall be \$194 per month.*

• Subparagraph 686.17(b)(1)(iii) is amended by the addition of a new clause (d) as follows:

(d) *Effective January 1, 2015, the individual shall pay the provider \$194 per month.*

• Subparagraph 686.17(b)(2)(iii) is amended by the addition of a new clause (d) as follows:

(d) *Effective January 1, 2015, the individual shall pay the provider \$194 per month.*

• Clause 686.17(d)(2)(iii)(b) is amended by the addition of a new subclause (4) as follows:

(4) *Effective January 1, 2015, the individual shall pay the provider \$194 per month.*

**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 March 29, 2015.

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

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

**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.

#### **Regulatory Impact Statement**

1. Statutory Authority:

a. OPWDD has the authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. Section 41.25 of the Mental Hygiene Law allows providers of services to establish fee schedules for services and requires that fees charged or payments requested take into account costs and ability to pay, considering resources available from private and public assistance programs.

c. Section 41.36(c) of the Mental Hygiene Law requires OPWDD to establish fees or rates for community residences.

d. OPWDD has the responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OPWDD.

2. Legislative Objectives: These emergency/proposed amendments further the legislative objectives embodied in sections 13.09(b), 41.25, 41.36 and 43.02 of the Mental Hygiene Law. The emergency/proposed amendments update the rent allowance offset for Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and the Supplemental Nutrition Assistance Program (SNAP) benefit offset for supervised CRs and supervised IRAs.

3. Needs and Benefits: Section (a) below describes the needs and benefits of the update to the rent allowance offset, and section (b) does the same for the update to the SNAP benefit offset.

a. An essential element of OPWDD's price setting and reimbursement methodologies for IRAs and CRs is an offset for rent which is based on the Supplemental Security Income (SSI) per diem allowances consistent with levels determined by the Federal Social Security Administration for Congregate Care level II. SSI levels for 2015 were increased. Without these amendments, the prices established by OPWDD for these facilities would not have been properly offset by the amount of rent received by the provider from other sources (primarily SSI). In addition, the amendments change the rent allowance offset from a daily amount to a monthly amount, to reflect the methodology changes made as part of rate reform effective July 1, 2014.

b. Effective October 1, 2014, SNAP benefits are increasing to a maximum of \$194 per month. The emergency/proposed amendments change the amount that individuals pay their respective supervised CR or supervised IRA providers effective January 1, 2015 to reflect this increased amount, and state that reimbursement to these affected provid-

ers be offset by the increased amount. OPWDD considers that these amendments are necessary to prevent individuals from using other resources (which may be scarce or limited) to pay for food and to prevent an overall reduction in reimbursement for food to operators of supervised CRs and supervised IRAs.

4. Costs:

a. Costs to the Agency and to the State and its local governments.

Regarding the rent allowance offset, the modest increase in the rent and board offset in the methodology for setting prices for community residences and IRAs will reduce overall State expenditures for these programs by \$1,660,000.

There will be no impact to local governments as a result of any of these amendments.

b. Costs to private regulated parties: There are no initial capital investment costs or initial non-capital expenses for either of these amendments.

The adjustments to reimbursement to providers found in these amendments result in an overall fiscal impact on providers that is cost neutral. The adjustments to reimbursement compensate providers for changes to revenue received from outside sources (i.e., SSI and SNAP benefits received from the federal government).

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The amendments do not require any paperwork of providers.

7. Duplication: Although the emergency/proposed amendments are derived from figures found in existing State and/or federal requirements, the amendments do not duplicate any existing requirements that are applicable to IRAs and CRs or other services for persons with developmental disabilities.

8. Alternatives: OPWDD did not consider any alternatives to the emergency/proposed amendments because not adjusting reimbursement for providers, and, in the case of the SNAP benefit offset, not adjusting the payment for food required of individuals, would have resulted in paying incorrect amounts to IRA and CR providers.

Additionally, there is no alternative to the emergency adoption of these amendments as the figures found in the amendments were not available to OPWDD within a timeframe that would have allowed for OPWDD to propose the amendments through the regular rulemaking process.

9. Federal Standards: The emergency/proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The emergency rule is effective January 1, 2015. OPWDD has concurrently filed the rule as a Notice of Proposed Rule Making, and it intends to finalize the rule as soon as possible within the time frames mandated by the State Administrative Procedure Act. These amendments do not impose any new requirements with which regulated parties are expected to comply.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis for small businesses and local governments is not submitted because these amendments do not impose any adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses. There are no professional services, capital, or other compliance costs imposed on small businesses as a result of these amendments.

The emergency/proposed amendments are concerned with updating the rent allowance offset for Individualized Residential Alternatives (IRAs) and Community Residences (CRs) and the Supplemental Nutrition Assistance Program (SNAP) benefit offset for supervised IRAs and supervised CRs. The amendments result in an overall fiscal impact that is cost neutral for the affected facilities and services, and further, the amendments do not result in any new compliance requirements. Due to an overall cost neutral fiscal impact and no new compliance requirements, the emergency/proposed amendments do not have any adverse effects on regulated parties.

These amendments do not impose any requirements on local governments.

These amendments will consequently have no adverse impacts on small businesses or local governments.

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

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments do not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the amendments.

The emergency/proposed amendments are concerned with updating the rent allowance offset for Individualized Residential Alternatives (IRAs) & Community Residences (CRs) and the Supplemental Nutrition Assistance

Program (SNAP) benefit offset for supervised IRAs and supervised CRs. The amendments result in an overall fiscal impact that is cost neutral for the affected facilities and services, and further, the amendments do not result in any new compliance requirements. Due to an overall cost neutral fiscal impact and no new compliance requirements, the emergency/proposed amendments do not have any adverse effects on regulated parties.

The amendments will consequently have no adverse impacts on public or private entities in rural areas.

#### **Job Impact Statement**

A Job Impact Statement for the emergency/proposed amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they do not have a substantial adverse impact on jobs and/or employment opportunities.

The emergency/proposed amendments are concerned with updating the rent allowance offset for Individualized Residential Alternatives (IRAs) and Community Residences (CRs), and updating the Supplemental Nutrition Assistance Program (SNAP) benefit offset for supervised CRs and supervised IRAs. The amendments result in an overall fiscal impact that is cost neutral for the affected facilities and services. Due to an overall cost neutral fiscal impact and no new compliance requirements, the emergency/proposed amendments do not have a substantial adverse impact on jobs or employment opportunities in New York State.

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## Public Service Commission

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

#### **Approving the 2014 Electric Emergency Response Plans for New York's Six Major Electric Utilities**

**I.D. No.** PSC-02-15-00005-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 approving, rejecting or modifying, in whole or in part, New York's six major electric utilities' 2014 Electric Emergency Response Plans filed on 12/15/14.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1)-(3), 66(1)-(3), (5) and (21)

**Subject:** Approving the 2014 electric emergency response plans for New York's six major electric utilities.

**Purpose:** Approving the 2014 electric emergency response plans for New York's six major electric utilities.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the 2014 Electric Emergency Response Plans for Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Central Hudson Gas and Electric Corporation, New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, and Niagara Mohawk Power Corporation d/b/a National Grid (collectively referred to hereinafter as Utilities). The Commission may decide to approve, reject or modify the plans, in whole or in part. The Commission may also address 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:** Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: [Elaine.Agresta@dps.ny.gov](mailto:Elaine.Agresta@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](mailto:secretary@dps.ny.gov)

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

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

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

(14-E-0524SP1)

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## Department of State

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### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **Use of Truss Type, Pre-Engineered Wood or Timber Construction in Residential Structures**

**I.D. No.** DOS-02-15-00004-EP

**Filing No.** 1101

**Filing Date:** 2014-12-30

**Effective Date:** 2014-12-31

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

**Proposed Action:** Addition of Part 1265 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 382-b

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

**Specific reasons underlying the finding of necessity:** This rule is adopted by the State Fire Prevention and Building Code Council (the Code Council) as an emergency measure to preserve public safety and general welfare and because time is of the essence.

This rule implements Executive Law § 382-b, as added by Chapter 353 of the Laws of 2014. This rule requires any person who uses truss type, pre-engineered wood or timber construction in the construction of a new residential structure or an addition to or rehabilitation of an existing residential structure to give written notice of that fact to the local code enforcement official and to place a sign or symbol on the exterior of the structure to indicate to firefighters and first responders that truss type, pre-engineered wood or timber construction has been used in the structure. This rule also prescribes the form to be used to provide notification to the code enforcement official; prescribes the sign or symbol to be affixed to the structure; provides for the notification and coordination between and among the code official, the fire department, and the emergency response personnel contemplated by Executive Law § 382-b; and directs fire departments and emergency dispatch personnel to provide for the warnings to firefighters and first responders contemplated by Executive Law § 382-b.

Adoption of this rule on an emergency basis is necessary to preserve public safety because, as stated in the Memorandum in Support of the bill enacting Executive Law § 382-b, "(w)hile truss construction is very durable, when weakened by a fire, major components of a truss foundation can collapse suddenly without warning. When responding to a fire emergency, firefighters are unable to differentiate between a building constructed of truss foundation or another type of construction. As a result, in recent years truss constructions have been the cause of many preventable deaths of fire-fighters. It is imperative that firefighters are notified of the use of truss type construction so they can take appropriate measures that will protect the lives of residents and ensure their own safety. With the enactment of this bill, emergency responders will be able to take proper precautions in responding to a fire in a residential structure where truss type construction was utilized." Executive Law § 382-b provides that the form to be used to notify the code enforcement official of the use of truss type, pre-engineered wood or timber construction in a new construction, addition or rehabilitation project, and the sign or symbol to be affixed to the structure, must be prescribed by the Code Council. Executive Law § 382-b will become effective on January 1, 2015. Adoption of this rule on an emergency basis is necessary to assure that the sign or symbol indicating to firefighters and first responders that truss type, pre-engineered wood or timber construction will begin to be placed on structures on and after the January 1, 2015 effective date of Executive Law § 382-b.

Adoption of this rule on an emergency basis is also necessary to preserve the general welfare. Executive Law § 382-b provides that when truss type, pre-engineered wood or timber construction is used in the construction of a new residential structure or the addition to or rehabilitation of an existing residential structure, the code enforcement official cannot issue a certificate of occupancy for the structure unless the sign or symbol contemplated by Executive Law § 382-b has been affixed to the structure. Adopting this rule on an emergency basis is necessary to assure that the sign or symbol contemplated by Executive Law § 382-b will be promulgated by the January 1, 2015 effective date of Executive Law § 382-b which, in turn, is necessary to assure that certificates of occupancy can continue to be issued on and after January 1, 2015.

**Subject:** Use of truss type, pre-engineered wood or timber construction in residential structures.

**Purpose:** To implement the provisions of new section 382-b of the Executive Law, as added by Chapter 353 of the Laws of 2014. In particular, but not by way of limitation, this rule prescribes (1) the form to be used by property owners to designate a residential structure as a truss type, pre-engineered wood or timber construction and (2) the sign or symbol to be affixed to the exterior of a residential building that utilizes truss type, pre-engineered wood and/or timber construction.

**Public hearing(s) will be held at:** 10:00 a.m., March 2, 2015 at Department of State, 99 Washington Ave., Rm. 505, Albany, NY.

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

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

**Substance of emergency/proposed rule (Full text is posted at the following State website:** [http://www.dos.ny.gov/DCEA/pdf/TextPart1265\\_11102014\\_Draft.pdf](http://www.dos.ny.gov/DCEA/pdf/TextPart1265_11102014_Draft.pdf)): This rule adds a new Part 1265 to Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York

Part 1265 shall apply to (1) the construction of a new residential structure; (2) an addition to an existing residential structure, and (3) the rehabilitation of an existing residential structure.

Part 1265 shall not apply in any city having a population in excess of one million persons.

The following terms will have the following meanings for the purposes of new Part 1265:

**ADDITION.** The term “addition” shall mean an extension or increase in floor area or height of a residential structure.

**AUTHORITY HAVING JURISDICTION.** The term “authority having jurisdiction” shall mean the city, town, village, county, agency or other governmental unit responsible for administration and enforcement of the State Uniform Fire Prevention and Building Code with respect to the subject residential structure.

**BCNYS.** The term “BCNYS” shall mean the publication which is entitled Building Code of New York State and which is incorporated by reference in Part 1221 of this Title.

**ELECTRIC BOX.** The term “electric box” shall mean the box, if any, mounted on the exterior of the residential structure at the service point (as that term is defined in section E3401 of the RCNYS).

**EXISTING RESIDENTIAL STRUCTURE.** The term “existing residential structure” means a residential structure that is already in existence at the time an addition or rehabilitation is commenced, without regard to the date of original construction of the residential structure.

**NEW RESIDENTIAL STRUCTURE.** The term “new residential structure” means a residential structure constructed on or after January 1, 2015.

**PRE-ENGINEERED WOOD CONSTRUCTION.** The term “pre-engineered wood construction” shall mean construction that uses, for any load-supporting purpose(s), girders, beams, or joists made using wood components (or wood-based components) that are bonded together with adhesives (including, but not limited to, prefabricated wood I-joists, structural glued laminated timbers, structural log members, structural composite lumber, and cross-laminated timber).

**RCNYS.** The term “RCNYS” shall mean the publication which is entitled Residential Code of New York State and which is incorporated by reference in Part 1220 of this Title.

**REHABILITATION.** The term “rehabilitation” shall mean any repair, renovation, alteration or reconstruction work undertaken in an existing residential building.

**RESIDENTIAL STRUCTURE.** The term “residential structure” shall include one-family dwellings, two-family dwellings, and townhouses (as those terms are defined in the publication entitled RCNYS) and structures or portions of structures classified as Residential Group R in accordance with Chapter 3 of the BCNYS (excluding, however, hotels and motels which are classified as Group R-1 or R-2 occupancy in accordance with Chapter 3 of the BCNYS and which are subject to the provisions of Part 1264 of this Title).

**TIMBER CONSTRUCTION.** The term “timber construction” shall mean construction that uses, for any load-supporting purpose(s), solid or laminated wood having the minimum dimensions required for structures built using type IV construction (HT) in accordance section 602.4 of the BCNYS.

**TRUSS TYPE CONSTRUCTION.** The term “truss type construction” shall mean construction that uses, for any load-supporting purpose(s), a fabricated structure of wood or steel, made up of a series of members con-

nected at their ends to form a series of triangles to span a distance greater than would be possible with any of the individual members on their own. Truss type construction shall not include (1) individual wind or seismic bracing components which form triangles when diagonally connected to the main structural system or (2) structural components that utilize solid plate web members.

When truss type construction, pre-engineered wood construction, and/or timber construction is to be utilized in the construction of a new residential structure or in an addition to or rehabilitation of an existing residential structure, the owner of such structure, or the owner’s duly authorized representative, shall notify the authority having jurisdiction of that fact. Such notice shall be in writing and shall be provided to the authority having jurisdiction with the application for a building permit. In the case of a construction, addition or rehabilitation project commenced prior to January 1, 2015 and not completed prior to January 1, 2015, such notice shall be given as soon as practicable after January 1, 2015 and in any event prior to the issuance of the certificate of occupancy or certificate of compliance for such project.

The form to be used to give the required notice to the authority having jurisdiction shall be substantially similar to the following, with all applicable lines checked and all blanks filed in with the appropriate information:

**NOTICE OF UTILIZATION OF TRUSS TYPE CONSTRUCTION, PRE-ENGINEERED WOOD CONSTRUCTION AND/OR TIMBER CONSTRUCTION**

To: [insert name of authority having jurisdiction]

Owner: [insert name of owner of the subject property]

Subject Property: [insert street address and tax map number, if any, of the subject property]

Please take notice that the (check applicable line):

new residential structure

addition to existing residential structure

rehabilitation to existing residential structure

to be constructed or performed at the subject property reference above

will utilize (check each applicable line):

truss type construction (TT)

pre-engineered wood construction (PW)

timber construction (TC)

in the following location(s) (check applicable line):

floor framing, including girders and beams (F)

roof framing (R)

floor framing and roof framing (FR).

Date: [insert date form is signed]

Signature: [signature of person submitting form to the authority having jurisdiction]

Name: [print or type name of person signing and submitting form]

Capacity: [insert “Owner” or “Owner’s Representative” as applicable]

An authority having jurisdiction shall be permitted to prescribe its own form to be used to give the required notice, provided that such form requests at least same information mentioned above.

Each new residential structure and each addition to or rehabilitation of an existing residential structure that utilizes truss type construction, pre-engineered wood construction and/or timber construction shall be identified by a sign or symbol in accordance with the provisions of Part 1265.

The sign or symbol required by this Part shall be affixed to the electric box attached to the exterior of the residential structure; provided, however, that:

(1) if affixing the sign or symbol to the electric box would obscure any meter on the electric box, or if the utility providing electric service to the residential structure does not allow the sign or symbol to be affixed to the electric box, the sign or symbol shall be affixed to the exterior wall of the residential structure at a point immediately adjacent to the electric box; and

(2) if no electric box is attached to the exterior of the residential structure or if, in the opinion of the authority having jurisdiction, the electric box attached to the exterior of the building is not located in a place likely to be seen by firefighters or other first responders responding to a fire or other emergency at the residential structure, the sign or symbol required by this Part shall be affixed to the exterior of the residential structure in a location approved by the authority having jurisdiction as a location likely to be seen by firefighters or other first responders responding to a fire or other emergency at the residential structure.

The sign or symbol shall be affixed prior to the issuance of a certificate of occupancy or a certificate of compliance. The authority having jurisdiction shall not issue a certificate of occupancy or certificate of compliance until the sign or symbol shall have been affixed.

The property owner shall be responsible for maintaining the sign or symbol and shall promptly replace any such sign or symbol that is affixed to an electric box when any change or modification is made to such electric box. The property owner shall promptly replace the sign or symbol if such

sign or symbol is removed or becomes damaged, faded, worn or otherwise less conspicuous to firefighters or other first responders responding to a fire or other emergency at the residential structure. The property owner shall keep the area in the vicinity of the sign or symbol clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or otherwise cause such sign or symbol to be less conspicuous to firefighters or other first responders responding to a fire or other emergency at the residential structure.

The sign or symbol indicating the utilization of truss type construction, pre-engineered wood construction and/or timber construction shall comply with the following requirements:

(1) The sign or symbol shall consist of a circle six inches (152.4 mm) in diameter, with a stroke width of 1/2 inch (12.7 mm). The background of the sign or symbol shall be reflective white in color. The circle and contents shall be reflective red in color, conforming to Pantone matching system (PMS) #187.

(2) The sign or symbol shall be of sturdy, non-fading, weather-resistant material; provided, however, that a sign or symbol applied directly to a door or sidelight may be a permanent non-fading sticker or decal.

(3) The sign or symbol shall contain an alphabetic construction type designation to indicate the construction type of the residential structure, as follows:

(i) if the residential structure is subject to the provisions of the RCNYS, the construction type designation shall be "V" and

(ii) if the residential structure is subject to the provisions of the BCNYS, the construction type designation shall be "I", "II", "III", "IV" or "V" to indicate the construction classification of the structure under section 602 of the BCNYS.

(4) The sign or symbol shall contain an alphabetic location designation to indicate the location(s) containing truss type construction, pre-engineered wood construction and/or timber construction structural components, as follows:

(i) "F" shall mean floor framing, including girders and beams;

(ii) "R" shall mean roof framing; and

(iii) "FR" shall mean floor framing and roof framing.

(5) The construction type designation shall be placed at the 12 o'clock position of the sign or symbol, over the location designation, which shall be placed at the six o'clock position of the sign or symbol.

Upon receipt of a form indicating that truss type, pre-engineered wood or timber construction is to be used in a residential structure, the authority having jurisdiction shall notify the chief of the fire district, fire department or fire company having jurisdiction over the structure of that fact.

The chief of the fire district, fire department, or fire company having jurisdiction over the residential structure to be erected, added to, or modified, or his or her designee shall use the information so provided to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

The local building department or local code enforcement official for the authority having jurisdiction shall consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

Subdivision 4 of section 382-b of the Executive Law directs local governments to provide for enforcement of section 382-b of the Executive Law. Enforcement of section 382-b of the Executive Law shall include, but shall not be limited to, enforcement of the provisions of this Part.

Nothing contained in Part 1265 shall in any way affect or diminish section 205-b of the General Municipal Law.

**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 March 29, 2015.

**Text of rule and any required statements and analyses may be obtained from:** Mark Blanke, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Mark.Blanke@dos.ny.gov

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

**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 AND LEGISLATIVE OBJECTIVES

Executive Law § 382-b (as added by Chapter 353 of the Laws of 2014) authorizes the State Fire Prevention and Building Code Council (the Code Council) to promulgate rules and regulations it deems necessary to carry into effect the provisions that section.

The legislative objectives of Executive Law § 382-b include (1)

providing a means of notifying a local code enforcement official when truss type, pre-engineered wood or timber construction is to be utilized in the construction of a new residential structure or in the addition to or rehabilitation of an existing residential structure; (2) providing for the placement and maintenance of a sign or symbol on the exterior of such residential structures to provide notice to firefighters and other first responders that one or more of those construction types have been used; and (3) providing for communication and coordination between and among code enforcement officials, fire departments, and emergency dispatch personnel for the purpose of providing warning to firefighters and other first responders that one or more of those construction types have been used.

##### 2. NEEDS AND BENEFITS

The Memorandum in Support of the bill enacting Executive Law § 382-b states that "(w)hile truss construction is very durable, when weakened by a fire, major components of a truss foundation can collapse suddenly without warning. When responding to a fire emergency, firefighters are unable to differentiate between a building constructed of truss foundation or another type of construction. As a result, in recent years truss constructions have been the cause of many preventable deaths of fire-fighters. It is imperative that firefighters are notified of the use of truss type construction so they can take appropriate measures that will protect the lives of residents and ensure their own safety. With the enactment of this bill, emergency responders will be able to take proper precautions in responding to a fire in a residential structure where truss type construction was utilized."

Executive Law § 382-b provides that any person utilizing truss type, pre-engineered wood or timber construction for the erection of any new residential structure, for any addition to an existing residential structure, or for any rehabilitation of an existing residential structure must (1) notify the local government that will issue the building permit for the that truss type, pre-engineered wood or timber construction is being utilized and (2) affix a sign or symbol to the electric box, if any, on the exterior of the structure indicating that truss type, pre-engineered wood or timber construction has been used. Executive Law § 382-b provides that the form to be used to notify the local code official that truss type, pre-engineered wood or timber construction is to be used shall be prescribed by the Code Council and that the sign or symbol to be fixed to the electric box shall be as approved by the Code Council.

Executive Law § 382-b also provides that (1) upon receipt of a form indicating that truss type, pre-engineered wood or timber construction is to be used in a residential structure, the code enforcement official must notify the chief of the fire district, fire department or fire company having jurisdiction over the structure of that fact; (2) the chief of the fire district, fire department, or fire company having jurisdiction over the residential structure to be erected, added to, or modified, or his or her designee shall use the information so provided to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure; (3) the local building department or local code enforcement official must consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure; (4) local governments shall provide by local law or resolution for the enforcement of the provisions of Executive Law § 382-b, if necessary; and (5) the Code Council shall promulgate rules and regulations it deems necessary to carry into effect the provisions of Executive Law § 382-b including, but not limited to, the dimensions and color of the required sign or symbol.

This rule implements Executive Law § 382-b by prescribing the form to be used to notify local code enforcement officials that truss type, pre-engineered wood and/or timber construction is to be used in a residential structure; prescribing the sign or symbol to be affixed to the exterior of such a residential structure; and directing local code enforcement officials, fire departments, and emergency dispatch personnel to fulfill the notification, warning, and coordination activities specified in new section 382-b of the Executive Law.

##### 3. COSTS

###### A. Regulated Parties

For a regulated party who chooses to use truss type, pre-engineered wood or timber construction in the construction of a new residential structure or the addition to or rehabilitation of an existing residential structure, the initial costs of complying with this rule will include (1) any increase in the fees currently charged by the local code enforcement officials to cover the additional costs associated with processing the form notifying the official that truss-type, pre-engineered wood or timber construction is to be used and/or for inspecting the structure to confirm that the required sign or symbol has been affixed to the exterior of the structure and (2) the cost of obtaining any affixing the required sign or symbol. Fees charged by local code enforcement officials are fixed by lo-

cal governments, and not by this rule; the Department of State (DOS) anticipates that for the most part, any fee increase imposed by local governments by reason of this rule will be modest. DOS estimates that the cost of purchasing and affixing the sign or symbol required by this rule will be \$20 to \$30.

For regulated parties who own residential structures covered by this rule, the annual or ongoing costs for continuing compliance with this rule will include the cost of replacing the sign or symbol required by this rule when the electric box to which the sign or symbol is affixed is changed or modified or when the sign or symbol becomes worn, faded, or otherwise less conspicuous. DOS estimates that the cost of purchasing and affixing a replacement sign or symbol required will be \$20 to \$30. For regulated parties who own residential structures covered by this rule will also be required to keep the area in the vicinity of the sign or symbol required by this rule clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or otherwise cause such sign or symbol less conspicuous to firefighters or other first responders responding to a fire or other emergency at the residential structure. DOS anticipates that this requirement will not significantly increase the cost of normal property maintenance.

The estimated cost of obtaining and affixing the required sign or symbol was determined by prices for signs currently posted on the website of a manufacturer of the signs now required under Part 1264 (ranging from \$12.45 to \$21.45 for a single sign to as low as \$8.95 per sign when purchased in quantity: <http://www.safetysign.com/products/p5973/ny-type-v-floor-truss-sign> [accessed 11/6/2014]); the cost of affixing the sign to the structure is assumed to be nominal.

B. Department of State, the State, and Local Governments

DOS does not anticipate that DOS or the State of New York will incur any significant costs for the implementation of, and continued administration of, this rule.

For local governments, the initial costs for implementation of this rule will include the cost of training their code enforcement personnel on the requirements of this rule. However, code enforcement personnel are required by existing law to receive 24 hours of in-service training each year, and DOS anticipates that training on the requirements of the new this rule can be provided within the already required annual in-service training.

For local governments, the on-going costs for the continued compliance with and administration of this rule will include the costs associated with the inspecting residential structures to confirm that the required sign or symbol has been affixed; notifying the fire department when truss type, pre-engineered wood or timber construction is to be used in the construction of a new residential structure; consulting with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure; and warning persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure. However, DOS anticipates that a local government will be able to fulfill these obligations using its existing code enforcement, fire department, and emergency dispatch personnel, at little or no additional cost to the local government. Further, local governments are authorized by existing law to charge fees to defray the cost of their code enforcement activities.

Any local government or state agency that chooses to construct, add to, rehabilitate or won a residential structure will subject to this rule, and will be subject to the same costs of initial compliance and on going compliance as any other regulated party.

#### 4. PAPERWORK

A property owner utilizing truss type, pre-engineered wood or timber construction for the erection of any new residential structure, for any addition to an existing residential structure, or for any rehabilitation of an existing residential structure will be required to notify the local code enforcement official of that fact. That notice must be given using the form prescribed in this rule or using a substantially similar form prescribed by the local code enforcement office.

#### 5. LOCAL GOVERNMENT MANDATES

Upon receipt of notification that a residential structure will use truss type, pre-engineered wood or timber construction, the local code enforcement official will be required to notify the chief of the fire district, fire department or fire company having jurisdiction over the structure of that fact. The chief of the fire district, fire department, or fire company must use the information so provided to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

The local building department or local code enforcement official must consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting

fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

Before issuing a certificate of occupancy, the local code enforcement official will be required to determine that the required sign has been affixed to the structure.

Local governments will be required to enforce Executive Law § 382-b and this new rule. Local governments, fire departments, and emergency dispatch personnel will be required to see that their personnel receive training on these new requirements.

DOS anticipates that local governments will be able to enforce the new requirements added by Executive Law § 382-b and implemented by this rule with their current code enforcement personnel, and will not require any additional professional services.

#### 6. DUPLICATION

This rule does not duplicate any rule or other legal requirement of the State or Federal government known to DOS.

#### 7. ALTERNATIVES

No significant alternatives to this rule were considered by DOS. DOS believes that the provisions of this rule are necessary to implement Executive Law § 382-b.

#### 8. FEDERAL STANDARDS

This rule does not exceed any minimum standards of the Federal government for the same or similar subject areas known to DOS.

#### 9. COMPLIANCE SCHEDULE

DOS anticipates that regulated parties will be able to comply with this rule immediately.

#### Regulatory Flexibility Analysis

##### 1. TYPES AND NUMBER OF SMALL BUSINESSES AND LOCAL GOVERNMENTS TO WHICH THE RULE WILL APPLY

This rule implements new section 382-b of the Executive Law, as added by Chapter 353 of the Laws of 2014, which relates to the use of truss-type, pre-engineered wood and timber construction in the construction of new residential structures and the addition to or rehabilitation of existing residential structures. New section 382-b of the Executive Law, and this rule, apply in all parts of the State except New York City. Therefore, this rule will apply to all small businesses and all local governments that construct new residential buildings or add to or rehabilitate existing residential structures in any part of the State except New York City.

In addition, new section 382-b of the Executive Law requires local governments to enforce section 382-b, and to communicate and coordinate with fire departments and emergency dispatch personnel in warning firefighters and other first responders when responding to a fire in a residential structure that utilizes truss-type, pre-engineered wood and timber construction in the construction. This rule implements those requirements. Therefore, this rule will apply to all or most of the local governments in the State other than New York City.

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

A small business or local government that chooses to utilize truss type, pre-engineered wood or timber construction in the construction of any new residential structure or in any addition to or rehabilitation of an existing residential structure to include with the building permit application a notification advising the local code enforcement official that truss type, pre-engineered wood or timber construction is being utilized.

Upon receipt of such notification, the local code enforcement official will be required to notify the chief of the fire district, fire department or fire company having jurisdiction over the structure that truss type, pre-engineered wood or timber construction is being utilized is being used. The chief of the fire district, fire department, or fire company must use the information so provided to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

The local building department or local code enforcement official must consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

A small business or local government that uses truss type, pre-engineered wood or timber construction in the construction of a residential structure or an addition to or rehabilitation of an existing residential structure will be required to place a sign or symbol of the type described in this rule on the exterior wall of the structure.

Before issuing a certificate of occupancy, the local code enforcement official will be required to determine that the required sign has been affixed to the structure.

A small business or local government that owns a residential structure that is subject to this rule will be required to keep the area in the vicinity of the sign or symbol required by this rule clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or

otherwise cause such sign or symbol less conspicuous to firefighters or other first responders responding to a fire or other emergency at the residential structure. A small business or local government that owns such a residential structure will be required to replace the sign or symbol if the electric box to which the sign or symbol is affixed is changed or modified or if the sign or symbol becomes worn, faded, or otherwise less conspicuous.

Local governments will be required to enforce new section 382-b of the Executive Law and this new rule. Local governments, fire departments, and emergency dispatch personnel will be required to see that their personnel receive training on these new requirements.

DOS anticipates that local governments will be able to enforce the new requirements added by new section 382-b of the Executive Law, and implemented by this rule, with their current code enforcement personnel, and will not require any additional professional services.

### 3. PROFESSIONAL SERVICES

A small business or local government that constructs a new residential structure or adds to or rehabilitates an existing residential structure will typically find it to be necessary or desirable to use the services of a design professional to design a new residential building or an addition to or rehabilitation of an existing residential structure. The new requirements added by new section 382-b of the Executive Law, and implemented by this rule, should not increase the level of professional services required.

### 4. COMPLIANCE COSTS

The initial costs of complying with this rule for small business or local government that uses truss type, pre-engineered wood or timber construction in the construction of a residential structure or an addition to or rehabilitation of an existing residential structure will include (1) any increase in the fees currently charged by the local code enforcement officials for processing permit applications, issuing permits, conducting inspections, and issuing permits to cover the additional costs associated with processing the form notifying the official that truss-type, pre-engineered wood or timber construction is to be used and/or for inspecting the structure to confirm that the required sign or symbol has been affixed to the exterior of the structure and (2) the cost of obtaining any affixing the required sign or symbol. Fees charged by local code enforcement officials are fixed by local governments, and not by this rule; the Department of State anticipates that for the most part, any fee increase imposed by local governments by reason of new section 382-b (and this rule) will be modest. The Department of State estimates that the cost of purchasing and affixing the sign or symbol required by this rule will be \$20 to \$30.

The initial costs of compliance described in the preceding paragraph are not likely to vary for small businesses or local governments of different types and of differing sizes.

The annual or ongoing costs to building owners for continuing compliance with this rule for a small business or local government that used truss type, pre-engineered wood or timber construction in the construction of a new residential structure or the addition to or rehabilitation of an existing residential structure will include the cost of replacing the sign or symbol required by this rule when the electric box to which the sign or symbol is affixed is changed or modified or when the sign or symbol becomes worn, faded, or otherwise less conspicuous. The Department of State estimates that the cost of purchasing and affixing a replacement sign or symbol required will be \$20 to \$30. A small business or local government that owns such a residential structure will also be required to keep the area in the vicinity of the sign or symbol required by this rule clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or otherwise cause such sign or symbol less conspicuous to firefighters or other first responders responding to a fire or other emergency at the residential structure. The Department of State anticipates that this requirement will not significantly increase the cost of normal property maintenance.

The annual/ongoing costs described in the preceding paragraph are not likely to for small businesses or local governments of different types and of differing sizes.

The initial costs to be incurred by local governments will include the cost of training their code enforcement personnel on the requirements of this rule. However, code enforcement personnel are required by existing law to receive 24 hours of in-service training each year, and the Department of State anticipates that training on the requirements of the new this rule can be provided within the already required annual in-service training.

The annual or on-going compliance costs for a local government will include the costs associated with fulfilling the notification, warning, and consultation obligations established by new section 382-b of the Executive Law. However, the Department of State anticipates that a local government will be able to fulfill these obligations using its existing code enforcement, fire department, and emergency dispatch personnel, at little or no additional cost to the local government. Further, local governments are authorized by existing law to charge fees to defray the cost of their code enforcement activities.

Any variation in local governments' costs of complying with this rule is likely to be attributable to the number of residential structures within the local government that utilize truss type, pre-engineered wood or timber construction and not to the type and/or size of the local government.

### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

It is economically and technologically feasible for regulated parties to comply with the rule. No substantial capital expenditures are imposed and no new technology need be developed for compliance.

The Department of State anticipates that local governments will be able to provide training to their code enforcement personnel through the already required annual in-service training; that local governments will be able to this rule with their existing code enforcement personnel; and that local governments will be able to recoup any additional code enforcement expenses through fees they are authorized to impose by existing law.

### 6. MINIMIZING ADVERSE IMPACT:

This rule was designed to minimize any adverse impact on small businesses and local governments by (1) implementing only those requirements that are specified in the underlying statute (section 382-b of the Executive Law) and (2) prescribing a simple notification form and permitting local governments to prescribe their own notification forms if they wish to do so.

Approaches such as establishing differing compliance or reporting requirements or timetables that take into account the resources available to small businesses and local governments and/or providing exemptions from coverage by the rule, or by any part thereof, for small businesses and local governments were not considered because doing so (1) is not authorized by new section 382-b of the Executive Law and (2) would endanger the public safety and general welfare.

### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department of State gave small business and local governments an opportunity to participate in this rule making by posting a notice regarding this rule on the Department of State's website and by publishing a notice regarding this rule in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

### 8. VIOLATIONS AND PENALTIES ASSOCIATED WITH VIOLATIONS

This rule will neither establish or modify a violation nor establish or modify penalties associated with a violation. Therefore, for the purposes of Chapter 524 of the Laws of 2011 and subdivision 1-a of section 202-b of the State Administrative Procedure Act, this rule is not required to include a cure period or other opportunity for ameliorative action, the successful completion of which will prevent the imposition of penalties on the party or parties subject to enforcement.

### *Rural Area Flexibility Analysis*

#### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements new section 382-b of the Executive Law, as added by Chapter 353 of the Laws of 2014, relating to the use of truss-type, pre-engineered wood and timber construction in the construction of new residential structures and in the addition to or rehabilitation of existing residential structures. New section 382-b, and this Part, apply in all parts of the State except cities having a population greater than 1,000,000 persons. Therefore, this rule will apply in all rural areas of the State.

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

This rule will require residential property owners wishing to utilize truss type, pre-engineered wood or timber construction in the construction of any new residential structure or in any addition to or rehabilitation of an existing residential structure to include with the building permit application a notification advising the local code enforcement official that truss type, pre-engineered wood or timber construction is being utilized.

Upon receipt of such notification, the local code enforcement official will be required to notify the chief of the fire district, fire department or fire company having jurisdiction over the structure that truss type, pre-engineered wood or timber construction is being utilized is being used. The chief of the fire district, fire department, or fire company must use the information so provided to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

The local building department or local code enforcement official must consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

The owner of the structure will be required to place a sign or symbol of

the type described in this rule on the exterior wall of the structure. Property owners will be required to keep the area in the vicinity of the sign or symbol required by this rule clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or otherwise cause such sign or symbol less conspicuous to fire fighters or other first responders responding to a fire or other emergency at the residential structure. Property owners will be required to replace the sign or symbol if the electric box to which the sign or symbol is affixed is changed or modified or if the sign or symbol becomes worn, faded, or otherwise less conspicuous.

Local governments will be required to enforce new section 382-b of the Executive Law (and this new rule). Local governments, fire departments, and emergency dispatch personnel will be required to see that their personnel receive training on these new requirements.

DOS anticipates that local governments will be able to enforce the new requirements added by new section 382-b of the Executive Law, and implemented by this rule, with their current code enforcement personnel, and will not require any additional professional services.

Building owners will typically find it to be necessary or desirable to use the services of a design professional to design a new residential building or an addition to or rehabilitation of an existing residential structure. The new requirements added by new section 382-b of the Executive Law, and implemented by this rule, should not increase the level of professional services required.

### 3. COSTS.

The initial costs of complying with this rule for the owner of a residential structure utilizing truss type, pre-engineered wood or timber construction for the erection of any new residential structure, for any addition to an existing residential structure, or for any rehabilitation of an existing residential structure will include (1) any increase in the fees currently charged by the local code enforcement officials for processing permit applications, issuing permits, conducting inspections, and issuing permits to cover the additional costs associated with processing the form notifying the official that truss-type, pre-engineered wood or timber construction is to be used and/or for inspecting the structure to confirm that the required sign or symbol has been affixed to the exterior of the structure and (2) the cost of obtaining any affixing the required sign or symbol. Fees charged by local code enforcement officials are fixed by local governments, and not by this rule; the Department of State anticipates that for the most part, any fee increase imposed by local governments by reason of new section 382-b (and this rule) will be modest. The Department of State estimates that the cost of purchasing and affixing the sign or symbol required by this rule will be \$20 to \$30. Such costs are not likely to vary for different types of public and private entities in rural areas.

The annual or ongoing costs to building owners for continuing compliance with this rule will include the cost of replacing the sign or symbol required by this rule when the electric box to which the sign or symbol is affixed is changed or modified or when the sign or symbol becomes worn, faded, or otherwise less conspicuous. The Department of State estimates that the cost of purchasing and affixing a replacement sign or symbol required will be \$20 to \$30. Property owners will also be required to keep the area in the vicinity of the sign or symbol required by this rule clear of all plants, vegetation, and other obstructions that may hide or obscure such sign or symbol or otherwise cause such sign or symbol less conspicuous to fire fighters or other first responders responding to a fire or other emergency at the residential structure. The Department of State anticipates that this requirement will not significantly increase the cost of normal property maintenance. The annual / ongoing costs described in this paragraph are not likely to for different types of public and private entities in rural areas.

The initial costs to be incurred by local governments will include the cost of training their code enforcement personnel on the requirements of this rule. However, code enforcement personnel are required by existing law to receive 24 hours of in-service training each year, and the Department of State anticipates that training on the requirements of the new this rule can be provided within the already required annual in-service training.

The annual or on-going compliance costs for a local government will include the costs associated with fulfilling the notification, warning, and consultation obligations established by new section 382-b of the Executive Law. However, the Department of State anticipates that a local government will be able to fulfill these obligations using its existing code enforcement, fire department, and emergency dispatch personnel, at little or no additional cost to the local government. Further, local governments are authorized by existing law to charge fees to defray the cost of their code enforcement activities.

### 4. MINIMIZING ADVERSE IMPACT.

This rule was designed to minimize any adverse impact on all areas of the State, including rural areas, by (1) implementing only those requirements that are specified in the underlying statute (section 382-b of the Executive Law) and (2) prescribing a simple notification form and permitting local governments to prescribe their own notification forms if they wish to do so.

Establishing different compliance requirements for public and private sector interests in rural areas and/or providing exemptions from coverage by the rule for public and private sector interests in rural areas was not considered because doing so (1) is not authorized by the statute and (2) would endanger the public safety and general welfare.

### 5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State, including interested parties in rural areas, of the proposed adoption of this rule by means of notices posted on the Department's website and published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

### Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

This rule amends adds a new Part 1265 (entitled "Residential Structures with Truss Type Construction, Pre-Engineered Wood Construction or Timber Construction") to Title 19 of the NYCRR. Part 1265 implements new section 382-b of the Executive Law, as added by Chapter 353 of the Laws of 2014. Under section 382-b, and this rule, any person who uses truss-type, pre-engineered wood or timber construction in the construction of a new residential structure or in the addition to or rehabilitation of an existing residential structure will be required to notify the local code enforcement official of that fact and to place a sign or symbol on the exterior wall of the structure intended to notify firefighters and other first responders that truss-type, pre-engineered wood or timber construction has been used in the structure. This rule prescribes (1) the form to be used by the property owner or property owner's representative to designate a residential structure as truss type, pre-engineered wood or timber construction and (2) the sign or symbol to be affixed to the exterior of a residential building that utilizes truss type, pre-engineered wood and/or timber construction.

The Department of State has concluded that although provisions of this rule will impose certain new obligations on regulated parties, the cost of complying with these new obligations will be minimal. For example, Part 1265 requires that each new residential structure and each addition to or rehabilitation of an existing residential structure that utilizes truss type construction, pre-engineered wood construction and/or timber construction be identified by signs or symbols in accordance with the provisions of this Part before receiving a certificate of occupancy or a certificate of compliance. The Department of State estimates that the cost of obtaining and posting a sign or symbol required by this rule will be \$20 to \$30. Therefore, the Department of State anticipates that the impact of this rule on the cost of any new construction, addition or rehabilitation project will be negligible.

New section 382-b of the Executive Law also requires, and this rule also provides, that local governments must enforce these new requirements, and that local governments, fire departments, and emergency dispatch personnel must consult with each other in developing means to warn firefighters and other first responders responding to a fire in a residential structure that truss-type construction, pre-engineered wood construction and/or timber construction has been utilized in the structure. The Department of State anticipates that, for the most part, these tasks can be accomplished by existing personnel, at little or no additional cost to local governments, fire departments or emergency dispatchers. Therefore, the Department of State anticipates that the impact of this rule on the costs of obtaining building permits, conducting construction inspections, issuing certificates of occupancy, and performing other code enforcement activities will be negligible.

Therefore, this rule should have no substantial adverse impact on the cost of obtaining a building permit, constructing a new residential structure, adding to or rehabilitating an existing residential structure, or obtaining a certificate of occupancy or a certificate of compliance and, consequently, this rule should have no substantial adverse impact on jobs and employment opportunities related to constructing a new residential structure or adding to or rehabilitating an existing residential structure utilizing truss type construction, pre-engineered wood construction and/or timber construction.