

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.

Office of Alcoholism and Substance Abuse Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Incident Reporting in OASAS Certified, Licensed, Funded, or Operated Services

I.D. No. ASA-37-15-00001-EP

Filing No. 742

Filing Date: 2015-08-26

Effective Date: 2015-08-26

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

Proposed Action: Repeal of Part 836; and addition of new Part 836 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.09(b), 19.20, 19.20-a, 19.40 and 32.02; Executive Law, section 296(15) and (16); Corrections Law, art. 23-A; Civil Service Law, section 50; Protection of People with Special Needs Act (L. 2012, ch. 501)

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

Specific reasons underlying the finding of necessity: The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services.

In December, 2012 Governor Andrew Cuomo signed the Protection of People with Special Needs Act (PPSNA; chapter 501 of the Laws of 2012); the statute created the Justice Center for the Protection of People with

Special Needs (Justice Center) establishing various protections for vulnerable persons, i.e., a new system for incident management in services operated or certified by OASAS; investigation of allegations of abuse and neglect and significant incidents; and new requirements for pre-employment background checks in OASAS certified and operated service providers, persons credentialed by the Office, and applicants for new operating certificates.

The amendments to Part 836, effective June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, December 14, 2014, March 14, 2015, June 12, 2015 and August 26, 2015 are necessary to implement the incident reporting and management provisions required by the statute and to ensure compliance with the criminal history background check provisions to further enhance patient safety.

The promulgation of these regulations is essential to preserve the health, safety and welfare of individuals receiving services within the OASAS treatment system. If OASAS did not promulgate regulations to report and manage incidents of abuse and neglect or other significant incidents, these requirements would not be implemented or would be implemented ineffectively. Further, protections for individuals receiving services would be threatened by the confusion resulting from similar functions performed but differing among the other agencies covered by the Justice Center.

OASAS 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.

Subject: Incident Reporting in OASAS Certified, Licensed, Funded, or Operated Services.

Purpose: To enhance protections for service recipients in the OASAS system.

Substance of emergency/proposed rule (Full text is posted at the following State website: <http://www.oasas.ny.gov/regs/index>): 14 NYCRR Part 836

Incident Reporting in OASAS Certified or Funded Services

The Proposed Rule would Repeal the current Part 836 and Replace it with a new Part 836. The new Part incorporates amendments related to incident reporting consistent with statutory requirements, definitions and procedures of the Justice Center, pursuant to the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012).

The Proposed Rule also makes technical amendments to standardize formatting for all Office regulations. Amendments related to the Justice Center include:

Section 836.1 sets forth the background and intent and adds language referencing the purpose for establishing the Justice Center and for coordinating agency incident reviews with the Justice Center.

§ 836.2 sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services (“Office”); adds The Protection of People with Special Needs Act; removes repealed statutes; adds the Vulnerable Persons Central Register in § 492 of the social services law.

§ 836.3 amends applicability of this Part to be consistent with Justice Center statute and regulations.

§ 836.4 adds new definitions or amends to be consistent with the Justice Center: “Reportable incident”, “physical abuse”, “psychological abuse”, “deliberate inappropriate use of restraints”, “use of aversive conditioning”, “obstruction of reports of reportable incidents”, “unlawful use or administration of a controlled substance,” “neglect”, “significant incident”, “custodian”, “facility or provider agency”, “mandated reporter”, “human services professional”, “physical injury”, “delegate investigatory entity”, “Justice Center”, “Person receiving services,” “Personal representative,” “Abuse or neglect”, “subject of the report,” “other persons named in the report,” “Vulnerable Persons Central Register,” “vulnerable person”, “intentionally and recklessly”, “clinical records”, “Incident management programs”, “Incident report”, “Missing client”, “qualified person”, “staff”, “Incident review Committee”.

§ 836.5 adds requirements for providers of services' policies and procedures related to, and implementation of, an Incident Management Program consistent with the requirements of Chapter 501 of the Laws of 2012.

§ 836.6 adds requirements for incident reporting, notice and investigation to incorporate changes in processes necessitated by Chapter 501 of the Laws of 2012.

§ 836.7 adds requirements for additional notice and reporting requirements for reportable and significant incidents necessitated by Chapter 501 of the Laws of 2012 such as: reporting "immediately" upon discovery of an incident; required reporting to the Justice Center Vulnerable Persons Central Register, Office and regional Field Office; includes all "custodians" as "mandated reporters" for purposes of this regulation.

§ 836.8 adds requirements for configuration of Incident Review Committees consistent with requirements of Chapter 501 of the Laws of 2012.

§ 836.9 adds requirements for recordkeeping and release of records to qualified persons consistent with requirements of Chapter 501 of the Laws of 2012.

§ 836.10 adds to a provider's duty to cooperate regarding inspection of facilities by permitting the Justice Center access for purposes of an investigation of a reportable or significant incident consistent with requirements of Chapter 501 of the Laws of 2012.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

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 November 23, 2015.

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, Associate Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: Sara.Osborne@oasas.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:

(a) Protection of People with Special Needs Act, Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and review criminal history information related to employees or volunteers of treatment facilities certified, licensed, funded or operated by the Office.

(d) Section 19.20-a of the MHL authorizes the Office to receive and review criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Subdivisions (15) and (16) of Section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.

(g) Civil Service Law § 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.

(h) Article 23-A of the Corrections Law provides the factors to be considered concerning a person's previous criminal convictions in making a determination regarding employment and the issuance of a license.

2. Legislative Objectives:

The legislative objectives are the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems.

The Justice Center operates a 24/7 hotline for reporting allegations of abuse, neglect and significant incidents in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A vulnerable persons' central register contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated

acts of abuse or neglect are prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires that allegations of abuse and neglect, and other significant incidents be reported to the Justice Center Vulnerable Persons Central Register via the toll free hotline. This legislation conforms OASAS regulations to definitions, incident reporting, documentation and review requirements of the Justice Center. The legislation strengthens the role of the Incident Review Committee and links compliance with reporting and investigating incidents to a providers operating certificate renewal. Criminal history information reviews will be conducted on each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services ("OASAS" or "Office") who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities and any individual seeking to be credentialed by the Office. The cost of fingerprinting will be subsidized by the Office.

This legislation requires patients and staff be notified of the toll free Vulnerable Persons Central Register for purposes of reporting allegations of abuse and neglect in OASAS certified programs and by OASAS custodians, and that staff receive regular training in their obligations as custodians regarding regulatory requirements for prompt and thorough investigations, staff oversight, confidentiality laws, recordkeeping, timing of reporting and investigating, content of reports, and procedures for corrective action plan implementation. Training will be provided by the Office or the Justice Center.

The legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

The legislation also makes technical amendments to make language and format consistent throughout OASAS regulations.

4. Costs:

The Office anticipates no fiscal impact on providers or local governments, job creation or loss, because the process of reporting incidents will not require any additions or reductions in staffing. OASAS will subsidize the fingerprinting process for not-for-profit providers.

5. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the Justice Center by mandated reporters and documentation retained by providers. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

6. Local Government Mandates:

This regulation imposes no new mandates on local governments operating certified OASAS programs.

7. Duplications:

This proposed rule does not duplicate any State or federal statute or rule.

8. Alternatives:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires the adoption of this proposed regulation.

9. Federal Standards:

These amendments do not conflict with federal standards.

10. Compliance Schedule:

The regulations will be effective on June 30, 2013 and subsequently September 25, 2013, December 20, 2013, March 20, 2014, June 17, 2014, September 12, 2014, and December 14, 2014, March 14, 2015, June 12, 2015 and August 26, 2015 to ensure compliance with Chapter 501 of the Laws of 2012.

Regulatory Flexibility Analysis

1. Effect of the rule:

OASAS services are provided by programs of varying size in every county in New York State; some counties are also certified service providers. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators; additionally this regulation has been reviewed by the OASAS Advisory Council which consists of providers and stakeholders of all sizes and municipalities.

2. Compliance requirements:

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified

providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. The proposed rule will incorporate the Justice Center incident reporting mechanism and database into the OASAS system so all reporting will be centralized and tracked for patterns and abuse and neglect allegations and other significant incidents. These regulations have been reviewed by the OASAS Advisory council consisting of stakeholders from all regions of the state, providers of all sizes and municipalities.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. Incidents will be reported electronically via a toll-free hotline.

3. Professional services:

The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers of all sizes and on local governments, whether or not they are certified operators. OASAS has determined that the new regulations will not require any new staff or any reductions in staff, any new reporting requirements or technology. No additional professional services will be required of as a result of these amendments; nor will the amendments add to the professional service needs of local governments. Because of the electronic nature of the reporting transactions, minimal paperwork will be involved on the part of business or local governments. Because every region of the state has certified programs, and requirements for staffing and training are uniform already, programs will not be affected in any way because of their size or corporate status.

4. Compliance costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed regardless of size or corporate status.

5. Economic and technological feasibility:

Implementation of the rule will require computer and email capability; all providers in all regions of the state, both private and public sector, already have such capability. No upgrades of hardware or software will be required.

6. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers on local governments or small businesses; therefore, it is designed on its face to minimize adverse impact.

7. Small business and local government participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in both public and private sectors, of all sizes and in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

Providers will be required to retain documentation of fingerprint requests for employees, contractors of volunteers they ultimately employ; this will not be a significant additional recordkeeping requirement for personnel records they are already required to retain. Every region of the state has resources for gathering fingerprints, the history information collection is done electronically from a central state or federal database, and communicated electronically, so any additional recordkeeping will be minimal regardless of geographic location. No new professional services are required; no professional services will be lost.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

OASAS services are provided in every county in New York State. 44 counties have a population 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, Saratoga, Schoharie, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

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

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of establishing a uniform incident reporting process via a state centralized hotline (Vulnerable Persons Central Register). The proposed regulation incorporates provisions from this Act into the OASAS incident reporting regulation which applies to all programs throughout the state in all geographic locations. Because the regulation applies to incident reporting and incident management in OASAS certified, operated, funded or licensed programs, there is no different application in any geographic location. The proposed regulation incorporates the OASAS incident reporting process into a larger oversight and enforcement entity under the Justice Center. These requirements apply to OASAS providers in all

geographic regions. Reporting will be done electronically via telephone or other secure means which are not limited by geography. The new rule does not require any additional staff, although training will be required statewide and be largely provided by the Office or the Justice Center.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. The proposed Rule has been reviewed by OASAS in consideration of its impact on service providers in rural areas. Because every region of the state has certified programs, and requirements for staffing, training and incident reporting are uniform already, programs will not be affected in any way because of their geographic location in a rural area.

3. Costs:

No additional costs will be incurred for implementation by providers because no additional capital investment, personnel or equipment is needed.

4. Minimizing adverse impact:

The application of the rule will not impose additional costs or operating requirements on providers in rural areas; therefore, it is designed on its face to minimize adverse impact.

5. Rural area participation:

The proposed rule is posted on the agency website; agency review process involves input from trade organizations representing providers in diverse geographic locations. The Office has prepared webinars and guidance documents for provider use and for training of agency administration.

Job Impact Statement

OASAS is not submitting a Job Impact Statement for these amendments because OASAS does not anticipate a substantial adverse impact on jobs and employment opportunities.

The proposed regulation implements provisions of The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) for the purpose of ensuring persons who receive services from OASAS certified providers are assured of receiving treatment from custodians who have been appropriately trained and screened for any prior abusive behavior. The proposed rule incorporates definitions and procedures for reporting incidents to the Justice Center and highlights the role of investigations and a provider Incident Review Committee to be responsible for quality assurance, implementing corrective action plans related to repetitive incidents or patterns of lack of oversight. It also strengthens the link to program certification through the requirement for staff background checks and record retention and the review by OASAS quality assurance staff.

The Rule sets forth criteria for incident reporting to the Justice Center, investigations, corrective action and penalties for programs and individuals who are not compliant with these, or other applicable, regulations. The proposed regulation requires criminal history information reviews of any employee, contractor, or volunteer in treatment facilities certified by the Office who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities. OASAS has evaluated this proposal considering its impact on existing jobs or the development of new employment opportunities for New York residents. It is anticipated that the proposed regulation will not have an adverse impact on existing employees in the field of substance use disorder treatment, nor affect any reduction or increase in the number of positions available in the future. OASAS providers are already required to report incidents, but the role of a new oversight agency will help to consolidate and streamline that process.

The proposed regulation will have no adverse impact on existing jobs or the development of new employment opportunities because programs are already required to report incidents; new regulations will not require any new staff or any reductions in staff. It is not anticipated that the proposed rule will affect the number of persons applying for employment within the OASAS system.

Office of Children and Family Services

NOTICE OF ADOPTION

To Eliminate the Use of Restraint Solely to Prevent Property Damage in Residential Facilities for Children

I.D. No. CFS-25-15-00005-A

Filing No. 745

Filing Date: 2015-08-31

Effective Date: 2015-09-16

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

Action taken: Amendment of section 441.17 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f)

Subject: To eliminate the use of restraint solely to prevent property damage in residential facilities for children.

Purpose: To eliminate the use of restraint solely to prevent property damage in residential facilities for children.

Text or summary was published in the June 24, 2015 issue of the Register, I.D. No. CFS-25-15-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Public Information Office, New York State Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 473-7793, email: info@ocfs.ny.gov

Initial Review of Rule

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

Assessment of Public Comment

The New York State Office of Children and Family Services (OCFS) received one comment from the public in response to the Notice of Proposed Rulemaking that appeared in the June 24, 2015 edition of the State Register regarding proposed regulations to eliminate the use of restraint solely to prevent property damage in residential facilities for children.

The comment received by OCFS supported the proposed regulatory change to eliminate the use of restraint solely to prevent property damage in residential facilities for children. The public comment also suggested further refinement of the regulations to permit the use of restraint only to prevent imminent and avoidable risk of physical harm to a person. At this time, OCFS will not be further refining the regulations to permit the use of restraint only to prevent imminent and avoidable risk of physical harm to a person.

Department of Economic Development

EMERGENCY RULE MAKING

START-UP NY Program

I.D. No. EDV-37-15-00003-E

Filing No. 744

Filing Date: 2015-08-28

Effective Date: 2015-08-28

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

Action taken: Addition of Part 220 to Title 5 NYCRR.

Statutory authority: Economic Development Law, art. 21, sections 435-36; L. 2013, ch. 68

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

Specific reasons underlying the finding of necessity: On June 24, 2013, Governor Andrew Cuomo signed into law the SUNY Tax-free Areas to Revitalize and Transform UPstate New York (START-UP NY) program, which offers an array of tax benefits to eligible businesses and their employees that locate in facilities affiliated with New York universities and colleges. The START-UP NY program will leverage these tax benefits to attract innovative start-ups and high tech industries to New York so as to create jobs and promote economic development.

Regulatory action is required to implement the START-UP NY program. The legislation creating the START-UP NY program delegated to the Department of Economic Development the establishment of procedures for the implementation and execution of the START-UP NY program. Without regulatory action by the Department of Economic Development, procedures will not be in place to accept applications from institutions of higher learning desiring to create Tax-Free Areas, or businesses wishing to participate in the START-UP NY program.

Adoption of this rule will enable the State to begin accepting applications from businesses to participate in the START-UP NY program, and represent a step towards the realization of the strategic objectives of the

START-UP NY program: attracting and retaining cutting-edge start-up companies, and positioning New York as a global leader in high tech industries.

Subject: START-UP NY Program.

Purpose: Establish procedures for the implementation and execution of START-UP NY.

Substance of emergency rule:

START-UP NY is a new program designed to stimulate economic development and promote employment of New Yorkers through the creation of tax-free areas that bring together educational institutions, innovative companies, and entrepreneurial investment.

1) The regulation defines key terms, including: "business in the formative stage," "campus," "competitor," "high tech business," "net new job," "new business," and "underutilized property."

2) The regulation establishes that the Commissioner shall review and approve plans from State University of New York (SUNY) colleges, City University of New York (CUNY) colleges, and community colleges seeking designation of Tax-Free NY Areas, and report on important aspects of the START-UP NY program, including eligible space for use as Tax-Free Areas and the number of employees eligible for personal income tax benefits.

3) The regulation creates the START-UP NY Approval Board, composed of three members appointed by the Governor, Speaker of the Assembly and Temporary President of the Senate, respectively. The START-UP NY Approval Board reviews and approves plans for the creation of Tax-Free NY Areas submitted by private universities and colleges, as well as certain plans from SUNY colleges, CUNY colleges, and community colleges, and designates Strategic State Assets affiliated with eligible New York colleges or universities. START-UP NY Approval Board members may designate representatives to act on their behalf during their absence. START-UP NY Approval Board members must remain disinterested, and recuse themselves where appropriate.

4) The regulation establishes eligibility criteria for Tax-Free Areas. Eligibility of vacant land and space varies based on whether it is affiliated with a SUNY college, CUNY college, community college, or private college, and whether the land or space in question is located upstate, downstate, or in New York City. The regulation prohibits any allocation of land or space that would result in the closure or relocation of any program or service associated with a university or college that serves students, faculty, or staff.

5) The regulation establishes eligibility requirements for businesses to participate in the START-UP program, and enumerates excluded industries. To be eligible, a business must: be a new business to the State at the time of its application, subject to exceptions for NYS incubators, businesses restoring previously relocated jobs, and businesses the Commissioner has determined will create net new jobs; comply with applicable worker protection, environmental, and tax laws; align with the academic mission of the sponsoring institution (the Sponsor); demonstrate that it will create net new jobs in its first year of operation; and not be engaged in the same line of business that it conducted at any time within the last five years in New York without the approval of the Commissioner. Businesses locating downstate must be in the formative stages of development, or engaged in a high tech business. To remain eligible, the business must, at a minimum, maintain net new jobs and the average number of jobs that existed with the business immediately before entering the program.

6) The regulation describes the application process for approval of a Tax-Free Area. An eligible institution may submit a plan to the Commissioner identifying land or space to be designated as a Tax-Free Area. This plan must: identify precisely the location of the applicable land or space; describe business activities to be conducted on the land or space; establish that the business activities in question align with the mission of the institution; indicate how the business would generate positive community and economic benefits; summarize the Sponsor's procedures for attracting businesses; include a copy of the institution's conflict of interest guidelines; attest that the proposed Tax-Free Area will not jeopardize or conflict with any existing tax-exempt bonds used to finance the Sponsor; and certify that the Sponsor has not relocated or eliminated programs serving students, faculty, or staff to create the vacant land. Applications by private institutions require approval by both the Commissioner and START-UP NY Approval Board. The START-UP NY Approval Board is to approve applications so as to ensure balance among rural, urban and suburban areas throughout the state.

7) A sponsor applying to create a Tax-Free Area must provide a copy of its plan to the chief executive officer of any municipality in which the proposed Tax-Free Area is located, local economic development entities, the applicable university or college faculty senate, union representatives and the campus student government. Where the plan includes land or space outside of the campus boundaries of the university or college, the institution must consult with the chief executive officer of any municipality in

which the proposed Tax-Free Area is to be located, and give preference to underutilized properties identified through this consultation. The Commissioner may enter onto any land or space identified in a plan, or audit any information supporting a plan application, as part of his or her duties in administering the START-UP program.

8) The regulation provides that amendments to approved plans may be made at any time through the same procedures as such plans were originally approved. Amendments that would violate the terms of a lease between a sponsor and a business in a Tax-Free Area will not be approved. Sponsors may amend their plans to reallocate vacant land or space in the case that a business, located in a Tax-Free Area, is disqualified from the program but elects to remain on the property.

9) The regulation describes application and eligibility requirements for businesses to participate in the START-UP program. Businesses are to submit applications to sponsoring universities and colleges by 12/31/20. An applicant must: (1) authorize the Department of Labor (DOL) and Department of Taxation and Finance (DTF) to share the applicant's tax information with the Department of Economic Development (DED); (2) allow DED to monitor the applicant's compliance with the START-UP program; (3) provide to DED, upon request, information related to its business organization, tax returns, investment plans, development strategy, and non-competition with any businesses in the community but outside of the Tax-Free Area; (4) certify efforts to ascertain that the business would not compete with another business in the same community but outside the Tax-Free Area, including an affidavit that notice regarding the application was published in a daily publication no fewer than five consecutive days; (5) include a statement of performance benchmarks as to new jobs to be created through the applicant's participation in START-UP; (6) provide a statement of consequences for non-conformance with the performance benchmarks, including proportional recovery of tax benefits when the business fails to meet job creation benchmarks in up to three years of a ten-year plan, and removal from the program for failure to meet job creation benchmarks in at least four years of a ten-year plan; (7) identify information submitted to DED that the business deems confidential, proprietary, or a trade secret. Sponsors forward applications deemed to meet eligibility requirements to the Commissioner for further review. The Commissioner shall reject any application that does not satisfy the START-UP program eligibility requirements or purpose, and provide written notice of the rejection to the Sponsor. The Commissioner may approve an application anytime after receipt; if the Commissioner approves the application, the business applicant is deemed accepted into the START-UP NY Program and can locate to the Sponsor's Tax-Free NY Area. Applications not rejected will be deemed accepted after sixty days. The Commissioner is to provide documentation of acceptance to successful applicants.

10) The regulation allows a business to amend a successful application at any time in accordance with the procedure of its original application. No amendment will be approved that would contain terms in conflict with a lease between a business and a SUNY college when the lease was included in the original application.

11) The regulation permits a business that has been rejected from the START-UP program to locate within a Tax-Free Area without being eligible for START-UP program benefits, or to reapply within sixty days via a written request identifying the reasons for rejection and offering verified factual information addressing the reasoning of the rejection. Failure to reapply within sixty days waives the applicant's right to resubmit. Upon receipt of a timely resubmission, the Commissioner may use any resources to assess the claim, and must notify the applicant of his or her determination within sixty days. Disapproval of a reapplication is final and non-appealable.

12) With respect to audits, the regulation requires businesses to provide access to DED, DTF, and DOL to all records relating to facilities located in Tax-Free Areas at a business location within the State during normal business hours. DED, DTF, and DOL are to take reasonable steps to prevent public disclosure of information pursuant to Section 87 of the Public Officers Law where the business has timely informed the appropriate officials, the records in question have been properly identified, and the request is reasonable.

13) The regulation provides for the removal of a business from the program under a variety of circumstances, including violation of New York law, material misrepresentation of facts in its application to the START-UP program, or relocation from a Tax-Free Area. Upon removing a business from the START-UP program, the Commissioner is to notify the business and its Sponsor of the decision in writing. This removal notice provides the basis for the removal decision, the effective removal date, and the means by which the affected business may appeal the removal decision. A business shall be deemed served three days after notice is sent. Following a final decision, or waiver of the right to appeal by the business, DED is to forward a copy of the removal notice to DTF, and the business is not to receive further tax benefits under the START-UP program.

14) To appeal removal from the START-UP program, a business must send written notice of appeal to the Commissioner within thirty days from the mailing of the removal notice. The notice of appeal must contain specific factual information and all legal arguments that form the basis of the appeal. The appeal is to be adjudicated in the first instance by an appeal officer who, in reaching his or her decision, may seek information from outside sources, or require the parties to provide more information. The appeal officer is to prepare a report and make recommendations to the Commissioner. The Commissioner shall render a final decision based upon the appeal officer's report, and provide reasons for any findings of fact or law that conflict with those of the appeal officer.

15) With regard to disclosure authorization, businesses applying to participate in the START-UP program authorize the Commissioner to disclose any information contained in their application, including the projected new jobs to be created.

16) In order to assess business performance under the START-UP program, the Commissioner may require participating businesses to submit annual reports within thirty days at the end of their taxable year describing the businesses' continued satisfaction of eligibility requirements, jobs data, an accounting of wages paid to employees in net new jobs, and any other information the Commissioner may require. The Commissioner shall prepare annual reports on the START-UP program for the Governor and publication on the DED website, beginning April 1, 2015. Information contained in businesses' annual reports may be published in these reports or otherwise disseminated.

17) The Freedom of Information Law is applicable to the START-UP program, subject to disclosure waivers to protect certain proprietary information submitted in support of an application to the START-UP program.

18) All businesses must keep relevant records throughout their participation in the START-UP program, plus three years. DED has the right to inspect all such documents upon reasonable notice.

19) If the Commissioner determines that a business has acted fraudulently in connection with its participation in the START-UP program, the business shall be immediately terminated from the program, subject to criminal penalties, and liable for taxes that would have been levied against the business during the current year.

20) The regulation requires participating universities and colleges to maintain a conflict of interest policy relevant to issues that may arise during the START-UP program, and to report violations of said policies to the Commissioner for publication.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires November 25, 2015.

Text of rule and any required statements and analyses may be obtained from: Phillip Harmonick, New York State Department of Economic Development, 625 Broadway, Albany, New York 12207, (518) 292-5112, email: pharmonick@esd.ny.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Chapter 68 of the Laws of 2013 requires the Commissioner of Economic Development to promulgate rules and regulations to establish procedures for the implementation and execution of the SUNY Tax-free Areas to Revitalize and Transform Upstate New York program (START-UP NY). These procedures include, but are not limited to, the application processes for both academic institutions wishing to create Tax-Free NY Areas and businesses wishing to participate in the START-UP NY program, standards for evaluating applications, and any other provisions the Commissioner deems necessary and appropriate.

LEGISLATIVE OBJECTIVES:

The proposed rule is in accord with the public policy objectives the New York State Legislature sought to advance by enacting the START-UP NY program, which provides an incentive to businesses to locate critical high-tech industries in New York State as opposed to other competitive markets in the U.S. and abroad. It is the public policy of the State to establish Tax-Free Areas affiliated with New York universities and colleges, and to afford significant tax benefits to businesses, and the employees of those businesses, that locate within these Tax-Free Areas. The tax benefits are designed to attract and retain innovative start-ups and high-tech industries, and secure for New York the economic activity they generate. The proposed rule helps to further such objectives by establishing the application process for the program, clarifying the nature of eligible businesses and facilities, and describing key provisions of the START-UP NY program.

NEEDS AND BENEFITS:

The emergency rule is necessary in order to implement the statute contained in Article 21 of the Economic Development Law, creating the START-UP NY program. The statute directs the Commissioner of Economic Development to establish procedures for the implementation and execution of the START-UP NY program.

Upstate New York has faced longstanding economic challenges due in

part to the departure of major business actors from the region. This divestment from upstate New York has left the economic potential of the region unrealized, and left many upstate New Yorkers unemployed.

START-UP NY will promote economic development and job creation in New York, particularly the upstate region, through tax benefits conditioned on locating business facilities in Tax-Free NY Areas. Attracting start-ups and high-tech industries is critical to restoring the economy of upstate New York, and to positioning the state as a whole to be competitive in a globalized economy. These goals cannot be achieved without first establishing procedures by which to admit businesses into the START-UP NY program.

The proposed regulation establishes procedures and standards for the implementation of the START-UP program, especially rules for the creation of Tax-Free NY Areas, application procedures for the admission of businesses into the program, and eligibility requirements for continued receipt of START-UP NY benefits for admitted businesses. These rules allow for the prompt and efficient commencement of the START-UP NY program, ensure accountability of business participants, and promote the general welfare of New Yorkers.

COSTS:

I. Costs to private regulated parties (the business applicants): None. The proposed regulation will not impose any additional costs to eligible business applicants.

II. Costs to the regulating agency for the implementation and continued administration of the rule: None.

III. Costs to the State government: None.

IV. Costs to local governments: None.

LOCAL GOVERNMENT MANDATES:

The rule establishes certain property tax benefits for businesses locating in Tax-Free NY Areas that may impact local governments. However, as described in the accompanying statement in lieu of a regulatory flexibility analysis for small businesses and local governments, the program is expected to have a net-positive impact on local government.

PAPERWORK:

The rule establishes application and eligibility requirements for Tax-Free NY Areas proposed by universities and colleges, and participating businesses. These regulations establish paperwork burdens that include materials to be submitted as part of applications, documents that must be submitted to maintain eligibility, and information that must be retained for auditing purposes.

DUPLICATION:

The proposed rule will create a new section of the existing regulations of the Commissioner of Economic Development, Part 220 of 5 NYCRR. Accordingly, there is no risk of duplication in the adoption of the proposed rule.

ALTERNATIVES:

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The regulation implements the statutory requirements of the START-UP NY program regarding the application process for creation of Tax-Free NY Areas and certification as an eligible business. This action is necessary in order to clarify program participation requirements and is required by the legislation establishing the START-UP NY program.

FEDERAL STANDARDS:

There are no federal standards applicable to the START-UP NY program; it is purely a State program that offers tax benefits to eligible businesses and their employees. Therefore, the proposed rule does not exceed any federal standard.

COMPLIANCE SCHEDULE:

The affected State agency (Department of Economic Development) and the business applicants will be able to achieve compliance with the regulation as soon as it is implemented.

Regulatory Flexibility Analysis

Participation in the START-UP NY program is entirely at the discretion of a qualifying business that may choose to locate in Tax-Free NY Areas. Neither statute nor the proposed regulations impose any obligation on any business entity to participate in the program. Rather than impose burdens on small business, the program is designed to provide substantial tax benefits to start-up businesses locating in New York, while providing protections to existing businesses against the threat of tax-privileged start-up companies locating in the same community. Local governments may not be able to collect tax revenues from businesses locating in certain Tax-Free NY Areas. However, the regulation is expected to have a net-positive impact on local governments in light of the substantial economic activity associated with businesses locating their facilities in these communities.

Because it is evident from the nature of the proposed rule that it will have a net-positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

The START-UP NY program is open to participation from any business that meets the eligibility requirements, and is organized as a corporation, partnership, limited liability company, or sole proprietorship. A business's decision to locate its facilities in a Tax-Free NY Area associated with a rural university or college would be no impediment to participation; in fact, START-UP NY allocates space for Tax-Free NY Areas specifically to the upstate region which contains many of New York's rural areas. Furthermore, START-UP NY specifically calls for the balanced allocation of space for Tax-Free NY Areas between eligible rural, urban, and suburban areas in the state. Thus, the regulation will not have a substantial adverse economic impact on rural areas, and instead has the potential to generate significant economic activity in upstate rural areas designated as Tax-Free NY Areas. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The regulation establishes procedures and standards for the administration of the START-UP NY program. START-UP NY creates tax-free areas designed to attract innovative start-ups and high-tech industries to New York so as to stimulate economic activity and create jobs. The regulation will not have a substantial adverse impact on jobs and employment opportunities; rather, the program is focused on creating jobs. Because it is evident from the nature of the rulemaking that it 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.

Department of Environmental Conservation

PROPOSED RULE MAKING HEARING(S) SCHEDULED

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

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

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

Proposed Action: Repeal of Parts 243, 244 and 245; addition of new Parts 243, 244 and 245; and amendment of Part 200 of Title 6 NYCRR.

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

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

Purpose: Repeal 6 NYCRR 243, 244, 245 CAIR; replace with 6 NYCRR 243, 244, 245 CSAPR; revise Part 200 to incorporate these changes.

Public hearing(s) will be held at: 5:00 p.m., October 19, 2015 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, 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 proposed rule (Full text is posted at the following State website: <http://www.dec.ny.gov>): 6 NYCRR Part 243, Transport Rule NO_x Ozone Season Trading Program

6 NYCRR Part 244, Transport Rule NO_x Annual Trading Program

6 NYCRR Part 245, Transport Rule SO₂ Group 1 Trading Program

6 NYCRR Part 200, General Provisions

The Department is adopting Parts 243, 244 and 245 to repeal the existing defunct CAIR program regulations and to implement an allocation protocol for the three Transport Rule programs that are more in line with

the environmental and energy goals of New York. The 2015 New York State Energy Plan – The Energy to Lead, calls for increased energy efficiency and renewable energy. After setting aside 5% of New York’s Transport Rule budget for new sources, Parts 243, 244 and 245 will allocate allowances based on recent emissions (the average of the 3 last years for which data are available) and provide the remaining allowances to New York State Energy Research and Development Authority (NYSERDA), who will use the proceeds of the sale of those excess allowances to promote energy efficiency and renewable energy technologies. This methodology provides sources with the amount of allowances needed to operate, while the sale of these excess allowances will aid New York in meeting the State Energy Plan goals for energy efficiency and renewable energy.

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

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

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

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

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

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

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

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

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

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

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

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

(iii) After allocating based on subparagraphs (i) and (ii) of this paragraph, the Energy Efficiency and Renewable Energy Technology (EERET) account will receive the remainder of allowances from the Transport Rule Trading Program Budget.

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

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

Under this proposal, an authorized account representative of a new unit may submit a written request to the Department to reserve allowances for the new unit in an amount no greater than the unit’s potential to emit. For proposed Part 243, the request must be made prior to May 1 of the control

period for which the request is being made or prior to the date the unit commences operation, whichever is later. For proposed Parts 244 and 245, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. The unit must have all of its required permits for the Department to consider these requests.

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

Under this proposal, New York’s Transport Rule Trading Program Budgets are designed to allocate a minimum of 10% of each trading program’s allowance budget to the EERET account. The EERET account would be administered by NYSEDA and the allowances in the account may be sold or distributed in order to help achieve the emissions reduction goals of the Transport Rule Trading Programs by promoting or rewarding investments in energy efficiency and renewable technologies, and/or innovative abatement technologies.

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

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

Text of proposed rule and any required statements and analyses may be obtained from: Michael F. Miliani, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8396, email: Michael.Miliani@dec.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 Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

Regulatory Impact Statement

INTRODUCTION

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

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

STATUTORY AUTHORITY

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

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

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

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

ECL section 19-0105 declares that it is the purpose of ECL Article 19 to safeguard the air resources of New York State under a program that is consistent with the policy expressed in section 19-0103 other provisions of Article 19.

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

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

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

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

LEGISLATIVE OBJECTIVES

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

NEEDS AND BENEFITS

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

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

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

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

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

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

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

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

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

COSTS

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

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

PAPERWORK

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

LOCAL GOVERNMENT MANDATES

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

DUPLICATION

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

ALTERNATIVES

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

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

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

FEDERAL STANDARDS

This proposal does not result in the imposition of requirements that exceed any minimum standards of the federal government for the same or similar subject areas.

COMPLIANCE SCHEDULE

There is no need for a specific compliance schedule because it does not impose any new compliance obligations on regulated entities. The EPA is still responsible for implementing and enforcing the provisions of the federal program until such time that the FIP is replaced with a full SIP. This rulemaking would only change the method by which allowances are allocated to regulated entities. Affected facilities must have sufficient allowances in their CSPAR accounts on the compliance dates in the federal program. Facility representatives will be provided with the number of allowances they will receive by the Department at least 1-year in advance of the 2017 control periods. All of the compliance obligations for the affected facilities will remain the same when the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods.

Regulatory Flexibility Analysis

EFFECT OF RULE

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

COMPLIANCE REQUIREMENTS

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

PROFESSIONAL SERVICES

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

COMPLIANCE COSTS

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

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

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

MINIMIZING ADVERSE IMPACT

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

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department held a stakeholder meeting on April 27, 2015 in which

facility representatives of affected CSAPR sources, including local governments, were provided an opportunity to provide pre-proposal input to the rule making process.

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Department of Financial Services

EMERGENCY RULE MAKING

Business Conduct of Mortgage Loan Servicers

I.D. No. DFS-37-15-00002-E

Filing No. 743

Filing Date: 2015-08-28

Effective Date: 2015-08-30

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

Action taken: Addition of Part 419 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-D

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

Specific reasons underlying the finding of necessity: The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner acceptable to the Department. However, since the passage of the Mortgage Lending Reform Law, foreclosures continue to pose a significant threat to New York homeowners. The Department continues to receive complaints from homeowners and housing advocates that mortgage loan servicers' response to delinquencies and their efforts at loss mitigation are inadequate. These rules are intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with re-

spect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing the pressing issue of mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees. The rule also sets forth prohibited practices such as engaging in deceptive practices or placing homeowners' insurance on property when the servicers has reason to know that the homeowner has an effective policy for such insurance.

Subject: Business conduct of mortgage loan servicers.

Purpose: To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

Substance of emergency rule: Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including "Servicer", "Qualified Written Request" and "Loan Modification".

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account statement which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer's obligations with respect to providing a payment history when requested by the borrower or borrower's representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer's obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer's loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 25, 2015.

Text of rule and any required statements and analyses may be obtained from: Hadas A. Jacobi, NYS Department of Financial Services, 1 State Street, New York, NY 10004, (212) 480-5890, email: hadas.jacobi@dfs.ny.gov

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Mortgage Lending Reform Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

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

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

2. Legislative Objectives.

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

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

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

Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

3. Needs and Benefits.

The Mortgage Lending Reform Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry, particularly with respect to servicing and foreclosure. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

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

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 9% were seriously delinquent as of the first quarter of 2012. Despite various initiatives adopted at the state level and the creation of federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified, have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute – the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licenses involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 67 entities have been approved for registration or have pending applications and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

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

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

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

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

5. Local Government Mandates.

None.

6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 "Federal Standards" below.

8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received. The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan.

Additionally, the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may soon propose additional regulations for mortgage loan servicers.

10. Compliance Schedule.

Similar emergency regulations first became effective on October 1, 2010.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. The functions and powers of the Banking Board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89. Of the 67 entities which have been approved for registration or have pending applications and the nearly 400 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "Mortgage Loan Servicer Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct

the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

3. Professional Services:

None.

4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publishes quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

6. Minimizing Adverse Impacts:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

7. Small Business and Local Government Participation:

The Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule reflects the input received from both industry and consumer groups.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas. Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 67 entities have pending applications or have been approved for registration and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 400 are located in New

York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services. The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Costs. The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers' own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 67 entities that have been approved for registration or that have pending applications, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

Minimizing Adverse Impact. As noted in the "Costs" section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas.

In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than \$5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

Rural Area Participation. The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2009, sets forth the application, exemption and approval procedures for registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

Department of Health

REVISED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. HLT-36-14-00012-RP

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

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

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

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

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

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

In subdivision 505.14(a), which contains definitions and provisions relating to the scope of personal care services, the definitions of "some assistance," "total assistance," and "continuous 24-hour personal care services" are repealed. Definitions of "continuous personal care services" and "live-in 24-hour personal care services" are added. Also added is a provision that personal care services shall not be authorized to the extent that the patient's need for assistance can be met by voluntary assistance from informal caregivers, by formal services other than the Medicaid program, or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

With regard to nutritional and environmental support functions ("Level I" services), a provision is added limiting the authorization to no more than eight hours per week, consistent with SSL § 365-a(2)(e)(iv). The list of Level II personal care functions is amended by the addition of "turning and positioning."

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

In paragraph 505.14(b)(4), which specifies the circumstances under which the local professional director must conduct an independent medical review, such reviews would have to be conducted in cases involving live-in 24-hour personal care services as well as cases involving continuous personal care services. The nursing assessment in continuous personal care services and live-in 24-hour personal care services cases would have to document certain factors, such as whether the physician's order had documented a medical condition that causes the patient to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding.

The social assessment in live-in 24-hour personal care services cases would have to evaluate whether the patient's home has sleeping accommodations for a personal care aide. If not, the district must authorize continuous personal care services; however, should the patient's circumstances change and sleeping accommodations for a personal care aide become available in the patient's home, the district must promptly review the case. If a reduction of the patient's continuous personal care services to live-in 24-hour personal care services is appropriate, the district must send the patient a timely and adequate notice of the proposed reduction.

In continuous personal care services and live-in 24-hour personal care services cases, the local professional director could consult with the patient's treating physician and conduct an additional assessment in the home. The final determination regarding the amount of care to be authorized would have to be made with reasonable promptness, generally not to exceed seven business days after receipt of required documentation.

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

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

In subdivision 505.28(b), which contains definitions relating to the CDPAP, the definitions of "continuous 24-hour consumer directed personal assistance" "some assistance" and "total assistance" are repealed. The definition of "consumer directed personal assistance" is amended to delete references to "some or total" assistance. Definitions of "continuous consumer directed personal assistance" and "live-in 24-hour consumer directed personal assistance" are added.

The definition of "personal care services" is amended to provide that, for individuals whose needs are limited to nutritional and environmental support functions (i.e. housekeeping tasks), personal care services shall not exceed eight hours per week.

In paragraph 505.28(d)(2), which specifies factors that the social assessment must include, the social assessment in continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance cases must document that all alternative arrangements for meeting the individual's medical needs have been explored and are infeasible. The social assessment for live-in 24-hour cases must evaluate whether the consumer's home has sleeping accommodations for a consumer directed personal assistant. If not, the district must authorize continuous consumer directed personal assistance; however, if the consumer's circumstances change and sleeping accommodations for a consumer directed personal assistant become available in the consumer's home, the district must promptly review the case. If a reduction of the consumer's continuous services to live-in services is appropriate, the district must send the consumer a timely and adequate notice of the proposed reduction.

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

Paragraph 505.28(d)(5), which specifies requirements for the local professional director's review, is repealed and a new paragraph 505.28(d)(5) is added. Cases involving continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance would have to be referred to the local professional director or designee for review and final determination of the amount of services to

be authorized. The local professional director or designee would be required to consider information in the social and nursing assessments and may consult with the consumer's treating physician and conduct an additional assessment in the home. The final determination of the amount of care to be authorized must be made with reasonable promptness, generally not to exceed seven business days after receipt of all information.

Subdivision 505.28(e), which pertains to the authorization process, would be amended to provide that consumer directed personal assistance shall not be authorized to the extent that a consumer's need for assistance can be met by voluntary assistance from informal caregivers, by formal services other than the Medicaid program, or by adaptive or specialized equipment or supplies when such equipment or supplies can be provided safely and cost-effectively.

Paragraph 505.28(h)(5) would be amended to provide additional detail regarding the content of social services district notices when the district denies, reduces or discontinues consumer directed personal assistance.

Revised rule compared with proposed rule: Substantial revisions were made in sections 505.14(a)(2), (3), (4), (5), (b)(3), (4), (5), 505.28(b)(4), (12), (d), (e) and (h).

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

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

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

Revised Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

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

The Department's October 4, 2011, emergency regulations established standards for the provision of continuous personal care services and live-in 24-hour personal care services. As defined in the emergency regulations, "continuous personal care services" means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted. "Live-in 24-hour" personal care services means the provision of care by one person for a patient who, because of the

patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted. Similar amendments were made to the Department's CDPAP regulations.

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

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

On October 3, 2012, the Department issued this clarification. (See GIS 12 MA/026, entitled "Availability of 24-Hour Split-Shift Personal Care Services," posted on the Department's website: www.health.ny.gov/health_care/medicaid/publications/gis/.)

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

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

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

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

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

The proposed regulations clarify that the "five hours daily of uninterrupted sleep" referred to in the definitions of continuous personal care services and live-in 24-hour personal care services set forth above occurs "in an eight hour period." This clarifying revision to the definitions of these services necessitated a minor revision to the regulatory impact statement.

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

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

The proposed regulations also require that the nursing assessments that districts currently complete or obtain include an evaluation of several factors set forth in GIS 12 MA/026. The local professional director or

designee would be required to consider these factors when determining whether split-shift or live-in 24-hour care was appropriate.

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

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

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

Costs:

Costs to Regulated Parties:

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

Costs to State Government:

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

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

Costs to Local Government:

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

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternatives:

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

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

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

Revised Regulatory Flexibility Analysis

Effect of Rule:

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

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

The proposed regulations that would establish revised eligibility criteria for continuous services for 16 or more hours (i.e. "split-shift" services) and live-in 24-hour services would primarily affect social services districts, which assess Medicaid applicants and recipients for personal care services and the CDPAP. There are 62 counties in New York State, but only 58 social services districts. The City of New York comprises five counties but is one social services district. Most split-shift cases and live-in 24-hour services cases reside in New York City.

Compliance Requirements:

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

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

Professional Services:

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

Compliance Costs:

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

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

The proposed regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients who are exempt or excluded from managed care enrollment to determine whether they are eligible for personal care services or the CDPAP. Districts have long been required to refer certain cases to the local professional director or designee for final determination. Pursuant to the

proposed regulations, districts would refer additional cases for such review and determination.

Small Business and Local Government Participation:

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

Cure Period:

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

Revised Rural Area Flexibility Analysis

Changes made to the last published rule do not necessitate revision to the previously published RAFA.

Revised Job Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published JIS.

Assessment of Public Comment

The Department received comments from the following: counsel for the plaintiff class in *Strouchler v. Shah* (Cardozo Bet Tzedek Legal Services, JASA/Legal Services for the Elderly in Queens, and New York Legal Assistance Group), Center for Disability Rights, Inc., Center for Independence of the Disabled, Consumer Directed Personal Assistance Association of New York State, Empire Justice Center, Legal Services of Central New York, and Southern Tier Independence Center.

1. Comment: The proposed definitions of continuous personal care services and live-in 24-hour personal care services should be revised to clarify that the live-in 24-hour aide is entitled to eight hours of sleep per day. The commentators stated that five hours of sleep may become the standard, placing both the individual and aide at risk.

Response: The Department has revised the proposed regulations in response to the public comments. The revisions clarify that a live-in aide's "five hours daily of uninterrupted sleep" is within an eight hour period. This is consistent with State Department of Labor ("DOL") guidance, which requires that live-in aides have an eight-hour sleep period and actually receive five hours of uninterrupted sleep. The DOL guidance governs the number of hours for which a live-in aide must be paid. The Department's proposed regulations have a different purpose: to establish eligibility criteria for personal care services that would enable social services districts to determine which Medicaid recipients would be eligible for continuous services and which would be eligible for live-in 24-hour services. To this end, the proposed regulations employ the DOL guidance regarding a live-in aide's ability to receive five hours of uninterrupted sleep as a standard to guide districts in their personal care services eligibility determinations. The Department has nonetheless revised the proposed regulations to clarify that this five-hour period of uninterrupted sleep is within an eight-hour period. Similar revisions were made to Section 505.28 governing the CDPAP.

2. Comment: The proposed regulations provide that, when live-in 24-hour personal care services is indicated, the social assessment must evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide. The proposed regulations should also provide that the lack of adequate sleeping accommodations for a live-in aide should not be used as a justification for denying services.

Response: The Department has revised the proposed regulations in response to the comments. The revised proposed regulations provide that the social assessment must evaluate whether the patient's home has sleeping accommodations for a personal care aide, not whether the home has "adequate" sleeping accommodations for the aide. The purpose of this revision is to avoid ambiguity regarding whether, in fact, the sleeping accommodations that exist are "adequate."

In addition, the revised proposed regulations provide that, when the patient is otherwise appropriate for live-in 24-hour personal care services, but the patient's home has no sleeping accommodations for an aide, the district must authorize continuous personal care services. This is the only circumstance under which continuous services may be authorized for a patient who is otherwise appropriate only for live-in 24-hour care. The revised proposed regulations also provide that, should the patient's circumstances change and sleeping accommodations for the aide become available in the patient's home, the district must promptly review the case. If a reduction of the patient's continuous services to live-in 24-hour services is appropriate, the district must send the patient a timely and adequate notice of the proposed reduction. Similar revisions were made to the proposed CDPAP regulations.

3. Comment: The proposed regulations provide that the nursing assessment must document whether, if live-in 24-hour personal care services were authorized, the individual “could be safely left alone without care for a period of one or more hours in a calendar day.” Commentators stated that, such a provision, without some clarification of the legitimate regulatory purpose, could be used to deny care to individuals with dementia who have a documented need for live-in home care services.

Response: This provision is not new. The Department’s regulations have long contained a similar provision. Specifically, subparagraph 505.14(b)(5)(i) has long provided that:

When the individual providing personal care services is living in the home of the patient, the local social services district shall determine whether or not, based upon the social and nursing assessments, the patient can be safely left alone without care for a period of one or more hours per day.

For many years, this was the only reference in the Department’s regulations to live-in 24-hour personal care services. It recognizes that there are hours during a live-in 24-hour aide’s shift when the aide is afforded time for meals and sleep.

The proposed regulations relocate this provision. This provision is deleted from its current location at 505.14(b)(5)(i) and included with the list of factors that the nursing assessment must document in cases that involve continuous services or live-in 24-hour services and that will be forwarded to the local professional director for review and final determination. The proposed CDPAP regulations also include this provision.

4. Comment: The proposed regulations should not include a provision that permits the denial, reduction or discontinuance of personal care services when “the client resides in a facility or participates in another program or receives other services which are responsible for the provision of needed personal care services.” This provision should be removed entirely or modified to only allow a denial of personal care services when the client is receiving other community-based long term care services. The client’s receipt of long-term care services in a facility should never be a justification for denying community-based long-term care Medicaid services.

Response: The Department has not revised the proposed regulations in response to the comments. This is not a new provision of the Department’s regulations. The Department’s regulations have included this provision since November 2001.

At that time, the Department amended its personal care services regulations pursuant to the Stipulation and Order of Settlement and Discontinuance of the *Mayer v. Wing* litigation. The regulations provided that districts’ determinations to deny, reduce or discontinue a client’s services must be stated in the client notice, and set forth several examples of appropriate reasons and notice language to be used when districts denied, reduced or discontinued services.

Among the provisions added at that time was the provision to which the commentators object. Its purpose is not to justify the denial of community-based long term care services to institutionalized persons. Its primary purpose is to reflect the federal prohibition on Medicaid payment for personal care services to persons who are inpatients or residents of hospitals, nursing facilities, intermediate care facilities for individual with intellectual disabilities or institutions for mental diseases. (42 C.F.R. § 440.167)

5. Comment: The proposed regulations should retain the requirement in clause 505.14(b)(5)(v)(d) that provides that the determination of the need for 24-hour personal care shall be made without regard to the availability of formal or informal caregivers to assist in the provision of such care.

Response: The Department has not revised the proposed regulations in response to the comment. The proposed regulations would delete this provision, which was added in November 2001 as part of the *Mayer* revisions, from clause 505.14(b)(5)(v)(d) because other provisions of the proposed regulations now address this “two-step” approach. Specifically, proposed clause 505.14(a)(3)(iii)(b) provides that social services districts first determine whether the patient, because of the patient’s medical condition, would be otherwise eligible for personal care services; and, if so, the district must determine whether, and the extent to which, the patient’s need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies. The proposed CDPAP regulations include a similar provision.

6. Comment: The proposed regulations at Section 505.28 should contain notice provisions for the consumer directed personal assistance program comparable to those set forth for personal care services.

Response: The Department has revised paragraph 505.28(h)(5) of the proposed regulations in response to the comments.

7. Comment: The proposed regulations must be amended to include a definition of “voluntary assistance” which requires the social services district to assess the appropriateness of each proposed informal support to the tasks and to the development of the consumer.

Response: The Department has not revised the proposed regulations in response to the comment because the existing personal care services and CDPAP regulations address the commentator’s concern. With respect to personal care services, Section 505.14(b)(3)(ii)(b) has long required the district’s social assessment to consider certain factors when evaluating the potential contribution of informal caregivers such as family and friends. Such factors include, among other things, the potential informal caregiver’s ability to assist in care and whether the informal caregiver’s involvement is acceptable to the patient. With respect to the CDPAP, Section 505.28(d)(2)(iii) currently mirrors these requirements.

8. Comment: The proposed regulations carry forward “a requirement that forces the authorization to be based on the possibility of formal supports. However, formal supports is not defined and has never been defined, leading to the potential for a lack of clarity of consistency in how this is interpreted and implemented.”

Response: The Department has revised the proposed regulations in response to the comment to clarify that formal services are those provided or funded by an entity, agency or program other than the Medicaid program.

The term “formal services” has long been included in the Department’s personal care services regulations. Beginning in 1986, the personal care services regulations required that, in cases involving continuous 24-hour personal care services, the social assessment must demonstrate that:

all alternative arrangements for meeting the patient’s medical needs have been explored and/or are infeasible including, but not limited to, the provision of personal care services in combination with other formal services or in combination with contributions of informal caregivers.

This requirement is consistent with the principle that the Medicaid program is the payor of last resort. Before Medicaid can authorize payment for personal care services, there should be a consideration whether, and the extent to which, the patient’s medical needs can be met by other available means or funding sources. The proposed regulations would extend this requirement so that all authorizations of personal care services and consumer directed personal assistance must consider whether, and the extent to which, the individual’s needs can be met by formal services, by voluntary assistance from informal caregivers who are acceptable to the individual, and by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

In general, the term “formal services” refers to programs, services or funding sources other than Medicaid-funded personal care services that are available to the individual and that can provide or pay for needed assistance so that the Medicaid program remains the “payor of last resort.” For example, home health services provided by a certified home health agency and funded by Medicare could be a “formal service” that is available to a dual-eligible recipient. A Medicaid recipient may also have third party health insurance that is available to pay for needed assistance. These are examples of “formal services” that should be considered before the district authorizes Medicaid-funded personal care services or consumer directed personal assistance.

9. Comment: The Department should amend its personal care services and consumer directed personal assistance regulations in all places where the provisions mention the “local district” or “social services district” to include “or managed care plan responsible for authorizing Medicaid long-term care services.”

Response: The Department has not revised the proposed regulations in response to the comment. The Department’s personal care services and CDPAP regulations apply to social services districts’ authorizations of these services for Medicaid fee-for-service recipients. While it is true that the personal care services and CDPAP services that managed care entities offer must be furnished in an “amount, duration and scope” that is no less than the “amount, duration and scope” for the same services furnished to Medicaid fee-for-service recipients, many of the provisions of Sections 505.14 and 505.28 pertain to the administrative processes by which social services districts are to authorize services rather than to the amount, duration and scope of the services themselves. Consequently, one cannot simply extend every reference to “local district” or “social services district” in such regulations also to encompass managed care entities. In

general, subdivision 505.14(a) sets forth the amount, duration and scope of the personal care services benefit and subdivisions 505.28(b) and (c) set forth the amount, duration and scope requirement for the CDPAP. While the Department has not adopted this comment, it will notify all managed care organizations and managed long term care plans of the final regulations. It will also provide appropriate guidance regarding how plans must administer the personal care services and CDPAP benefits consistent with the amount, duration, and scope requirement and with enrollees' due process rights to appropriate notice of plan actions.

**REGULATORY IMPACT
STATEMENT,
REGULATORY FLEXIBILITY
ANALYSIS, RURAL AREA
FLEXIBILITY ANALYSIS
AND/OR
JOB IMPACT STATEMENT**

Protection Against Legionella

I.D. No. HLT-35-15-00005-E

This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement pertain(s) to a notice of Emergency rule making, I.D. No. HLT-35-15-00005-E, printed in the *State Register* on September 2, 2015.

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

Outbreaks of legionellosis have been associated with cooling towers. A cooling tower is an evaporative device that is part of a recirculated water system incorporated into a building's cooling, industrial process, refrigeration, or energy production system. Because water is part of the process of removing heat from a building, these

devices require disinfectants—chemicals that kill or inhibit bacteria (including Legionella)—as means of controlling bacterial overgrowth. Overgrowth may result in the normal mists ejected from the tower having droplets containing Legionella.

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

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

More recently, 119 cases of legionellosis that included 12 fatalities (8/12/15) occurred in Bronx, NY (July-August, 2015). This event was preceded by an outbreak in Co-Op City in the Bronx, from December 2014 to January 2015, which involved 8 persons and no fatalities. Both of these outbreaks have been attributed to cooling towers, and emergency disinfection of compromised towers helped curtail these outbreaks. These events highlight the need for proper maintenance of cooling towers.

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

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

Further, these regulations requires that all owners of cooling towers ensure proper maintenance of the cooling tower Legionella sampling plan for their potable water system, report the results, and take necessary actions to protect the safety of their patients or residents, as the Department may deem appropriate. The details of each facility's

sampling plan and remedial measures will depend on the risk factors for acquiring Legionnaires' disease in the population served by the hospital or nursing home.

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

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

Costs:

Costs to Private Regulated Parties:

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

- Routine Bacteriological Culture Testing – The regulations require routine bacteriological testing pursuant to their cooling tower maintenance program and plan. The cost per dip slide test is \$3.50. Assuming that some plans may require tests be performed twice a week, this could result in an annual cost of \$364. If heterotrophic plate count analysis is used the cost per sample on average is \$25.

- Emergency Legionella Culture Testing – Owners of cooling towers are required to conduct additional testing for Legionella in the event of disruption of normal operations or process control, or when indicated by epidemiological evidence. The average cost of each sample analysis is estimated to be approximately \$125.00.

- Maintenance Program and Plan Development – The formulation of a cooling tower program and sampling plan would require 4 to 8 hours at \$150 per hour (\$600 to \$1200). The range represents the cost for reviewing and modifying an existing plan versus the preparation of a new plan.

- Inspection – Owners of cooling towers shall obtain the services of a professional engineer (P.E.), certified industrial hygienist (C.I.H.), certified water technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015, for inspection of the cooling towers at intervals not exceeding 90 days while in use. The cost of such services is estimated to be approximately \$150.00 per hour and estimated to take approximately eight (8) hours.

- Annual Certification – The same persons qualified to perform inspections are qualified to perform annual certifications. The certification can follow one of the required inspections and requires some additional evaluation and considerations. The cost of such services is estimated to be approximately \$150.00 per hour and is estimated to take approximately four (4) hours.

- Emergency Cleaning and Disinfection – If emergency cleaning and disinfection is required, owners of cooling towers are required to obtain the services of a certified commercial pesticide applicator or pesticide technician who is qualified to apply biocide in a cooling tower, or a pesticide apprentice under the supervision of a certified applicator. The cost of such services is estimated to be approximately \$5,000.00 for labor, plus the cost of materials.

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

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

Costs to State Government and Local Government:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

This regulation does not duplicate any state requirements.

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

All owners of existing cooling towers shall register their towers within 30 days after the effective date of this Part. Thereafter, all owners shall register such towers prior to initial operation.

All owners of existing cooling towers must collect water samples, obtain culture testing, and inspect their cooling towers within 30 days of the effective date of this Part, unless such testing has occurred within the last 30 days. Depending upon the test results, owners may need to take immediate appropriate action.

By March 1, 2016, all owners of existing cooling towers must obtain and implement a maintenance program and plan. Until such plan is obtained, culture testing must be performed every 90 days, while the tower is in use.

All owners must inspect their cooling towers at least every 90 days while in use. All owners of cooling towers shall obtain a certification that regulatory requirements have been met by November 1, 2016, with subsequent annual certifications by November 1st of each year.

Owners must register cooling towers and report certain actions, using a statewide electronic system. Reportable events include date of sample collections; date of cleaning and disinfection; start and end dates of any shutdown lasting more than five days; dates of last inspection and when due; dates of last certification and when due; and date of discontinued use. These events must be reported to the statewide electronic system within 10 days of occurrence.

Regulatory Flexibility Analysis

Effect of Rule:

The rule will affect the owner of any building with a cooling tower, as those terms are defined in the regulation. This could include small

businesses. At this time, it is not possible to determine the number of small businesses so affected. This regulation affects local governments by establishing requirements for implementing, administering, and enforcing elements of this Part. Local governments have the power to enforce the provisions of the State Sanitary Code, including this new Part. PHL §§ 228, 229, 309(1)(f) and 324(1)(e).

Compliance Requirements:

Small businesses that are also owners of cooling towers must comply with all provisions of this Part. A violation of any provision of this Part is subject to all civil and criminal penalties as provided for by law. Each day that an owner remains in violation of any provision of this Part shall constitute a separate and distinct violation of such provision.

Professional Services:

To comply with inspection and certification requirements, small businesses will need to obtain services of a P.E., C.I.H., certified water technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015. Small businesses will need to secure laboratory services for routine culture sample testing and, if certain events occur, emergency Legionella culture testing.

To comply with disinfection requirements, small businesses will need to obtain the services of a commercial pesticide applicator or pesticide technician, or pesticide apprentice under supervision of a commercial pesticide applicator. These qualifications are already required for the properly handling of biocides that destroy Legionella.

Compliance Costs:

Costs to Private Regulated Parties:

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

- Routine Bacteriological Culture Testing – The regulations require routine bacteriological testing pursuant to industry standards. The cost per test is \$3.50. Assuming tests are performed twice a week, this would result in an annual cost of \$364.
- Emergency Legionella Culture Testing – Owners of cooling towers are required to conduct additional testing for Legionella in the event of disruption of normal operations. The average cost of each sample analysis is estimated to be approximately \$125.00.
- Inspection – Owners of cooling towers shall obtain the services of a professional engineer (P.E.), certified industrial hygienist (C.I.H.), certified water technologist, or environmental consultant with training and experience performing inspections in accordance with current standard industry protocols including, but not limited to ASHRAE 188-2015; for inspection of the cooling towers at intervals not exceeding once every 90 days while the cooling towers are in use. The cost of such services is estimated to be approximately \$150.00 per hour and estimated to take approximately eight (8) hours.
- Annual Certification – The same persons qualified to perform inspections are qualified to perform annual certifications. The cost of such services is estimated to be approximately \$150.00 per hour and is estimated to take approximately four (4) hours.
- Emergency Cleaning and Disinfection – If emergency cleaning and disinfection is required, owners of cooling towers are required to obtain the services of a certified commercial pesticide applicator or pesticide technician who is qualified to apply biocide in a cooling tower, or a pesticide apprentice under the supervision of a certified applicator. The cost of such services is estimated to be approximately \$5,000.00 for labor, plus the cost of materials.
- Recordkeeping and Electronic Reporting – Owners of cooling towers are required to maintain certain specified records and to electronically report certain specified information. The costs of these administrative activities are predicted to be minimal.
- The formulation of a cooling tower program and sampling plan would require 4 to 8 hours at \$150 per hour (\$600 to \$1200). The range represents the cost for reviewing and modifying an existing plan versus the preparation of a new plan.

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

Costs to State Government and Local Government:

State and local governments possess authority to enforce compliance with these regulations. Exact costs cannot be predicted at this time. However, some local costs may be offset through the collection of fees, fines and penalties authorized pursuant to this Part. Costs to State and local governments may be offset by a reduction in the need to respond to community legionellosis outbreaks.

Economic and Technological Feasibility:

Although there will be an impact of building owners, including small businesses, compliance with the requirements of this regulation is considered economically and technologically feasible as it enhances and enforces existing industry best practices. The benefits to public health are anticipated to outweigh any costs. This regulation is necessary to protect public health.

Minimizing Adverse Impact:

The New York State Department of Health will assist local governments by providing a cooling tower registry and access to the database, technical consultation, coordination, and information and updates.

Small Business and Local Government Participation:

Development of this regulation has been coordinated with New York City.

Cure Period:

Violation of this regulation can result in civil and criminal penalties. In light of the magnitude of the public health threat posed by the improper maintenance and testing of cooling towers, the risk that some small businesses will not comply with regulations justifies the absence of a cure period.

Rural Area Flexibility Analysis

Pursuant to Section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas. The proposed rule will not impose an adverse economic impact on rural areas, nor will it impose any disproportionate reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

Nature of the Impact:

The Department of Health expects there to be a positive impact on jobs or employment opportunities. The requirements in the regulation generally coincide with industry standards and manufacturers specification for the operation and maintenance of cooling towers. However, it is expected that a subset of owners have not adequately followed industry standards and will now hire firms or individuals to assist them with compliance and to perform inspections and certifications.

Categories and Numbers Affected:

The Department anticipates no negative impact on jobs or employment opportunities as a result of the proposed regulations.

Regions of Adverse Impact:

The Department anticipates no negative impact on jobs or employment opportunities in any particular region of the state.

Minimizing Adverse Impact:

Not applicable.

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Electric Rate Filing

I.D. No. PSC-37-15-00006-P

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

Proposed Action: The Commission is considering a proposal filed by New York State Electric & Gas Corporation (NYSEG) to make various changes in the rates, charges, rules and regulations contained in its Schedules P.S.C. Nos. 119, 120 and 121—Electricity.

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

Subject: Major electric rate filing.

Purpose: To consider an increase in NYSEG's electric delivery revenues by approximately \$122 million or 16.8%.

Public hearing(s) will be held at: 10:00 a.m., Nov. 4, 2015 and continuing daily as needed at Department of Public Service, Agency Bldg. Three, 19th Fl. Boardroom, Albany, NY (Evidentiary Hearing)*

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Cases 15-E-0283 and 15-G-0284.

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 Commission is considering a proposal filed by New York State Electric & Gas Corporation (NYSEG) to increase NYSEG's electric delivery revenues for the rate year ending March 31, 2017 by approximately \$138 million (or 19.0 percent). NYSEG proposes to offset this increase with customer credits of \$15.7 million for an increase in electric delivery revenues of approximately \$122 million (or 16.8 percent). The initial suspension period for the proposed filing runs through October 16, 2015. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: 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

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

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

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

(15-E-0283SP1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Gas Rate Filing

I.D. No. PSC-37-15-00008-P

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

Proposed Action: The Commission is considering a proposal filed by New York State Electric & Gas Corporation (NYSEG) to make various changes in the rates, charges, rules and regulations contained in its Schedules P.S.C. Nos. 87, 88 and 90—Gas.

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

Subject: Major gas rate filing.

Purpose: To consider an increase in NYSEG's gas delivery revenues by approximately \$36.3 million or 19.1%.

Public hearing(s) will be held at: 10:00 a.m., Nov. 4, 2015 and continuing daily as needed at Department of Public Service, Agency Bldg. Three, 19th Fl. Boardroom, Albany, NY (Evidentiary Hearing)*

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Cases 15-E-0283 and 15-G-0284.

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 Commission is considering a proposal filed by New York State Electric & Gas Corporation (NYSEG) to increase NYSEG's gas delivery revenues for the rate year ending March 31, 2017 by approximately \$44.1 million (or 23.6 percent). NYSEG proposes to offset this increase with customer credits of \$7.8 million for an increase in gas delivery revenues of \$36.3 million (or 19.1 percent). The initial suspension period for the proposed filing runs through October 16, 2015. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and major resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: 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

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

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

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

(15-G-0284SP1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Electric Rate Filing

I.D. No. PSC-37-15-00009-P

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

Proposed Action: The Commission is considering a proposal filed by Rochester Gas and Electric Corporation (RG&E) to make various changes in the rates, charges, rules and regulations contained in its Schedules P.S.C. Nos. 18 and 19—Electricity.

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

Subject: Major electric rate filing.

Purpose: To consider an increase in RG&E's electric delivery revenues by approximately \$53 million or 12.1%.

Public hearing(s) will be held at: 10:00 a.m., Nov. 4, 2015 and continuing daily as needed at Department of Public Service, Agency Bldg. Three, 19th Fl. Boardroom, Albany, NY (Evidentiary Hearing)*

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Cases 15-E-0285 and 15-G-0286.

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 Commission is considering a proposal filed by Rochester Gas and Electric Corporation (RG&E) to increase RG&E's electric delivery revenues for the rate year ending March 31, 2017 by approximately \$53 million (or 12.1 percent). RG&E proposes to offset this increase with customer credits of \$63 million for a decrease in electric delivery revenues of approximately \$10 million (or -2.3 percent). The initial suspension period for the proposed filing runs through October 16, 2015. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: 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

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

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

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

(15-E-0285SP1)

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

Major Gas Rate Filing

I.D. No. PSC-37-15-00010-P

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

Proposed Action: The Commission is considering a proposal filed by Rochester Gas and Electric Corporation (RG&E) to make various changes in the rates, charges, rules and regulations contained in its Schedule P.S.C. No. 16 — Gas.

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

Subject: Major gas rate filing.

Purpose: To consider an increase in RG&E's gas delivery revenues by approximately \$21.8 million or 31.1%.

Public hearing(s) will be held at: 10:00 a.m., November 4, 2015 and continuing daily as needed at Department of Public Service, Agency Bldg. Three, 19th Fl. Boardroom, Albany, NY. (Evidentiary Hearing)*

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Cases 15-E-0285 and 15-G-0286.

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 Commission is considering a proposal filed by Rochester Gas and Electric Corporation (RG&E) to increase RG&E's gas delivery revenues for the rate year ending March 31, 2017 by approximately \$24.4 million (or 34.8 percent). RG&E proposes to offset this increase with customer credits of \$2.6 million for an increase in gas delivery revenues of \$21.8 million (or 31.1 percent). The initial suspension period for the proposed filing runs through October 16, 2015. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: 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

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

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

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

(15-G-0286SP1)

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

Submetered Electricity

I.D. No. PSC-37-15-00007-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the request of 89 Murray Street Associates LLC for clarification of the submetering order issued December 20, 2007, in Case 07-E-1015.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Submetered electricity.

Purpose: To consider the request of 89 Murray Street Ass. LLC, for clarification of the submetering order issued December 20, 2007.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the request of 89 Murray Street Associates LLC, for clarification of the submetering order issued December 20, 2007, in Case 07-E-1015, and to take other actions necessary to address the request for clarification.

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

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(07-E-1015SP3)

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

Minor Water Rate Filing

I.D. No. PSC-37-15-00011-P

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

Proposed Action: The Commission is considering a proposal filed by William K. Green to make various changes in the rates, charges, rules and regulations contained in its Schedule P.S.C. No. 2 — Water.

Statutory authority: Public Service Law, sections 4(1), 5(1)f, 89-c(1), (10)(a), (b), (3) and (f)

Subject: Minor water rate filing.

Purpose: To consider an increase in William K. Green's annual water revenues by approximately \$4,458 or 66%.

Substance of proposed rule: The Commission is considering a proposal filed by William K. Green (Company) to increase its total annual revenues by approximately \$4,458 or 66%. The Company is also requesting approval to change its tariff rates from a monthly rate to a quarterly rate billed in arrears, and to modify the restoration of service charges to be consistent with charges in the standard small water company tariff. The charge to restore service after discontinuance at the customer's request, for non-payment, or for violation of rules, is proposed to increase from \$5.00 to \$50 during normal business hours (8:00 a.m. to 4:00 p.m., Monday through Friday), from \$10.00 to \$75 outside of normal business

hours Monday through Friday, and from \$10.00 to \$100 on weekends or public holidays.

In addition, the Company also requests approval to recover \$16,259 in extraordinary expenses it incurred in 2014 to rehabilitate its well supplies, install a new treatment system, and construct a new treatment building, as required by the Orange County Department of Health. The Company proposes to recover this amount through a surcharge to be collected quarterly over a five-year period. The proposed minor rate filing has an effective date of December 1, 2015. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: 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

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

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

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

(15-W-0508SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Issuance by Corning of Long-term Indebtedness

I.D. No. PSC-37-15-00012-P

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

Proposed Action: The Commission is considering whether to approve or reject, in whole or in part, the petition of Corning Natural Gas Corporation (Corning) for Authority to issue approximately \$34.7 million in long-term debt.

Statutory authority: Public Service Law, section 69

Subject: Issuance by Corning of long-term indebtedness.

Purpose: To consider Corning's petition for authority to issue approximately \$34.7 million in long-term debt.

Substance of proposed rule: On August 6, 2015, Corning Natural Gas Corporation (Corning) filed a petition under Public Service Law (PSL) § 69 seeking Commission approval to issue a maximum of \$34,768,837 in long-term debt. Corning states that the borrowing is necessary to refund short-term indebtedness, fund Commission-mandated safety and reliability measures, and fund expansion of residential gas service within Corning's service area. The Commission may grant, deny or modify, in whole or in part, Corning's petition and may consider issues related to the proposed long-term debt.

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

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(15-G-0460SP1)

Office of Temporary and Disability Assistance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Monthly Shelter Supplements

I.D. No. TDA-37-15-00005-P

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

Proposed Action: Amendment of section 352.3(a)(3)(i) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 131(1); L. 2009, ch. 53; L. 2011, ch. 53; L. 2012, ch. 53; L. 2013, ch. 53; L. 2014 ch. 53; L. 2015, ch. 53; L. 2010, chs. 58 and 110

Subject: Monthly Shelter Supplements.

Purpose: To update State regulations to reflect current State law.

Text of proposed rule: Amend subparagraph (i) of paragraph (3) of subdivision (a) of section 352.3 of Title 18 NYCRR to read as follows:

(i) A social services district, with the approval of the Office of Temporary and Disability Assistance, may provide [an] additional monthly shelter [supplement] *supplements* to [families with children who are] public assistance applicants [or] *and* recipients [and] who will reside in private housing, *or who currently reside in private housing and are facing eviction*. Social services districts choosing to provide [a supplement] *such supplements* must submit a plan to the Office of Temporary and Disability Assistance, attention: [Division of Temporary Assistance] *Center for Employment and Economic Supports*, prior to providing [the supplement] *any such supplements*. Plans submitted to the office must include: justification for providing [a supplement] *the supplement(s)*, the targeted population, the amount of the [supplement] *supplement(s)* and any additional information as required by the office. The [supplement] *supplement(s)* must be a monthly amount that, when combined with the shelter allowance, does not exceed the rental obligation *or home ownership shelter expenses* of the applicant or recipient. The amount of the shelter supplement is not part of the standard of need.

Text of proposed rule and any required statements and analyses may be obtained from: Matthew L. Tulio, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 486-9568, email: Matthew.Tulio@otda.ny.gov

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

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

Regulatory Impact Statement

1. Statutory Authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to establish regulations to carry out its powers and duties.

SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State.

SSL § 131(1) requires social services districts, insofar as funds are available for that purpose, to provide adequately for those persons who are unable to maintain themselves, in accordance with the provisions of the SSL.

Beginning with Chapter 53 of the Laws of 2009, and then continuing in Chapters 58 and 110 of the Laws of 2010 and Chapters 53 of the Laws of 2011, 2012, 2013, 2014 and 2015, the enacted appropriations language authorizes social services districts to provide shelter supplements at local option to safety net and family assistance households in order to prevent eviction and address homelessness in accordance with social services district plans approved by OTDA and the Director of the Budget, provided, however, that such supplements will not be part of the standard of need, pursuant to SSL § 131-a.

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes, that OTDA establish rules, regulations and policies so that adequate provision is made for those persons who are unable to provide for themselves, so that, whenever possible, such persons can be restored to a condition of self-support and self-care.

3. Needs and Benefits:

The current regulation at 18 NYCRR § 352.3(a)(3)(i) allows social ser-

vices districts, with the approval of OTDA, to provide additional monthly shelter supplements to families with children who are public assistance applicants or recipients and who will reside in private housing. This proposed amendment would update 18 NYCRR § 352.3(a)(3)(i) to reflect current State law by extending the authority to provide additional monthly shelter supplements to eligible public assistance applicants and recipients, including single adults and childless couples. The proposed amendment also would clarify that public assistance applicants and recipients who will reside in private housing or who currently reside in private housing and are facing eviction may be eligible for the additional monthly shelter supplements. The proposed amendment would specify that whether the eligible persons are renters or home owners, their monthly supplements may not exceed their rental obligations or their home ownership shelter expenses, respectively.

Beginning in 2009, the enacted appropriations language authorized social services districts to provide shelter supplements at local option to safety net and family assistance households consisting not only of families with children, but also of single adults and childless couples. OTDA issued an Administrative Directive, transmittal 09-ADM-10, on May 28, 2009, informing the social services districts of the changes to the State law that provided authority for public assistance shelter allowance supplements for single adults and childless couples to prevent eviction and address homelessness.

For homeless households that are moving from temporary housing to permanent housing, public assistance can be a stabilizing factor allowing households to begin working or increase earnings as they receive assistance to help pay bills, purchase food and meet their monthly rent. When necessary, rent supplements are also a stabilizing factor to help pay for some of the rent until the households become self-sufficient.

4. Costs:

This proposed amendment would have no fiscal impact upon the State or the social services districts. The proposed amendment reflects the current policies and practices of OTDA and the social services districts.

5. Local Government Mandates:

The proposed amendment would not impose any additional programs, services, duties or responsibilities upon the social services districts. The proposed amendment is simply needed to bring the State regulations into compliance with State appropriations language.

6. Paperwork:

There will be no additional forms required to support this proposed amendment.

7. Duplication:

The proposed amendment does not duplicate, overlap or conflict with any existing State or federal regulations. This change is necessary to bring State regulations into compliance with State law.

8. Alternatives:

The alternative is to leave 18 NYCRR § 352.3(a)(3)(i) intact. However, that is not a viable option. The current regulatory provision does not accurately reflect statutory authority.

9. Federal Standards:

The proposed amendment does not conflict with federal standards for public assistance.

10. Compliance Schedule:

The social services districts are already in compliance with the statutory requirements and thus with the proposed amendment.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed amendment would have no impact on small businesses or the 58 social services districts in the State. The proposed amendment is simply needed to bring the State regulations into compliance with State appropriations language. This proposed amendment reflects the current policies and practices of OTDA and the social services districts.

2. Compliance requirements:

The social services districts are already in compliance with the State statutory requirements and thus with the proposed amendment.

3. Professional services:

The proposed amendment would not require social services districts to hire additional professional services to comply with the amendment.

4. Compliance costs:

The proposed amendment would have no fiscal impact on the social services districts.

5. Economic and technological feasibility:

The social services districts already have the economic and technological ability to comply with the proposed amendment.

6. Minimizing adverse impact:

The proposed amendment would not have an adverse economic impact on the social services districts.

7. Small business and local government participation:

The social services districts did not participate in the development of this proposal, because all portions of the amendment are necessary to

comply with enacted appropriations language. However, OTDA did develop an Administrative Directive (ADM), transmittal 09-ADM-10, to explain the State statutory requirements after Chapter 53 of the Laws of 2009 was enacted. All of the social services districts had an opportunity to review and comment on the draft version of the ADM. The social services districts did not raise any objections or concerns regarding the implementation of the statutory requirements.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed amendment will have no impact on the 44 rural social services districts in the State. The proposed amendment is simply needed to bring the State regulations into compliance with State appropriations language. This proposed amendment reflects the current policies and practices of the rural social services districts.

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

The rural social services districts are already in compliance with the State statutory requirements and thus with the proposed amendment. The rural social services districts will not need to hire any additional professional services.

3. Costs:

The proposed amendment would have no fiscal impact on the rural social services districts.

4. Minimizing adverse impact:

There will be no adverse economic impact on the rural social services districts.

5. Rural area participation:

The rural social services districts did not participate in the development of this proposal because all portions of the amendment are necessary to comply with enacted appropriations language. However, OTDA developed an Administrative Directive (ADM), transmittal 09-ADM-10, to explain the State statutory requirements after Chapter 53 of the Laws of 2009 was enacted. All of the social services districts, including those in rural areas, had an opportunity to review and comment on the draft version of the ADM. The rural social services districts did not raise any objections or concerns regarding the implementation of the statutory requirements.

Job Impact Statement

A Job Impact Statement is not required for the proposed amendment. It is apparent from the nature and the purpose of the proposed amendment that it would not have a substantial adverse impact on jobs and employment opportunities in New York State. The proposed amendment would not affect private businesses. The proposed amendment would not affect the jobs of the workers in the social services districts or at OTDA. Thus the changes would not have any adverse impact on jobs and employment opportunities in New York State.

Workers' Compensation Board

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Ambulatory Surgery Fee Schedule

I.D. No. WCB-37-15-00004-EP

Filing No. 746

Filing Date: 2015-08-31

Effective Date: 2015-10-01

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

Proposed Action: Amendment of Part 329 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 141 and 13

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. The current Products of Ambulatory Surgery (PAS) system used as the basis for the Workers' Compensation Board's (Board) Ambulatory Surgery Fee Schedule is obsolete as it is no longer supported by the Department of Health. The Department of Health has transitioned to an Ambulatory Patient Groups (APG) system. In addition, the International Classification

of Diseases, 9th Revision (ICD-9), a comprehensive coding system promulgated by the federal Centers for Medicare and Medicaid Services in the US Department of Health and Human Services, will be replaced by the ICD-10 system on October 1, 2015. Both the PAS and APG methodologies rely on the ICD-9 systems. The Department of Health will not be updating the PAS system to ICD-10. Accordingly, the Board seeks to adopt the APG on an emergency basis to coordinate with the roll-out of the ICD-10 system on October 1, 2015. This is necessary to ensure that the Board's ambulatory surgery fee schedule is consistent with the industry and that reimbursement rates are properly updated. Accordingly, emergency adoption of this rule is necessary.

Subject: Ambulatory Surgery Fee Schedule.

Purpose: Update the methodology for the computation of fees for ambulatory surgery to an Ambulatory Patient Groups (APG) system.

Text of emergency/proposed rule: Part 329 of Title 12 NYCRR is amended to add Subparts 329-1, 329-2 and 329-3, and to renumber Sections 329.1, 329.2, 329.3, 329.6 and 329.7 as 329-1.1, 329-1.2, 329-1.3, 329-3.1, 329-3.2 and repeal Sections 329.4 and 329.5 of Title 12 NYCRR and add new Subpart 329-2.

Subpart 329-2 Ambulatory Surgery Services Fee Schedule
§ 329-2.1 Scope and Effective Date.

Payment for ambulatory surgery services shall be made according to the ambulatory patient groups (APG) methodology, governing reimbursement for licensed freestanding ambulatory surgical centers and hospital-based ambulatory surgery services as set forth herein and subject to WCB specific adjustments. The effective date of this Subpart shall be October 1, 2015.

§ 329-2.2 Definitions: Ambulatory Patient Group

As used in this Subpart, the following definitions shall apply:

(a) Ambulatory Patient Group ("APG") shall mean a defined group of outpatient procedures, encounters or ancillary services, as specifically identified and published by the Department of Health, which reflect similar patient characteristics and resource utilization and which incorporate the use of ICD-10-CM diagnosis codes and CPT-4 and HCPCS procedure codes, as defined below;

(b) Allowed APG weight shall mean the relative resource utilization for a given APG after adjusting for consolidation, packaging, and discounting.

(c) APG relative weight shall mean a numeric value that reflects the relative expected average resource utilization (cost) for each APG as compared to the expected average resource utilization for all other APGs. Procedure-based APG weight shall mean a numeric value that reflects the relative expected average resource utilization (cost) for a specific procedure. A procedure that has been assigned its own weight shall have its payment derived from its procedure-specific weight without regard to the weight of the APG to which the procedure groups.

(d) Workers' Compensation specific base rates shall mean the numeric value that shall be multiplied by the allowed APG weight for a given APG, or by the final APG relative weight to determine the total allowable Workers' Compensation operating payment for a visit.

(e) Consolidation, also known as "bundling", shall mean the process for determining if a single payment amount is appropriate in those circumstances when a patient receives multiple APG procedures during a single patient visit.

(f) Current Procedural Terminology, fourth edition (CPT-4) is the systematic listing and coding of procedures and services provided by physicians or other related health care providers. It is a subset of the Healthcare Common Procedure Coding System (HCPCS). The CPT-4 and HCPCS are maintained by the American Medical Association and the federal Centers for Medicare and Medicaid Services and are updated annually.

(g) Discounting shall mean the reduction in APG payment that results when additional procedures do not consolidate. Additional occurrences of the same ancillary APG within a single visit or episode will also discount.

(h) APG Software System shall mean the New York State-specific version of the APG computer software developed and published by Minnesota Mining and Manufacturing Corporation (3M) to process CPT-4 and ICD-10 code information in order to assign patient visits to the appropriate APG category or categories and apply appropriate bundling, packaging and discounting to assign the appropriate final APG weight and associated reimbursement.

(i) Final APG Weight shall mean the allowed APG weight for a given visit as expressed in the applicable APG software, and as adjusted by all applicable consolidation, packaging and discounting and other applicable adjustments.

(j) International Classification of Diseases, 10th Revision (ICD-10) is a comprehensive coding system maintained by the federal Centers for Medicare and Medicaid Services in the US Department of Health and Human Services. It is maintained for the purpose of providing a standardized, universal coding system to identify and describe patient diagnoses, symptoms, complaints, conditions and/or causes of injury or illness. It is updated annually.

(k) Packaging shall mean those circumstances in which payment for routine ancillary services or drugs shall be deemed as included in the applicable APG payment for a related significant procedure or medical visit. Medical visits also package with significant procedures, unless specifically excepted herein.

(l) Significant procedure APG shall mean an APG incorporating a medical procedure that constitutes the primary reason for the visit in terms of time and resources expended.

(m) Medical visit APG shall mean an APG representing a visit during which a patient received medical treatment, but did not have a significant procedure performed.

(n) Visit shall mean a unit of service consisting of all the APG services performed for a patient that are coded on the same claim and share a common date of service.

(o) Peer Group shall mean a group of providers that share a common APG Workers' Compensation specific base rate. Peer groups may be established based on facility licensure, geographic region, types of services provided or categories of patients.

(p) Ancillary services APGs shall mean those APGs designated by the Department of Health as reflecting those tests and procedures ordered by physicians to assist in patient diagnosis and/or treatment.

§ 329-2.3 APGs, Relative Weights, and system updating

The table of APG Weights, Procedure Based Weights and units, and APG Fee Schedule Fees and units for each effective period are published on the New York State Department of Health website at: http://www.health.state.ny.us/health_care/medicaid/rates/apg/docs/apg_payment_components.xls and are herein incorporated by reference.

§ 329-2.4 Diagnostic coding and rate computation

(a) Facility shall assign ICD-10 diagnostic and HCPCS/CPT-4 procedure codes for each visit and shall utilize the claim coding information to assign the applicable APG. The facility shall use the APG software system to determine the significant procedure APG, applicable ancillary services APGs and the final weight for a visit. The APG software system shall incorporate methodologies for consolidation, packaging and discounting to be reflected in the final weight to be assigned to the claim.

(b) Other applicable adjustments shall be made by the facility.

(c) Bill in accordance with APG requirements and WCB adjustments submitted for reimbursement to Payer with a copy to WCB.

§ 329-2.5 System updating and incorporation by reference

(a) The following elements of the APG rate-setting system shall be updated no less frequently than annually:

(1) the listing of reimbursable APGs subject to this Subpart and the relative weight assigned to each such APG;

(2) the Workers' Compensation specific base rates;

(3) the applicable ICD-10 codes utilized in the APG software system;

(4) the applicable CPT-4/HCPCS codes utilized in the APG software system;

(5) the APG software system

(b) The Current Procedure Code, fourth edition (CPT-4) and the Healthcare Common Procedure Coding System (HCPCS), published by the American Medical Association, and the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM), published by the United States Department of Health and Human Services, as described in this Subpart, are hereby incorporated by reference, with the same force and effect as if fully set forth herein and are available at <http://www.cms.gov/Medicare/Coding/ICD10/Downloads/2016-Code-Descriptions-in-Tabular-Order.zip>. Copies of the CPT-4 and HCPCS are also available from the American Medical Association, Order Department, P.O. Box 930876, Atlanta, Georgia 31193-0876. Copies of the ICD-10CM are also available from the United States Government Printing Office, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7954. Copies of the WCB Ambulatory Surgery Base Rates are available on the WCB website and may be downloaded without cost. Information about the WCB Ambulatory Surgery Fee Schedule or a paper copy of the WCB Ambulatory Surgery Base Rates may be requested by email at GENERAL_INFORMATION@wcb.ny.gov, or by telephone at 1-800-781-2362. More information about the APG system and the 3M products that support it are available at: http://www.health.ny.gov/health_care/medicaid/rates/apg/index.htm

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 November 28, 2015.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 328 State Street, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority:

Workers' Compensation Law (WCL) section 117(1) authorizes the Chair of the Workers' Compensation Board (Board) to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. WCL section 13 directs the Chair to prepare and establish fee schedules for medical, ambulance, dental, surgical, optometric treatment, physical and occupational therapy, and durable medical equipment.

2. Legislative objectives:

The purpose of the proposed ambulatory fee schedule is to provide a system for fair reimbursement that also contains costs to payers in the workers' compensation system. The proposed ambulatory patient groups (APG) methodology is consistent with this objective inasmuch as it provides appropriate billing and payment practices for medical providers and payers in the New York State workers' compensation system. The APG methodology is supported by an empirical framework that is regularly updated and used throughout the medical practice industry.

3. Needs and benefits:

The current workers' compensation fee schedule for ambulatory surgery is based on a Products of Ambulatory Surgery (PAS) system that was supported by the Department of Health. In December 2008, the Department of Health converted the ambulatory surgery reimbursement system from PAS to a new Ambulatory Patient Groups (APG) system. The Department of Health no longer supports the PAS system. Consequently, the Board seeks to adopt an APG system. In support of the new APG system, 3M Health Information Systems has created a grouper for use in identifying the appropriate APG and a pricer that calculates the reimbursement rate according to the new formulas. The pricer will produce rates according to the workers' compensation schedule. More information about the APG system and the 3M products that support it are available at: http://www.health.ny.gov/health_care/medicaid/rates/apg/index.htm.

Both the current PAS system and the APG systems rely on ICD-9 codes to set rates of reimbursement. As the ICD-10 system will roll-out and replace the ICD-9 system on October 1, 2015, the Workers' Compensation Board (Board) will adopt the new regulations using the APG methodology to coincide with the ICD-10 rollout.

This change will promote consistency between medical systems in medical practices across the state and avoid imposing significant costs to support multiple systems. The Board use of ICD-10 is consistent with Medicare and Medicaid.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments.

It is believed that all or nearly all affected medical providers already use the 3M Health Information Systems that support the Ambulatory Surgery Fee Schedule as this is the system used to support Medicare and Medicaid. In the event that a provider or carrier does not own the software, the purchase price is believed to be based on volume of claims and approximates \$1 per claim dependent upon the software purchased. Reimbursement rates may also be computed manually at no cost by downloading the tables from the Board's website. A paper version of the tables is available for purchase from the Board for \$10 and in CD format for \$5. These fees are to cover the costs of reproduction and mailing of the materials.

5. Local government mandates:

Self-insured local governments will be required to use the new ambulatory surgery fee schedule to pay medical bills received for workers' compensation injuries.

6. Paperwork:

This proposed rule modifies the ambulatory surgery payments for all payers of workers' compensation benefits including municipalities, but does not impose additional reporting requirements.

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

Because the Board's existing Ambulatory Fee Schedule based on the PAS methodology is no longer supported by the Department of Health, the Board, must update its fee schedule that relies on PAS. The APG system is used for Medicaid payments and is fully supported by the Department of Health. It also utilizes an industry standard software system, 3M Healthcare Information Systems.

The Board could adopt a proprietary fee schedule. However, such a system could not be updated easily, would not have Department of Health support and would not be supported by software. Accordingly, the Board did not consider this option.

Ambulatory Payment Classification (APC) is another methodology and used by Medicare. However, the Board chose not to go with that methodology as the APGs as promulgated by Department of Health addresses New York State specific facilities and costs related to practice in New York.

Upon information and belief, there are no other available Ambulatory Surgery Fee Schedules that could be readily adopted by the Board.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

The Board has a set an effective date of October 1, 2015.

Regulatory Flexibility Analysis

1. Effect of rule:

Small businesses and local governments whose only involvement with the workers' compensation system is that they are employers and are required to have coverage will not be affected by this rule. Small businesses cannot be individually self-insured but must purchase workers' compensation coverage from the State Insurance Fund or a private insurance carrier authorized to write workers' compensation insurance in New York or join a group self-insured trust. It is the entity providing coverage for the small employer that must comply with all of the provisions of this rulemaking, not the covered employer. The impact on the State Insurance Fund and all private insurance carriers is not covered in this document as they are not small businesses. Group self-insured trusts and third party administrators hired by private insurance carriers may be small businesses, and these businesses may be impacted by this regulation. All health practitioners authorized by the Chair who perform surgery in an Ambulatory Surgery Center will have to comply with the fee schedule when billing for medical care. Finally, local governments that own and/or operate a hospital may be affected by this rule.

The approximately 2,500 political subdivisions that are self-insured for workers' compensation coverage in New York State will have to comply with the provisions of this proposal. Those local governments who are not self-insured and do not own and/or operate an Ambulatory Surgery Center will not be affected by this rule.

2. Compliance requirements:

The proposed rule does not impose additional compliance requirements on the small businesses and local governments described above. Rather the proposed rule changes the mechanism for billing in workers' compensation cases. Ambulatory Surgery Centers that may be small businesses or part of a local government will find the changes easy to adopt as they already use Medicaid billing practices.

3. Professional services:

Small businesses and local governments affected by the rule will not need any new professional services to comply with this rule.

4. Compliance costs:

The proposed amendment should not increase costs and should ultimately reduce administrative costs to all parties including rural participants. In addition, the Board will not charge for use of the fee schedule. The current fee schedule is proprietary. A hard copy of the current fee schedule costs \$85.

5. Economic and technological feasibility:

It is economically and technologically feasible for small businesses and local governments to comply with the proposed amendments. The proposed amendments do not add any technological requirements or economic challenges from the current Fee Schedule.

6. Minimizing adverse impact:

As stated above, the implementation of the proposed amendments is expected to save money for all participants in the workers' compensation system by adopting a widely used, existing methodology.

7. Small business and local government participation:

The Chair of the Board published a Subject Number on December 2, 2009 announcing the Board's intention to adopt this methodology. All participants in the workers' compensation system were invited to provide input into that decision. The proposed amendment is expected to reduce costs and consume fewer resources for all participants in the workers' compensation system including small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The amendment of Part 329 of 12 NYCRR will apply to all insurance carriers, the State Insurance Fund self-insured employers, self-insured local governments, local governments that own and/or operate Ambulatory Surgery Centers, group self-insured trusts, and third party administrators across the state. These individuals and entities exist in all rural areas of the state.

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

Adoption of the ambulatory fee schedule will require all medical providers at Ambulatory Surgery Centers and payers to adhere to the new billing process contained in the fee schedule. The fee schedule replaces an older outdated method and will not involve additional reporting, record-keeping or other compliance requirements. It is not anticipated that the proposed amendment will require any additional staffing or resources by rural employers.

3. Costs:

The proposed amendment should not increase costs and should ultimately reduce administrative costs to all parties including rural participants. In addition, the Board will not charge for use of the fee schedule. The current fee schedule is proprietary. A hard copy of the current fee schedule costs \$85.

4. Minimizing adverse impact:

As stated above, the adoption of the new fee schedule should not have adverse impact on rural areas. Medical providers should be able to readily adapt due to their familiarity with Medicare and Medicaid billing rules. Once payers incorporate the new rules into their existing practices there should be no adverse impact.

5. Rural area participation:

The Chair published a Subject Number announcing a change to the Ambulatory Fee Schedule that adopted the APG methodology on December 2, 2009. This Subject Number provided for comments and questions to be directed to the Board from all participants including those in rural areas.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Part 329 of 12 NYCRR, known as the Ambulatory Surgery Fee Schedule.

The rule does not eliminate any existing process, procedure, or program, and will not result in an adverse impact on jobs.