RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Program Rules for New York State Grown and Certified

I.D. No. AAM-35-16-00017-A
Filing No. 1040
Filing Date: 2016-11-15
Effective Date: 2016-11-30

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

Action taken: Addition of Part 161 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18, 156-f and 156-h

Subject: Program rules for New York State Grown and Certified.

Purpose: Inform interested parties of the program; its purpose, participation requirements, qualifying product and rules of participation.

Text of final rule: Title One of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding thereto a new Part 161, to read as follows:

PART 161
NEW YORK STATE GROWN AND CERTIFIED PROGRAM
161.1 Purpose

This Part has been promulgated to allow producers of farm or forest products, grown, harvested, raised and bred in New York and processors and/or manufacturers of farm and forest products manufactured in New York using farm and forest products predominantly grown, harvested or raised in the state by New York State Grown and Certified Program producers, to use the New York State Grown and Certified Seal on labels and labeling associated with such product, provided that, as more specifically set forth in this Part, the producer, processor or manufacturer has: (a) been verified to grow, harvest, raise, process and/or manufacture the product using good agricultural or handling practices; and/or (b) operates in an environmentally responsible manner.

161.2 Definitions

For the purpose of this Part, the following terms shall have the following meanings:

(a) "Environmentally Responsible Manner" means participation in: (i) the Agricultural Environmental Management Program, administered by the Department of Agriculture and Markets ("AEM Program"), with the completion of Tier 2 of the program, or higher, within three years of admission into the New York State Grown and Certified Program; or (ii) another program, either identified in this Part or determined by the Commissioner to demonstrate environmental responsibility sufficient to qualify for participation in the New York State Grown and Certified Program.

(b) "Farm products" means agricultural and horticultural products grown and/or produced in New York, including: vegetable and fruit products; grains, livestock and meats; milk, poultry; eggs; nuts; honey; maple tree sap and maple products produced therefrom; as well dairy products that have been processed or manufactured in New York from milk predominantly produced in New York. Except as otherwise provided in this subdivision, a farm product is produced in New York if it is, solely, the product of land or trees located in New York.

(c) "Forest products" means trees, logs, firewood, lumber, paper and related products that have been produced or processed in New York. A forest product is produced in New York if it: (i) consists solely of trees, or parts thereof, grown in New York or (ii) it has been manufactured in New York from trees grown predominantly in New York.

(d) "Good Agricultural Practices" (GAP) and Good Handling Practices (GHP) mean the voluntary audit programs bearing those names administered by the United States Department of Agriculture.

(e) "GAP or GHP Certification" means that the processes employed by the producer have been verified under the United States Department of Agriculture's GAP or GHP Program.

(f) "GAP or GHP Certified Equivalent" means a program with annual third-party audits to verify that the participant operates using good agricultural and/or handling practices, which program is either identified in this Part or which has been determined to be a GAP or GHP Certified equivalent by the Commissioner.

(g) "Horticultural products" means nursery stock, ornamental shrubs, ornamental trees and flowers.

(h) "Seal" means the official New York State Grown and Certified seal.

161.3 Qualifications for New York State Grown and Certified Producers, Processors and Manufacturers

(a) New York State Grown and Certified is a voluntary program open to:

(1) producers of farm products;

(2) processors and/or manufacturers of food products manufactured in New York, including wine, spirits, beer and cider, using farm products of New York State Grown and Certified Program producers at levels to be established by the Commissioner which in no event shall fall below a preponderance of the product's ingredients;

(3) producers of forest products and equine stock born and bred in New York;

(4) processors and/or manufacturers of forest products that are processed and manufactured in New York and use forest products from New York State Certified Producers at levels established by the Commissioner which in no event shall fall below a preponderance of the product or the component parts of the product; and/or

(5) processors and/or manufacturers of such other non-food products determined by the Commissioner to qualify for the New York State Certified Program, which product is processed or manufactured in New York and uses product from New York State Certified Producers at levels established by the Commissioner which in no event shall fall below a preponderance of the product or the component parts of the product.

(b) Qualifications for the New York State Grown and Certified Program producers, processors and manufactures shall be established by the Commissioner and at a minimum require:

(1) for food products:

(a) certification for safe food handling practices, evidenced by: (i) GAP Certification, GHP Certification, or a GAP or GHP certified equivalent; (ii) participation in a Safe Quality Food Institute auditing program (SQF), or in an annual safe food handling training program deemed acceptable by the Commissioner, or in a modified annual food safety inspection for good manufacturing practices (GMPs) conducted by the Department's Division of Food Safety & Inspection, and/or (iii) such other good food handling practices program deemed acceptable by the Commissioner for the particular product category; and/or

(b) operation in an environmentally responsible manner.

(2) for non-food products: operation in an environmentally responsible manner.

161.4 The New York State Grown and Certified Seal

(a) Individuals or entities that grow, produce, raise or harvest farm products in New York and individuals or entities that process or manufacture farm products in New York predominately from farm products grown, produced, raised or harvested in the State may use the New York State Grown and Certified Seal (the "Seal") on or upon a label, labeling, package, container, advertisement, or display, in the form set forth below as applicable to the product and under the terms set forth in this Part, provided that the individual or entity has been determined to be qualified to use the Seal by the Commissioner and has executed a license agreement in the form provided by the Commissioner ("license").

(b) The Seal shall be in the following form: See Appendix in the back of this issue.

161.5 Application for Participation in the New York State Grown and Certified Program

A producer, processor and/or manufacturer of farm or forest products or a breeder of horses born and bred in New York may apply to the Commissioner for permission to place the Seal on or upon a label, labeling, package, or container of, or on or upon an advertisement or display promoting, products qualifying for use of the New York State Grown and Certified Seal. Such application shall be submitted to the Commissioner, upon a form provided by the Commissioner, and shall contain the information required by the provisions of this Part as well as any other information that, in the opinion of the Commissioner, is necessary for the proper administration of the New York State Grown and Certified Program. Except as provided in section 161.6 of this Part, permission will not be granted unless an application therefor has been made and a Trademark Licensing Agreement, in a form provided by the Commissioner has been executed.

161.6 Granting permission to use the New York State Grown and Certified Seal; granting applications therefor; revoking permission therefor

The Commissioner may grant an application for permission for the Seal to be placed on a label or labeling of, or upon an advertisement or display promoting, a qualifying product, after finding the applicant is qualified to participate in this program pursuant to the terms of this Part. The Commissioner may decline to grant an application, or may suspend or revoke permission to use the Seal, whenever he or she finds, after an opportunity to be heard, that the program participant:

(a) does not or no longer meets the qualifications set forth in section 161.3 of this Part;

(b) has failed or refused to produce any information demanded by the Commissioner reasonably related to the administration and enforcement of this Part;

(c) has failed or refused to comply with any applicable provision set forth in this Part or in the Trademark Licensing Agreement; and/or

(d) has, in the Commissioner's opinion, disparaged the Seal or engaged in conduct damaging the good will of the Seal.

161.7 Conditions of use of the New York State Grown and Certified Seal

A producer, processor and/or manufacturer granted permission to use the Seal shall:

(a) use it on articles or other publicity materials solely for the purpose of referring to the New York State Grown and Certified Program;

(b) use it to support the New York State Grown and Certified Program and for the purpose of promoting products to their customers and to the general public;

(c) use it only on products for which permission was granted by the Commissioner, pursuant to the provisions of this Part;

(d) use it only on high-quality products;

(e) comply with all federal, state, local and municipal laws and ordinances directly related to products in connection with which the Seal is used;

(f) not alter, amend, change, or otherwise distort the Seal in any way, except as otherwise and expressly authorized by the Commissioner;

(g) not challenge, contest, impair or tend to impair or use it in a way that invalidates or may tend to invalidate any of the Department's rights in the Seal;

(h) not use it in any manner likely to confuse, mislead or to deceive the public, or engage in conduct that damages the value or good will of the Seal or of the New York State Grown and Certified Program;

(i) not claim or assert any property interest in the Seal; and

(j) not to register or file applications to register the Seal or a name substantially similar thereto.

Final rule as compared with last published rule: Nonsubstantial changes were made in section 161.7(d) and (h).

Text of rule and any required statements and analyses may be obtained from: Kevin King, Director, Division of Agricultural Development, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 485-0048, email: Kevin.King@agriculture.ny.gov

Revised Job Impact Statement

The change to the proposed rule will impose no impact upon jobs or employment opportunities. The proposed rule will provide for a voluntary program whereby producers, processors, and manufacturers of farm or forest products grown, harvested, or raised in New York, or that predominantly use such products, may apply for and receive permission to use a "New York State Grown and Certified Seal" on the label or labeling of such products, if the program participants have been determined to meet certain conditions. The proposed rule, when implemented, will either have no impact upon jobs and employment opportunities, or will have a positive effect if consumers purchase farm or forest products that bear the seal rather than products from outside the state that do not.

Assessment of Public Comment

The Department received a letter from the Farm Bureau, dated October 19, 2016, that contained no objections to the provisions of the proposed rule but, rather, set forth suggestions regarding its implementation and concerns regarding certain of its provisions. The Farm Bureau suggested that the proposed rule should be implemented to ensure that farm products eligible to use the New York State Grown and Certified Seal must contain a high level of New York grown inputs -- the Department intends to implement the proposed rule, upon its adoption, to accomplish that objective. The Farm Bureau also expressed concern that the proposed rule would not allow "culls" to be labeled with such Seal and the proposed rule has been amended to allow "culls" that are, nevertheless, of high quality to bear the Seal.

The Department received no other comments regarding the proposed rule.

Education Department

EMERGENCY RULE MAKING

Education Requirements for Occupational Therapists and Occupational Therapy Assistants

I.D. No. EDU-44-16-00012-E

Filing No. 1039

Filing Date: 2016-11-15

Effective Date: 2016-11-18

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

Action taken: Amendment of sections 76.1 and 76.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 7904(2) and 7904-a(b); L. 2016, ch. 124

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Chapter 124 of the Laws of 2016, which takes effect on November 18, 2016. This amendment to the Education Law amends the education requirements for occupational therapists and occupational therapy assistants by providing the New York State Education Department with the flexibility to issue licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant, as long as they meet the other licensure requirements for these two oc-

cupational therapy professions. Specifically, Chapter 124 amends Education Law § 7904(2) to allow applicants for licensure as occupational therapists to satisfy the education requirement by having a baccalaureate or master's degree or greater, or its equivalent as determined by the Department. Chapter 124 also amends Education Law § 7904-a(b) to allow applicants for licensure as occupational therapy assistants to satisfy the education requirement by having an associate degree or greater, or its equivalent as determined by the Department.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure (SAPA) Act section 201(1) and (5), would be the January 9-10, 2017 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the January meeting, would be January 25, 2017, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 124 of the Laws of 2016 become effective November 18, 2016.

Therefore, emergency action is necessary at the October 2016 Regents meeting for the preservation of the public health and general welfare in order to provide the State Education Department with the flexibility to issue licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant, as long as they meet the other licensure requirements for these two occupational therapy professions, which will increase the number of licensed professionals qualified to practice occupational therapy and help ensure continuing competency across the State.

It is anticipated that the proposed rule will be presented for adoption at the January 9-10, 2017 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

Subject: Education requirements for Occupational Therapists and Occupational Therapy Assistants.

Purpose: Provides that licenses may be granted to applicants who have completed education exceeding current requirements for licensure.

Text of emergency rule: 1. Section 76.1 of the Regulations of the Commissioner of Education is amended, effective November 18, 2016, as follows:

To meet the professional education requirement for licensure in this State, the applicant shall present evidence of:

(a) *at least* a bachelor's or master's degree in occupational therapy from a program registered by the department or accredited by a national accreditation agency which is satisfactory to the department*, or its equivalent, as determined by the department*; or

[(b) a certificate in occupational therapy from a program registered by the department or accredited by a national accreditation agency which is satisfactory to the department following the completion of a bachelor's degree from an institution acceptable to the department; or

(c)] *(b)* completion of a program satisfactory to the department of not less than four years of postsecondary study which includes the professional study of occupational therapy and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as preparation in occupational therapy in that country.

2. Subdivision (b) of section 76.7 of the Regulations of the Commissioner of Education is amended, effective November 18, 2016, as follows:

To qualify for licensure as an occupational therapy assistant pursuant to section 7904-a of the Education Law, an applicant shall fulfill the following requirements:

(a) . . .

[(b) have received an education as follows:

(1)] *(b)* complete[ion of] *at least* a two-year associate degree program for occupational therapy assistants registered by the department or accredited by a national accreditation agency which is satisfactory to the department*, or its equivalent, as determined by the department*[; or

(2) completion of a postsecondary program of at least two years duration that has been determined by the Board of Regents pursuant to Education Law section 6506(5) to substantially meet the requirements of Education Law section 7904-a(b)];

(c) . . .

(d) . . .

(e) . . .

(f) . . .

(g) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-44-16-00012-P, Issue of November 2, 2016. The emergency rule will expire February 12, 2017.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

Subdivision (2) of section 7904 of the Education Law, as amended by Chapter 124 of the Laws of 2016, allows an applicant for licensure as an occupational therapist to satisfy the education requirement by completing a baccalaureate or master's degree program or greater, or its equivalent, as determined by the Department.

Subdivision (b) of section of 7904-a of the Education Law, as amended by Chapter 124 of the Laws of 2016, allows an applicant for licensure as an occupational therapy assistant to satisfy the education requirement by completing an associate degree program or greater, or its equivalent, as determined by the Department.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes that the Department shall supervise the regulation of the practice of the professions for the benefit of the public. The proposed amendment will conform the Regulations of the Commissioner of Education to Chapter 124 of the Laws of 2016, which amended Article 156 of the Education Law, by amending the education requirements for occupational therapists and occupational therapy assistants to provide the Department with the flexibility to grant licenses to applicants who have completed an education, or its equivalent, that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant.

The proposed amendment to section 76.1 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapist, the applicant must present evidence of: (1) at least a bachelor's or master's degree in occupational therapy from a program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department; or (2) completion of a program satisfactory to the Department of not less than four years of postsecondary study which includes the professional study of occupational therapy and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as preparation in occupational therapy in that country.

The proposed amendment to subdivision (b) of section 76.7 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapy assistant, an applicant must complete at least a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department.

Chapter 124 of the Laws of 2016 further authorizes the Department to develop regulations necessary to implement it.

3. NEEDS AND BENEFITS:

Currently, pursuant to Education Law § 7904(2), the education requirement for occupational therapy licensure requires applicants to have satisfactorily completed an approved occupational therapy curriculum in a baccalaureate or master's program, or a certificate program satisfactory to the Department which is substantially equivalent to a baccalaureate degree program, in accordance with the Commissioner's Regulations. Additionally, pursuant Education Law § 7904-a(b), the current education requirement for occupational therapy assistant licensure requires applicants to have received an education consisting of the completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department.

However, the nationally recognized accrediting agency for the profession of occupational therapy, the American Occupational Therapy Association's Accreditation Council for Occupational Therapy Education (ACOTE), has determined that occupational therapist education programs may grant either a master's degree or a doctoral degree. Additionally, ACOTE has determined that occupational therapy assistant education programs may grant either an associate degree or a baccalaureate degree.

Chapter 124 of the Laws of 2016, which takes effect on November 18, 2016, was enacted to amend the Education Law's education requirements

for licensure as an occupational therapist and occupational therapy assistant to provide the Department with the flexibility to grant licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant, in recognition of the changes made to the national accreditation standards.

The proposed rule amends section 76.1 and subdivision (b) of section 76.7 of the Regulations of the Commissioner of Education to provide the Department with the flexibility to grant licenses to applicants who have completed an education, or its equivalent, that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant.

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 124 of the Laws of 2016.

4. COSTS:

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

(b) Costs to local government: The proposed rule does not impose any additional costs on local government.

(c) Costs to private regulated parties: The proposed rule does not impose any additional costs to regulated parties.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule implements the requirements of Chapter 124 of the Laws of 2016, by providing the Department with the flexibility to grant licenses to applicants who have completed an education, or its equivalent, that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant. It does not impose any program, service, duty or responsibility upon local governments.

6. PAPERWORK:

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

7. DUPLICATION:

The proposed rule is necessary to implement Chapter 124 of the Laws of 2016. There are no other State or federal requirements on the subject matter of this proposed rule. Therefore, the proposed rule does not duplicate other existing State or federal requirements.

8. ALTERNATIVES:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 124 of the Laws of 2016. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards regarding the education requirements for occupational therapists and occupational therapy assistants, the proposed rule does not exceed any minimum federal standards for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 124 of the Laws of 2016. The proposed rule will become effective on November 18, 2016, which is the effective date of the statute. The proposed amendment does not impose any compliance schedules on regulated parties or local governments beyond the November 18, 2016 effective date.

Regulatory Flexibility Analysis

On July 21, 2016, Chapter 124 of the Laws of 2016 was enacted to amend the education requirements for occupational therapists and occupational therapy assistants to provide the Department with the flexibility to grant licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant.

The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement the provisions of Chapter 124 of the Laws of 2016. The proposed amendment to section 76.1 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapist, the applicant must present evidence of: (1) at least a bachelor's or master's degree in occupational therapy from a program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department; or (2) completion of a program satisfactory to the Department of not less than four years of postsecondary study which includes the professional study of occupational therapy and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as preparation in occupational therapy in that country. The proposed amendment to subdivision (b) of section 76.7 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapy assistant, an applicant must have completed at least a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department.

The statutory education requirements for applicants for licensure as either an occupational therapist or occupational therapy assistant, which the proposed amendment implements, are comparable to the American Occupational Therapy Association's Accreditation Council for Occupational Therapy Education (ACOTE)'s education requirements for occupational therapist and occupational therapy assistant education programs. ACOTE is the nationally recognized accrediting agency for the profession of occupational therapy. Pursuant to ACOTE's standards, occupational therapist education programs may grant either a master's degree or a doctoral degree and occupational therapy assistant education programs may grant either an associate degree or a baccalaureate degree. Chapter 124 was enacted to amend the Education Law's educational requirements for licensure as an occupational therapist and occupational therapy assistant, in recognition of ACOTE's standards.

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

Rural Area Flexibility Analysis

Currently, pursuant to Education Law § 7904(2), the education requirement for licensure as an occupational therapist requires applicants to have satisfactorily completed an approved occupational therapy curriculum in a baccalaureate or master's program, or a certificate program satisfactory to the Department which is substantially equivalent to a baccalaureate degree program, in accordance with the Commissioner's Regulations. Additionally, pursuant Education Law § 7904-a(b), the current education requirement for licensure as an occupational therapy assistant requires applicants to have received an education consisting of the completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department.

However, the nationally recognized accrediting agency for the profession of occupational therapy, the American Occupational Therapy Association's Accreditation Council for Occupational Therapy Education (ACOTE), has determined that occupational therapist education programs may grant either a master's degree or a doctoral degree. Additionally, ACOTE has determined that occupational therapy assistant education programs may grant either an associate degree or a baccalaureate degree.

Chapter 124 of the Laws of 2016, which takes effect on November 18, 2016, was enacted to amend the Education Law's education requirements for licensure as an occupational therapist and occupational therapy assistant to provide the Department with the flexibility to grant licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant, in recognition of the changes made to the national accreditation standards.

Chapter 124 amends Education Law § 7904(2) to allow an applicant for licensure as an occupational therapist to satisfy the education requirement by having a baccalaureate or master's degree or greater, or its equivalent as determined by the Department.

Chapter 124 amends Education Law § 7904-a(b) to allow an applicant for licensure as an occupational therapy assistant to satisfy the education requirement by having an associate degree or greater, or its equivalent as determined by the Department.

The proposed amendment to section 76.1 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapist, the applicant must present evidence of: (1) at least a bachelor's or master's degree in occupational therapy from a program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department; or (2) completion of a program satisfactory to the Department of not less than four years of postsecondary study which includes the professional study of occupational therapy and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as preparation in occupational therapy in that country.

The proposed amendment to subdivision (b) of section 76.7 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapy assistant, an applicant must have completed at least a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is

satisfactory to the Department, or its equivalent, as determined by the Department.

The proposed amendment is only applicable to applicants for licensure as either an occupational therapist or an occupational therapy assistant in New York State. The proposed amendment will not impose any adverse impact on rural areas and would not impose any new reporting, recordkeeping, or other compliance requirements, on entities in rural areas of New York State. Accordingly, no further steps were needed to ascertain the impact of the proposed amendment on entities in rural areas and none were taken. Thus, a rural area flexibility analysis is not required, and one has not been prepared.

Job Impact Statement

The proposed rule is required to implement Chapter 124 of the Laws of 2016, which amends the education requirements for occupational therapists and occupational therapy assistants to provide the Department with the flexibility to grant licenses to applicants who have completed an education that exceeds the current requirements for licensure as either an occupational therapist or occupational therapy assistant. Chapter 124 amends Education Law § 7904(2) to allow an applicant for licensure as an occupational therapist to satisfy the education requirement by having a baccalaureate or master's degree or greater, or its equivalent as determined by the Department. In addition, Chapter 124 amends Education Law § 7904-a(b) to allow an applicant for licensure as an occupational therapy assistant to satisfy the education requirement by having an associate degree or greater, or its equivalent as determined by the Department. The proposed amendment to section 76.1 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapist, the applicant must present evidence of: (1) at least a bachelor's or master's degree in occupational therapy from a program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department; or (2) completion of a program satisfactory to the Department of not less than four years of post-secondary study which includes the professional study of occupational therapy and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as preparation in occupational therapy in that country. The proposed amendment to subdivision (b) section 76.7 of the Regulations of the Commissioner of Education provides that to meet the professional education requirement for licensure as an occupational therapy assistant, an applicant must have completed at least a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, or its equivalent, as determined by the Department.

Although the proposed rule may increase the number of individuals who may be eligible for licensure as either an occupational therapist or occupational therapy assistant, it is not anticipated that the proposed rule will increase or decrease the number of jobs to be filled.

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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Extension of Time Validity of Certificates

I.D. No. EDU-48-16-00007-P

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

Proposed Action: Amendment of section 80-1.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), 3001(2), 3004(1) and 3006(1)

Subject: Extension of time validity of certificates.

Purpose: To automatically provide for a three year time extension, instead of initial two-year extension for certain candidates.

Text of proposed rule: Section 80-1.6 of the Regulations of the Commissioner of Education is amended, effective March 1, 2017, to read as follows:

(a) [Subject] *(1) For candidates who applied for their first time extension under this section prior to March 1, 2017, subject* to the limitation provided in subdivision (e) of this section and excluding expired certificates in the classroom teaching service or expired provisional certificate in the title of school administrator and supervisor, the time validity of an expired provisional, initial or transitional certificate may be extended for a period not to exceed two years from the expiration date of such certificate, except as provided in [subdivisions (b), (c) and (d)] *subdivision (c)* of this section, upon application by the holder of a teaching certificate:

[(1)] *(i)* who is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;

[(2)] *(ii)* who is serving with the Peace Corps or other volunteer organization;

[(3)] *(iii)* whose service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;

[(4)] *(iv)* who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;

[(5)] *(v)* for a candidate who has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

(2) For candidates who were issued a two-year time extension under this subdivision prior to March 1, 2017 and the two-year time extension expired on or after August 31, 2016, the commissioner shall automatically extend the time validity of the expired certificate beyond the two-year extension provided for in subdivision (a) of this section, for a period not to exceed one year from the expiration date of the two-year extension.

(b) For holders of a provisional certificate in the pupil personnel service, holders of an initial or transitional certificate in the classroom teaching service or school leadership applying for their first time extension on or after March 1, 2017, the time validity of the expired certificate may be extended for a period not to exceed three years from the expiration date of such certificate, except as provided in subdivision (c) of this section, upon application by the holder of the certificate:

(i) who is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;

(ii) who is serving with the Peace Corps or other volunteer organization;

(iii) whose service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;

(iv) who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;

(v) for a candidate who has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

[(b)] *(c)* The time validity of expired certificates prescribed in this section, including an expired provisional certificate in the classroom teaching service or an expired provisional certificate in the title of school administrator and supervisor, held by individuals on active duty with the Armed Forces may be extended by the commissioner, upon application by the holder of such certificate, for the time of such active service and an additional 12 months from the end of such service.

[(c) Except as otherwise provided in this subdivision, the commissioner may extend the time validity of an expired provisional, excluding an expired provisional certificate in the classroom teaching service or an expired provisional certificate in the title of school administrator and supervisor, initial or transitional certificate beyond the two-year extension provided for in subdivision (a) of this section, for a period not to exceed one additional year, if in the six months preceding the end of the two-year extension, the candidate is faced with extreme hardship or other circumstances beyond the control of the individual and is unable to complete the requirements for the professional certificate in a timely manner. The commissioner may further extend the time validity of an expired initial or transitional certificate for an additional period of not to exceed one additional year; and may extend the validity of a conditional initial certificate for a period of up to one year if a candidate took one of the revised content specialty examinations administered on or after September 2014, and is required for his/her certificate title and he/she did not receive his/her score on such examination from the department on such examination within a timeframe prescribed by the commissioner and he/she has met all the other certification requirements for the next certificate (i.e., the initial or professional certificate, as applicable).

(d) The commissioner may extend the time validity of an expired provisional, including an expired provisional certificate in the classroom teaching service or an expired provisional certificate in the title of school administrator and supervisor, or initial certificate beyond the extensions provided for in subdivisions (a) and (c) of this section, in increments of one additional year for a candidate who has applied for citizenship or permanent residency, and whose application for citizenship or permanent residency has not been acted upon by the U.S. Citizenship and Immigration Services (USCIS) until the USCIS acts upon such application. Such candidates must provide documentation satisfactory to the department that they meet these requirements, and that they have completed all academic,

testing and experience requirements for permanent or professional certification.

(e) The commissioner will only extend the time validity of an expired provisional certificate under this section if the holder of such provisional certificate submits evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate, when a content specialty test(s) is required.]

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 138, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, Office of Higher Education, New York State Education Department, Room 979, Albany, NY 12234, (518) 408-1189, email: regcomments@nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law 207(not subdivided) grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

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

Education Law 3001(2) establishes the qualifications of teachers in the State and requires that such teachers possess a teaching certificate issued by the Department.

Education Law 3003 establishes the qualifications of superintendents in the State and requires that superintendent to possess a certificate issued by the Department.

Education Law 3009 prohibits school district monies from being used to pay the salary of an unqualified teacher.

2. LEGISLATIVE OBJECTIVES:

The purpose of proposed amendment is intended to address concerns from the field related to teacher shortages raised by school districts and Board of Cooperative Educational Services (BOCES). The proposed amendment allows holders of certain provisional, initial or transitional certificates to apply for one three-year time extension, if they meet certain criteria, rather than applying for two separate time extensions.

3. NEEDS AND BENEFITS:

Currently, Section 80-1.6 of the Commissioner's Regulations allows holders of certain provisional, initial or transitional certificates, who meet one of the following criteria, to get a two-year extension to provide time for candidates to meet the requirements for an initial, professional or permanent certificate:

- is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;
- is serving with the Peace Corps or other volunteer organization;
- service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;
- who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;
- has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

The Commissioner may then extend the time validity of an expired provisional certificate (excluding an expired provisional certificate in the classroom teaching service or an expired provisional certificate in the title of school administrator and supervisor) or an expired initial or transitional certificate beyond the two-year extension provided for one additional year, if in the six months preceding the end of the two-year extension, the candidate is faced with extreme hardship or other circumstances beyond the control of the individual and is unable to complete the requirements for the professional certificate in a timely manner.

Proposed Amendment:

Based on feedback from the field, the proposed amendment instead seeks to allow candidates to apply for just one three-year extension if they meet one of the criteria listed below instead of submitting two separate requests for an extension of their expired certificates:

- is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;
- is serving with the Peace Corps or other volunteer organization;
- service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;
- who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;
- has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

The proposed amendment also eliminates the option to receive a time extension in increments of one additional year for candidates who apply for citizenship or permanent residency, and whose application for citizenship or permanent residency has not been acted upon by the U.S. Citizenship and Immigration Services (USCIS) because permanent residency is no longer required for a professional certificate in light of the regulatory changes made at the May 2016 Regents meeting.

The proposed amendment further removes the requirement that a candidate take and pass a content specialty examination prior to the issuance of a time extension because this requirement only applied to permanent teaching certificates, which are no longer issued by the Department.

4. COSTS:

a. Costs to State government: The amendment does not impose any costs on State government, including the State Education Department.

b. Costs to local government: The amendment does not impose any costs on local government, including school districts and BOCES.

c. Costs to private regulated parties: The amendment does not impose any costs on private regulated parties.

d. Costs to regulating agency for implementation and continued administration: See above.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon any local government.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements; in fact, it may reduce paperwork that would currently be required of candidates to apply for two separate time extensions.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

No alternatives were considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be permanently adopted by the Board of Regents at its February 2017 meeting. If adopted at the February meeting, the proposed amendment will become effective on March 1, 2017.

Regulatory Flexibility Analysis

The purpose of proposed amendment is intended to address concerns from the field related to teacher shortages raised by school districts and Board of Cooperative Educational Services (BOCES). The proposed amendment allows holders of certain provisional, initial or transitional certificates to apply for one three-year time extension if they meet certain criteria, rather than applying for two separate time extensions.

The amendment does not impose any new recordkeeping or other compliance requirements, and will not have an adverse economic impact, on local governments or small businesses. Because it is evident from the nature of the rule that it does not affect local governments or small businesses, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

This amendment applies to all certificate holders who wish to apply for a three-year time extension instead of submitting two separate requests for an extension of their expired certificates in each of the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Currently, Section 80-1.6 of the Commissioner's Regulations allows holders of certain provisional, initial or transitional certificates, who meet one of the following criteria, to get a two-year extension to provide time for candidates to meet the requirements for an initial, professional or permanent certificate:

- is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;
- is serving with the Peace Corps or other volunteer organization;
- service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;
- who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;
- has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

The Commissioner may then extend the time validity of an expired provisional certificate (excluding an expired provisional certificate in the classroom teaching service or an expired provisional certificate in the title of school administrator and supervisor) or an expired initial or transitional certificate beyond the two-year extension provided for one additional year, if in the six months preceding the end of the two-year extension, the candidate is faced with extreme hardship or other circumstances beyond the control of the individual and is unable to complete the requirements for the professional certificate in a timely manner.

Proposed Amendment:

Based on feedback from the field, the proposed amendment instead seeks to allow candidates to apply for just one three-year extension if they meet one of the criteria listed below instead of submitting two separate requests for an extension of their expired certificates:

- is on leave from his/her teaching duties because of childbearing, childrearing, serious illness, or extended illness;
- is serving with the Peace Corps or other volunteer organization;
- service as a teacher has been discontinued as a result of abolition of teaching positions in the school district in which employed;
- who, because of extreme hardship or other circumstances beyond the control of the individual, was unable to complete the requirements for the permanent or professional certificate in a timely manner, excluding normal family commitments or inconvenience;
- has been unable to secure employment as a teacher or who has been pursuing a career other than teaching.

The proposed amendment also eliminates the option to receive a time extension in increments of one additional year for candidates who apply for citizenship or permanent residency, and whose application for citizenship or permanent residency has not been acted upon by the U.S. Citizenship and Immigration Services (USCIS) because permanent residency is no longer required for a professional certificate in light of the regulatory changes made at the May 2016 Regents meeting.

The proposed amendment further removes the requirement that a candidate take and pass a content specialty examination prior to the issuance of a time extension because this requirement only applied to permanent teaching certificates, which are no longer issued by the Department.

3. COSTS:

The proposed amendment does not impose any costs on candidates. In fact, the amendment may result in a cost savings for candidates who may otherwise have had to apply for two separate time extensions.

4. MINIMIZING ADVERSE IMPACT:

The rule seeks to provide a more flexible pathway for certain candidates with expired provisional, initial, or transitional certificates who meet specific requirements to obtain an extension of their certificate in an effort to address hardships that school districts and BOCES are facing related to teacher shortages.

5. RURAL AREA PARTICIPATION:

Copies of the rule have been provided to Rural Advisory Committee for review and comment.

Job Impact Statement

The proposed amendment allows holders of certain provisional, initial or transitional certificates to apply for one three-year time extension (if they meet certain criteria) on an expired certificate rather than applying for two separate time extensions.

Because the proposed amendment seeks to address an issue raised by the field in employing certified teachers, it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, and no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

School Counseling, Certification Requirements for School Counselors and the School Counselor Program Registration Requirements

I.D. No. EDU-06-16-00004-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 52.21(a), (d), 80-2.1, 80-2.9(1)(iii), (2), 80-3.1, 80-5.9, 100.2(j); and addition of sections 80-3.11, 80-3.12 and 80-5.23 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 214(not subdivided), 215(not subdivided), 305(1), (2), 308, 3001(2), 3004(1), 3006(1)(b) and 3009(1)

Subject: School counseling, certification requirements for school counselors and the school counselor program registration requirements.

Purpose: School counseling/guidance programs, certification requirements for school counselors, and school counselor program registration.

Substance of revised rule: The Commissioner of Education proposes to amend § § 52.21, 80-2, 80-3, 80-5 and 100.2(j) of the Commissioner's regulations, relating to comprehensive developmental school counseling/guidance programs, certification requirements for school counselors and registration requirements for school counselor preparation programs. The following is a summary of the substance of the rule.

Subdivision (a) of section 52.21 is amended to require that programs leading to initial or professional certification in school counseling meet the new requirements outlined in subdivision (d) of section 52.21 by September 1, 2020.

A new subdivision (d) is added to section 52.21 to prescribe the requirements for institutions of higher education offering school counseling preparation programs leading to an initial certificate, and for those programs leading to a professional certificate.

The title of Subpart 80-2 is amended to clarify that the requirements of Subpart 80-2 do not apply to certificates for school counseling applied and qualified for on or after September 2, 2022.

Section 80-2.1 is amended to clarify that candidates who apply and qualify for the provisional certificate in the title school counselor on or before September 2, 2022 shall be subject to the requirements of this Subpart. Candidates who do not meet these requirements shall be subject to the requirements of Subpart 80-3 of this Part, unless otherwise specifically prescribed in this Part. Candidates with an expired provisional certificate in the title school counselor who apply for permanent certificates prior to September 2, 2022 shall be subject to this Subpart, provided that they have been issued a provisional certificate in this title and have met all requirements for the permanent certificate while under a provisional certificate that was in effect. Candidates with expired provisional certificates who apply for permanent certificates in the title school counselor on or after September 2, 2022 or who do not meet these conditions shall be subject to the requirements of Subpart 80-3 of the Part, unless otherwise specifically prescribed in this Part.

Sections 80-2.9(1)(iii) and 80-2.9(2)(iii) are amended to include the definition of pupil personnel service professional as defined in section 80-3.11.

The title of Subpart 80-3 is amended to clarify that the requirements of Subpart 80-3 for school counselor certificates shall apply for candidates who apply or qualify for such certificate on or after September 2, 2022.

Section 80-3.1 is amended to clarify that candidates who apply for a permanent certificate in the title school counselor shall be subject to the requirements of Subpart 80-2 of this Part, provided that they have been issued a provisional certificate in this title for which the permanent certificate is sought and have met all requirements for the permanent certificate while under a valid provisional certificate that was in effect after that date and that candidates who apply for certificates on or after September 2, 2022 shall be subject to the requirements of Subpart 80-3.

A new Section 80-3.11 is added to establish the requirements for both an initial certificate for school counselor, and a professional certificate for candidates who apply for a school counselor certificate on or after September 2, 2022.

A new Section 80-3.12 proscribes the requirements necessary for meeting the education requirements for school counselor certificates through individual evaluation.

Section 80-5.9 is amended to allow a candidate in a registered or approved graduate program of school counseling to obtain an internship certificate when the registered program includes internship experience, and the candidate has completed at least one-half of the semester hour requirements of the program.

A new Section 80-5.23 is added to set forth the standards and process of the Commissioner of Education to endorse the certificate of another state or territory of the United States or the District of Columbia for service as a school counselor, provided that the candidate meets the requirements set forth therein.

The title of Subdivision (j) of section 100.2 is amended to include comprehensive developmental school counseling/guidance programs. Paragraph (1) of section 100.2(j) is amended to clarify that the existing guidance programs for public schools shall apply until the 2019-2020 school year.

A new Paragraph (2) is added to section 100.2(j) to require public school districts to have a comprehensive developmental school counseling/guidance program, beginning with the 2019-2020 school year and describes the requirements thereof. The full text of the terms are available by visiting: http://www.regents.nysed.gov/common/regents/files/1116p12hed1.pdf

Revised rule compared with proposed rule: Substantial revisions were made in sections 52.21(d)(2), (3), 80-3.12(a)(4), 100.2(j)(2) and (3).

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

Data, views or arguments may be submitted to: Peg Rivers, Office of Higher Education, New York State Education Department, 89 Washington Avenue, Room 979, Albany, NY 12234, (518) 486-3633, email: regcomments@nysed.gov

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

Revised Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Ed.L.§ 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Ed.L.§ 210 authorizes SED to fix the value of degrees, diplomas and certificates issued by institutions of other states or countries as presented for entrance to schools, colleges and the professions of the state.

Ed.L.§ 214 provides that the institutions of The University of the State of New York shall include all secondary and higher educational institutions which are or may be incorporated in the state, and grants authority to the Board to exclude from such membership any institution failing to comply with law or with any rule of the university.

Ed.L.§ 215 authorizes the Commissioner to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Ed.L.§ 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Regents shall have general supervision over all schools and institutions subject to the provisions of the EdL., or of any statute relating to education.

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

Ed.L.§ 3001(2) establishes certification by SED as a qualification to teach in the public schools of NYS.

Ed.L.§ 3004(1) authorizes the Commissioner to prescribe, subject to approval by the Regents, regulations governing the examination and certification of teachers employed in the public schools of NYS.

Ed.L.§ 3006(1)(b) provides that the Commissioner may issue such teacher certificates as the Regents Rules prescribe.

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Regents relating to comprehensive developmental school counseling/guidance programs for all students in grades kindergarten through twelve. It also changes the certification requirements for school counselors and requirements for school counselor preparation programs.

3. NEEDS AND BENEFITS:

The proposed amendments were published in the State Register on February 10, 2016 and SED received approximately 1,000 comments. See, http://www.regents.nysed.gov/common/regents/files/meetings/Sep%202015/915p12hed1.pdf. The majority of the comments surrounded § 100.2(j). The proposed amendments to § 100.2(j) were intended to broaden opportunities for students to explore the multitude of pathways from P-12 to college and career. Exposing students at a younger age, in a more comprehensive manner will serve to prepare our students for success in P-12 and beyond. The comments made clear that there was confusion surrounding the amendments, and the perceived impact on students, schools, and other licensed professionals.

To better understand the areas of concern and areas of commonality, the Department met with stakeholders in May 2016 (NYSUT, UFT, the New York State School Social Workers Association, the Association of New York State School Psychologists, the New York State School Counselors Association). SED staff revised the amendments and convened again in September 2016. Below is an overview of the major areas revised in response to public comment:

- Many commenters objected to the ASCA recommended ratio of 1:100 up to 1:250, and the ASCA Model Standards. The regulation was revised to remove the ratio and standards, which will be encouraged through guidance.
- The proposed amendment updated the title from "guidance program" to "comprehensive school counseling program." In response to comment, the proposed amendment revises the title to include the word "guidance" to make explicitly clear that this regulation only addresses school counseling within the context of the "comprehensive school counseling/guidance program." Additional language was also included to ensure that, school counselors will continue to make referrals to a properly licensed professional and/or certified pupil personnel service provider, for more targeted supports. This last revision was made to help clarify the roles of the school counselor compared with other licensed professionals in schools (e.g. school social workers, school psychologists).
- SED received many comments opposing the use of the title school counselor. Part 80 of the Commissioner's Regulations provides for the certification of school counselors and has referred to the professional title of "school counselor" for several decades. Additional concerns were raised by individuals who work in NYC and hold licenses issued by the NYC under the title "guidance counselor", as permitted by 80-2.2. To address this concern, SED revised to make clear in § 100.2(j) that, for the NYC and Buffalo, certified school counselor includes "licensed guidance counselors" pursuant to Part 80.
- § 100.2(j) required individual progress review plans for grades 7-12. The amendments expanded that for all students in P-12. In response to public comment, the regulation was revised to only require plans grades 6-12. Additionally, comment, the revised regulation no longer includes prekindergarten.
- Pupil personnel service providers were concerned that the proposed amendment expanded the scope of practice of school counselors. Additional language was included to ensure that nothing within § 100.2(j) prohibits certified or licensed school psychologists or certified or licensed school social workers pursuant to Part 80 from providing other direct student services within their applicable scope of practice.
- Part 80-3.11 Certification. On or after September 2, 2022, candidates seeking an initial school counselor certificate must:

o complete an approved graduate program or complete 48semester hours of graduate school counseling coursework in six core areas. In response to comment, the six core areas were revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness (best practices for implementation are now a core content area for professional certificates).

o complete a 100-hour practicum and a 600-hour internship. In response to comment the amendments were revised to provide that such mentoring and supervision may be provided by other qualified school personnel only if the employing school district cannot provide a certified school counselor in the school building.

o take and receive a satisfactory passing score on a NYSED approved certification exam, if available.

- On or after September 2, 2022, candidates seeking a professional school counselor certificate must:

o complete a registered school counselor program or a minimum of 60 semester hours of graduate study acceptable to the Department in each of the eight core areas and the subareas;

o the two core content areas for the professional certificate were revised to, in lieu of content in career development and college readiness, require content in best practices for implementing a school counseling program. Candidates for a professional certificate will have received the content in career development and college readiness as preparation for the initial certificate.

o earn a master's degree in school counseling;

o meet requirements described for an initial certificate and will be required to satisfactorily complete three years of experience as a school counselor.

- Program Registration (§ 52.21(d)) by September 1, 2020)

o Initial certificate-must provide a minimum of 48 semester hours of graduate study in an approved school counseling program and in six core areas, and their subareas. In response to comment, the core areas for the initial certificate have been revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness (best practices for implementation have been transferred to the core content areas required for a professional certificate).

o Professional certificate-must provide a minimum of 12 additional semester hours in two core areas of graduate study in an approved certificate of advanced study. In response to comment, in lieu of content in career development and college readiness, content in best practices for implementing a school counseling program is required.

o Initial/professional certificate-must provide a minimum of 60 semester hours of graduate study in an approved school counseling program leading to a master's or higher degree and in the eight core content areas (following those in the 48 and 12 credit registered programs).

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: The current rule requires a general guidance program, designed in coordination with the teaching staff for K-6 students. For 7-12 students a more comprehensive program is required. The proposed amendment requires both district and building-level comprehensive school counseling plans. For grades K-5, the proposed amendment requires the program to be designed by a certified school counselor in coordination with the teaching staff and any appropriate pupil personnel service providers for the purpose of preparing students to participate effectively in their current and future educational programs, to provide information related to college and careers, and to assist students who may exhibit challenges to academic success, including but not limited to attendance or behavioral concerns, and where appropriate make a referral to a properly licensed professional and/or certified pupil personnel service provider, as appropriate, for more targeted supports. For grades 6-12, the proposed amendment requires certified school counselors to provide an annual individual progress review plan which shall reflect each student's educational progress and career plans. The existing rule requires the plan for 7-12 students.

It is anticipated that for the apx. 700 districts who already have elementary school counselors, the proposed amendment would not impose additional costs. Those 350 districts could develop building-level and district plans and individual progress review plans for grade 6 within their current school counselor job responsibilities by the 2019-2020 school year. Of the remaining 350 school districts with no elementary school counselor, we project that approximately half of those districts, (175 districts), some districts have sixth grade within their middle/high schools, wherein a school counselor already exists. However, for the remaining districts with grade six in schools without a school counselor, we project that the remaining districts may need to hire, on average, a quarter-time counselor, with larger districts needing more than one half time school counselor and smaller districts perhaps sharing the cost of an additional school counselor so that the cost would be less than one four time counselor. With the average salary of a school counselor estimated to be $68,000 with fringe benefits added, the cost of a 1/4-time school counselor would be approximately $17,000. Therefore, the anticipated added cost of adding building-level plans and individual progress review plans to grade six is estimated to be: $17,000 (.25FTE) X 175 districts (one quarter of the districts) = $2,975,000.

For candidates seeking a school counselor certificate, the proposed amendment provides that if, and when, a certification exam is available, such candidates will be required to pay a fee to SED for the exam.

(c) Costs to private regulated parties: None.

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

5. LOCAL GOVERNMENT MANDATES:

The amendment is necessary to implement policy enacted by the Regents related to enhancing existing guidance programs by requiring comprehensive developmental school counseling/guidance programs for all students in kindergarten through twelve. It also requires certified school counselors to provide an annual individual progress review plan for each 6-12 student. Districts are must annually update building-level and district-level comprehensive school counseling plans, and make them available online. Districts must also establish an advisory council to review and advise on implementation of the program.

6. PAPERWORK:

See Section 5.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposal to enhance school counselor preparation programs and comprehensive developmental school counseling/guidance programs arose from the work of the SCAC. The proposed amendment is necessary to implement Regents policy to meet the diverse and evolving needs of students by enhancing existing public school guidance programs to require comprehensive developmental school counseling/guidance programs for all students in K-12. It also amends the requirements of school counselor preparation programs necessary to support comprehensive developmental school counseling programs.

In an effort to reduce the potential costs of the comprehensive developmental school counseling program and in response to public comment, the proposed amendment removes the recommended ratios. It was further amended to only expand the individual progress review plans to students in grade six, rather than for students in pre-kindergarten through six. Such alternatives were considered, and proposed to minimize the impact of the comprehensive developmental school counseling/guidance programs.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance by the effective date which provides districts until the 2019-2020 school year to have a comprehensive developmental school counseling/guidance program. Further, institutions of higher education offering a school counseling preparation program have until September 1, 2020 to meet the program registration requirements. Candidates seeking school counselor certificates on or after September 2, 2022 must meet the requirements.

Revised Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to implement policy enacted by the Board of Regents relating to enhancing existing public school district guidance programs to require comprehensive developmental counseling/guidance programs for all students in grades kindergarten through twelve. The proposed amendment also makes changes to the certification requirements for school counselors and the requirements for school counselor preparation programs in order to support comprehensive developmental school counseling programs.

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

Local Government:

1. EFFECT OF RULE:

The proposed amendment applies to each of the approximately 680 public school districts in the State who will be required to expand existing guidance programs to meet the needs of students in grades kindergarten through twelve through a comprehensive developmental school counseling/guidance program. The proposed amendment will also apply to institutions of higher education with registered school counseling preparation programs that lead to certification in school counseling.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment makes the following major changes to the existing guidance programs in the public schools of this State:

- All public schools are still required to have a guidance program for all students.
- All students in K-12 should have access to certified school counselor, which for the city school district of the City of New York and the city school district of Buffalo shall include licensed guidance counselors pursuant to Part 80 of the Commissioner's regulations.
- Provide all public school students in 6-12 with annual individual progress review plans reflecting each student's educational progress and career plans conducted by certified school counselors.
- Comprehensive school counseling plans that are updated annually should be made available on the district website.
- Districts must establish a school counselor advisory council to review and advise the district on implementation issues relating to the comprehensive developmental school counseling program.

The proposed amendment makes the following major changes to the certification requirements for school counselors:

- Part 80-3.11 Certification. On or after September 2, 2022, candidates seeking an initial school counselor certificate must:

o complete an approved graduate program or complete 48 semester hours of graduate school counseling coursework in six core areas. In response to comment, the six core areas were revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness (best practices for implementation are now a core content area for professional certificates).

o complete a 100-hour practicum and a 600-hour internship. In response to comment the amendments were revised to provide that such mentoring and supervision may be provided by other qualified school personnel only if the employing school district cannot provide a certified school counselor in the school building.

o take and receive a satisfactory passing score on a NYSED approved certification exam, if available.

On or after September 2, 2022, candidates seeking a professional school counselor certificate must:

o complete a registered school counselor program or a minimum of 60 semester hours of graduate study acceptable to the Department in each of the eight core areas and the subareas;

o the two core content areas for the professional certificate were revised to, in lieu of content in career development and college readiness, require content in best practices for implementing a school counseling program. Candidates for a professional certificate will have received the content in career development and college readiness as preparation for the initial certificate.

o earn a master's degree in school counseling;

o meet requirements described for an initial certificate and will be

required to satisfactorily complete three years of experience as a school counselor.

Program Registration (§ 52.21(d)) by September 1, 2020)

o Initial certificate-must provide a minimum of 48 semester hours of graduate study in an approved school counseling program and in six core areas, and their subareas. In response to comment, the core areas for the initial certificate have been revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness (best practices for implementation have been transferred to the core content areas required for a professional certificate).

o Professional certificate-must provide a minimum of 12 additional semester hours in two core areas of graduate study in an approved certificate of advanced study. In response to comment, in lieu of content in career development and college readiness, content in best practices for implementing a school counseling program is required.

o Initial/professional certificate-must provide a minimum of 60 semester hours of graduate study in an approved school counseling program leading to a master's or higher degree and in the eight core content areas (following those in the 48 and 12 credit registered programs).

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any professional services requirements on school districts, school counselor candidates or school counselor preparation programs.

4. COMPLIANCE COSTS:

The current rule requires a general guidance program, designed in coordination with the teaching staff for K-6 students. For 7-12 students a more comprehensive program is required. The proposed amendment requires both district and building-level comprehensive school counseling plans. For grades K-5, the proposed amendment requires the program to be designed by a certified school counselor in coordination with the teaching staff and any appropriate pupil personnel service providers for the purpose of preparing students to participate effectively in their current and future educational programs, to provide information related to college and careers, and to assist students who may exhibit challenges to academic success, including but not limited to attendance or behavioral concerns, and where appropriate make a referral to a properly licensed professional and/or certified pupil personnel service provider, as appropriate, for more targeted supports. For grades 6-12, the proposed amendment requires certified school counselors to provide an annual individual progress review plan which shall reflect each student's educational progress and career plans. The existing rule requires the plan for 7-12 students.

It is anticipated that for the apx. 700 districts who already have elementary school counselors, the proposed amendment would not impose additional costs. Those 350 districts could develop building-level and district plans and individual progress review plans for grade 6 within their current school counselor job responsibilities by the 2019-2020 schoolyear. Of the remaining 350 school districts with no elementary school counselor, we project that approximately half of those districts, (175 districts), some districts have sixth grade within their middle/high schools, wherein a school counselor already exists. However, for the remaining districts with grade six in schools without a school counselor, we project that the remaining districts may need to hire, on average, a quarter-time counselor, with larger districts needing more than one half time school counselor and smaller districts perhaps sharing the cost of an additional school counselor so that the cost would be less than one four time counselor. With the average salary of a school counselor estimated to be $68,000 with fringe benefits added, the cost of a 1/4-time school counselor would be approximately $17,000. Therefore, the anticipated added cost of adding building-level plans and individual progress review plans to grade six is estimated to be: $17,000 (.25FTE) X 175 districts (one quarter of the districts) = $2,975,000.

For candidates seeking a school counselor certificate, the proposed amendment provides that if, and when, a certification exam is available, such candidates will be required to pay a fee to SED for the exam.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment requires school districts to post comprehensive developmental school counseling plans on the district website. Such actions may require minimal costs to add such documentation to an existing school district website.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents related to meeting the diverse and evolving needs of students by enhancing existing public school district guidance programs to require comprehensive developmental counseling programs for all students in grades prekindergarten through twelve provided by certified school counselors. The proposed amendment also makes changes to the requirements of school counselor preparation programs necessary to support comprehensive developmental school counseling programs.

Because the Regents policy upon which the proposed amendment is based uniformly applies to all school districts throughout the State, it is not appropriate to establish differing compliance or reporting requirements or timetables or to exempt school districts in rural areas from coverage by the proposed amendment.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. The proposed amendment arose from recommendations made by the SCAC which was comprised of 8 school counselors from across New York State and 8 representatives from school counselor preparation programs. Membership included two New York State United Teachers representatives, and one United Federation of Teachers representative.

Revised Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to school districts, and candidates seeking a certificate in school counseling in this State, including those who live and work, or are located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment also applies to institutions of higher education with registered school counseling preparation programs, which include those in rural areas of the State.

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

See the Needs and Benefits and Paperwork sections of the Regulatory Impact Statement submitted herewith. The proposed amendment does not impose any additional compliance requirements upon rural areas but merely implements policy enacted by the Board of Regents to enhance existing public school district guidance programs to require comprehensive developmental counseling/guidance programs for all students in grades kindergarten through twelve. The proposed amendment also makes changes to the requirements of school counselor preparation programs necessary to support comprehensive developmental school counseling programs.

The proposed amendment imposes no additional professional services requirements on school districts in rural areas.

3. COMPLIANCE COSTS:

The current rule requires a general guidance program, designed in coordination with the teaching staff for K-6 students. For 7-12 students a more comprehensive program is required. The proposed amendment requires both district and building-level comprehensive school counseling plans. For grades K-5, the proposed amendment requires the program to be designed by a certified school counselor in coordination with the teaching staff and any appropriate pupil personnel service providers for the purpose of preparing students to participate effectively in their current and future educational programs, to provide information related to college and careers, and to assist students who may exhibit challenges to academic success, including but not limited to attendance or behavioral concerns, and where appropriate make a referral to a properly licensed professional and/or certified pupil personnel service provider, as appropriate, for more targeted supports. For grades 6-12, the proposed amendment requires certified school counselors to provide an annual individual progress review plan which shall reflect each student's educational progress and career plans. The existing rule requires the plan for 7-12 students.

It is anticipated that for the apx. 700 districts who already have elementary school counselors, the proposed amendment would not impose additional costs. Those 350 districts could develop building-level and district plans and individual progress review plans for grade 6 within their current school counselor job responsibilities by the 2019-2020 school year. Of the remaining 350 school districts with no elementary school counselor, we project that approximately half of those districts, (175 districts), some districts have sixth grade within their middle/high schools, wherein a school counselor already exists. However, for the remaining districts with grade six in schools without a school counselor, we project that the remaining districts may need to hire, on average, a quarter-time counselor, with larger districts needing more than one half time school counselor and smaller districts perhaps sharing the cost of an additional school counselor so that the cost would be less than one four time counselor. With the average salary of a school counselor estimated to be $68,000 with fringe benefits added, the cost of a 1/4-time school counselor would be approximately $17,000. Therefore, the anticipated added cost of adding building-level plans and individual progress review plans to grade six is estimated to be: $17,000 (.25FTE) X 175 districts (one quarter of the districts) = $2,975,000.

For candidates seeking a school counselor certificate, the proposed amendment provides that if, and when, a certification exam is available, such candidates will be required to pay a fee to SED for the exam.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents related to meeting the diverse and evolving needs of

students by enhancing existing public school district guidance programs to require comprehensive developmental counseling/guidance programs for all students in grades prekindergarten through twelve provided by certified school counselors. The proposed amendment also makes changes to the requirements of school counselor preparation programs necessary to support comprehensive developmental school counseling programs.

Because the Regents policy upon which the proposed amendment is based uniformly applies to all school districts throughout the State, it is not appropriate to establish differing compliance or reporting requirements or timetables or to exempt school districts in rural areas from coverage by the proposed amendment.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. The proposed amendment was also based upon recommendations made by School Counselor Advisory Council which was comprised of 8 school counselors from across New York State, including Mount Markham Central School District and Hamburg Central School District, and representatives from school counselor preparation programs located across the State.

Revised Job Impact Statement

The proposed amendment is necessary to implement policy enacted by the Board of Regents to enhance existing public school district guidance programs to require comprehensive developmental counseling/guidance programs for all students in grades kindergarten through twelve. The proposed amendment also makes changes to the certification requirements for school counselors and the requirements for school counselor preparation programs to support comprehensive developmental school counseling/guidance programs in the public school districts of this state.

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on February 10, 2016, the State Education Department received approximately 1,000 individual comments. The majority of the comments received related to the amendments to Commissioner's regulation § 100.2(j). The proposed amendments to Commissioner's regulation § 100.2(j) were intended to broaden the opportunities for students to explore the multitude of pathways from P-12 to college and career. Exposing students to opportunities at a younger age and in a more comprehensive manner will only serve to prepare our students for success in P-12 and beyond. However, it was evident from the comments received that there was confusion surrounding the proposed amendments to the guidance program, and the perceived impact on students, schools, and other licensed professionals.

Below is an overview of the major areas which were revised in response to public comment and concerns from the field. For the full Assessment of Public Comment please visit: http://www.regents.nysed.gov/common/regents/files/1116p12hed1.pdf

• Student to School Counselor Ratios - deleted reference to ratios:

The proposed amendment was designed to encourage schools to use ratios for certified school counselors to students that conform to the American School Counselor Association standards. The ASCA recommended the following ratios for school counselors to students: 1:100 with a maximum of 1:250. Across New York State some schools meet this recommended ratio but some schools have a ratio of up to 1:700 or 1:800 (based on BEDS data[1]). In the 2013-14 school year, the statewide average ratio was 1:418. In response to a significant number of comments objecting to including a recommended ratio in regulation, the regulation has been revised and no longer recommends any such ratio. Instead, the Department will continue to encourage the use of the ASCA standards in guidance.

• The American School Counselor Association (ASCA) Model – deleted reference to the ASCA Model:

The ASCA model is nationally recognized for developing comprehensive school counseling standards aimed at increasing student outcomes. The proposed amendment presented to the Board in September 2015 required school counseling programs to address multiple student competencies in accordance with the ASCA Model including career/college readiness standards, and academic and social/emotional development standards. It also included language that referenced "other comparable national and/or New York State recognized standards." While the ASCA standards were praised for their quality by many stakeholders, others were concerned about prescribing the specific national standards developed by ASCA in regulation. The Department revised the regulation to remove the reference to the ASCA Model and standards, and will instead encourage the use of such standards through guidance.

• Comprehensive School Counseling Program – added the word Guidance throughout the regulation when referring to the School Counseling Program:

The proposed amendments to the regulations presented to the Board in September 2015 updated the title of the required program from "guidance program" to "comprehensive school counseling program." This change was made to recognize that school counselors serve all students in schools and that the national movement over the past several decades has been to eliminate the word "guidance" when referring to school counseling. However, that change in the title of the program led to confusion in the field about the nature of the counseling. In response to public comment, the proposed amendment revises the title of the program to include the word "guidance" to make explicitly clear that this regulation only addresses school counseling within the context of the "comprehensive school counseling/guidance program." This program is designed for the purpose of preparing students to participate effectively in their current and future educational programs, to provide information related to college and careers, and to assist students who may exhibit challenges to academic success including, but not limited to, attendance or behavioral concerns. Additional language was also included to ensure that, where appropriate, school counselors will continue to make referrals to a properly licensed professional and/or certified pupil personnel service provider, for more targeted supports. This last revision was made to help clarify the roles of the school counselor compared with other licensed professionals in schools (e.g., school social workers, school psychologists).

The comprehensive school counseling/guidance program was not intended to be confused with the more targeted mental health and behavioral supports that may be provided to students by other certified/licensed professionals. In response to public comment and to avoid confusion about the purpose of the rule, the title of the program within the regulation was revised and is now called the "comprehensive school counseling/guidance program."

• School Counselor v. Guidance Counselor – added specific language to reference Part 80 of the Commissioner's regulations:

Consistent with the certification title prescribed by Part 80 of the Commissioner's Regulations, the proposed regulation continues to use the title of school counselor. However, the Department received many comments opposing the use of the title school counselor instead of guidance counselor. Part 80 of the Commissioner's Regulations provides for the certification of school counselors and has referred to the professional title of "school counselor" for several decades. Additional concerns were raised by individuals who work in New York City and hold licenses issued by the City of New York under the title "guidance counselor", as permitted by Commissioner's Regulation § 80-2.2. To address this concern, the Department revised the language to make clear in the beginning of Commissioner's regulations § 100.2(j) that, for the city school district of the City of New York and the city school district of Buffalo, certified school counselor shall include "licensed guidance counselors" pursuant to Part 80 of the Commissioner's regulations.

• Individual Annual Progress Review Plans – revised the language to include grades 6 – 12, rather than P-12:

The existing regulation required individual progress review plans for students in grades 7-12. The proposed regulation expanded that requirement for all students in P-12 public schools, with P-6 plans to be provided in small groups. In response to public comment, the regulation has been revised to now only require individual progress review plans for students in grades 6-12.

• Duration of the Comprehensive School Counseling/Guidance Program – changed the grade level requirement from P-12 to K-12:

The proposed regulation expanded the program to serve students in prekindergarten through grade 12. However, in response to public comment, the revised regulation limits the program for students in grades K-12.

• Scope of Practice of Pupil Personnel Service Providers –added language to be clear that these proposed regulations would not change the scope of practice for other licensed or certified professionals.

The Department received much feedback from other pupil personnel service providers who were concerned that this proposed regulation would expand the scope of practice of school counselors, and impinge upon the scope of practice of other certified or licensed individuals. Additional language was included to ensure that nothing within Commissioner's regulation § 100.2(j) would prohibit certified or licensed school psychologists or certified or licensed school social workers pursuant to Part 80 of the Commissioner's Regulations from providing other direct student services within their applicable scope of practice.

Office of Higher Education: Highlights of Recommended Revisions

In response to the comments received, the Department made the following major changes:

• Part 80-3.11 Certification

• On or after September 2, 2022 (previously 2020), candidates seeking an initial school counselor certificate:

o must complete a NYSED approved graduate school counselor program (minimum of 48 semester hours) or complete 48 semester hours of graduate school counseling coursework in six core areas and the subareas for these core areas. In response to public comment, the six core content areas for the initial certificate have been revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness, including use of a variety of research-based school counseling approaches to provide services to meet the career needs of all students. Best practices for implementation have been transferred to the core content areas required for a professional certificate.

o complete a 100-hour practicum and a 600-hour internship as described in section 52.21 (d). In response to public comment and to ensure that candidates receive adequate supervision during the internship the proposed amendments were revised to provide that such mentoring and supervision may be provided by other qualified school personnel only if the employing school district cannot provide a certified school counselor in the school building in which the internship occurs.

o must take and receive a satisfactory passing score on a NYSED approved certification exam, if available.

• On or after September 2, 2022 (previously 2020), candidates seeking a professional school counselor certificate:

o must complete a school counselor program registered by the Department pursuant to Section 52.21(d); or complete a minimum of 60 semester hours of graduate study acceptable to the Department in each of the eight core areas and the subareas;

o in response to public comment, the two core content areas for the professional certificate have been revised to, in lieu of content in career development and college readiness, require content in best practices for implementing a school counseling program. Candidates for a professional certificate will have received the core content in career development and college readiness as preparation for the initial certificate.

o earn a master's degree in school counseling;

o meet requirements described for an initial certificate and will be required to satisfactorily complete three years of experience as a school counselor.

• Section 52.21(d) Program Registration

• By September 1, 2020 (previously 2018), school counseling programs leading to:

o Initial certificate - must provide a minimum of 48 semester hours of graduate study in an approved school counseling program and in six core areas, and the subareas for those content areas. In response to public comment, the core content areas for the initial certificate have been revised to, in lieu of content in best practices for implementing a school counseling program, require content in career development and college readiness, including use of a variety of research-based school counseling approaches to provide services to meet the career needs of all students. Best practices for implementation have been transferred to the core content areas required for a professional certificate.

o Professional certificate - must provide a minimum of 12 additional semester hours in two core areas of graduate study in an approved certificate of advanced study. In response to public comment, the two core content areas for the professional certificate have been revised to, in lieu of content in career development and college readiness, require content in best practices for implementing a school counseling program. Candidates for a professional certificate will have received the core content in career development and college readiness as preparation for the initial certificate.

o Initial/professional certificate - must provide a minimum of 60 semester hours of graduate study in an approved school counseling program which leads to a master's or higher degree and in the eight core content areas (following those in the 48 and 12 credit registered programs).

[1] Basic Educational Data System (BEDS).

Department of Environmental Conservation

EMERGENCY RULE MAKING

Chemical Bulk Storage (CBS)

I.D. No. ENV-19-16-00006-E
Filing No. 1038
Filing Date: 2016-11-14
Effective Date: 2016-11-14

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

Action taken: Amendment of Part 597 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 17-0301, 17-0303, 17-0501, 17-1743, 27-1301, 37-0101 through 37-0107 and 40-0101 through 40-0121

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

Specific reasons underlying the finding of necessity: The New York State Department of Health (NYSDOH) has requested that the New York State Department of Environmental Conservation (DEC) add perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service (CAS) No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to 6 NYCRR Section 597.3, List of Hazardous Substances. DEC has concluded that these four substances meet the definition of a hazardous substance based upon the conclusion of the NYSDOH that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. NYSDOH scientists have concluded that it is essential to list these chemicals as hazardous substances. See the Regulatory Impact Statement for additional information, including NYSDOH's letter requesting that these chemicals be added to the List of Hazardous Substances (Section 597.3).

It is essential to immediately identify PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances pursuant to 6 NYCRR Section 597.3, thereby making them hazardous wastes pursuant to Environmental Conservation Law Section 27-1301, and enabling DEC to exert its enforcement authorities and to expend funds from the Hazardous Waste Remedial Fund to clean up the contaminant. The emergency rule will provide DEC with authority to take immediate action to protect public health. To the extent elevated levels of PFOA-related and PFOS-related substances are identified throughout the State, DEC needs the authority to act expeditiously.

Subject: Chemical Bulk Storage (CBS).

Purpose: To amend Part 597 of the CBS regulations.

Text of emergency rule: 6 NYCRR Part 597 is amended to read as follows:

Existing subdivision 597.1(a) through paragraph 597.1(b)(1) remain unchanged.

Existing paragraph 597.1(b)(2) is amended to read as follows:

(2) Chemical [a]*A*bstract*s* [s]*S*ervice number or CAS number is the unique identifier for a chemical substance assigned by the CAS division of the American Chemical Society.

Existing paragraph 597.1(b)(3) through section 597.2 remain unchanged.

Existing section 597.3 is amended to read as follows:

597.3 List of hazardous substances

Table 1 sets forth the list of hazardous substances in alphabetical order. Table 2 sets forth the list of hazardous substances in Chemical Abstract*s* Service (CAS) number order.

Table 1 and Table 2 are amended to read as follows:

Table 1 – Alphabetical Order

CASRN	Substance	RQ Air *(pounds)*	RQ Land/ Water *(pounds)*	Notes
3825-26-1	*Ammonium Perfluorooctanoate*	*1*	*1*	

2795-39-3	*Perfluorooctane Sulfonate*	*1*	*1*
1763-23-1	*Perfluorooctane Sulfonic Acid*	*1*	*1*
335-67-1	*Perfluorooctanoic Acid*	*1*	*1*

Table 2 – CAS Number Order

CASRN	Substance	RQ Air *(pounds)*	RQ Land/ Water *(pounds)*	Notes
335-67-1	*Perfluorooctanoic Acid*	*1*	*1*	
1763-23-1	*Perfluorooctane Sulfonic Acid*	*1*	*1*	
2795-39-3	*Perfluorooctane Sulfonate*	*1*	*1*	
3825-26-1	*Ammonium Perfluorooctanoate*	*1*	*1*	

Existing subdivision 597.4(a) is amended to read as follows:

(a) Prohibition of releases.

The release of a hazardous substance which is required to be reported pursuant to subdivision (b) of this section is prohibited unless:

(1) such release is authorized; [or]

(2) such release is continuous and stable in quantity and rate and has been reported pursuant to paragraph (b)(4) of this section[.]*; or*

(3) such release is of fire-fighting foam containing Perfluorooctanoic Acid (CAS No. 335-67-1), Ammonium Perfluorooctanoate (CAS No. 3825-26-1), Perfluorooctane Sulfonic Acid (CAS No. 1763-23-1), or Perfluorooctane Sulfonate (CAS No. 2795-39-3) used for fighting fires (but not for training purposes) and occurs on or before April 25, 2017. In the event there is a release of such foam that exceeds the reportable quantity of any hazardous substance, the release must be reported pursuant to subdivision (b) of this section.

Existing subdivision 597.4(b) remains unchanged.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ENV-19-16-00006-EP, Issue of May 11, 2016. The emergency rule will expire January 12, 2017.

Text of rule and any required statements and analyses may be obtained from: Russ Brauksieck, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7020, (518) 402-9553, email: derweb@dec.ny.gov

Additional matter required by statute: Negative Declaration, Coastal Assessment Form, and Short Environmental Assessment Form have been completed for the proposed rule making that was filed on April 25, 2016 with the initial Notice of Emergency Adoption.

Summary of Regulatory Impact Statement

Full text of the Regulatory Impact Statement is available on the New York State Department of Environmental Conservation's website at http://www.dec.ny.gov/regulations/104968.html

1. STATUTORY AUTHORITY

The State law authority that empowers the New York State Department of Environmental Conservation (Department) to create a list of hazardous substances is found in Title one of Article 37 of the Environmental Conservation Law (ECL), sections 37-0101 through 37-0111, entitled "Substances Hazardous to the Environment" (Article 37). The Department is authorized to adopt regulations to implement ECL provisions (ECL sections 3-0301(2)(a) and (m)) which includes listing "substances hazardous to the public health, safety or environment" which "because of their quantity, concentration, or physical, chemical or infectious characteristics cause physical injury or illness when improperly treated, stored, transported, disposed of, or otherwise managed" in 6 NYCRR Part 597.

2. LEGISLATIVE OBJECTIVES

The legislative objectives underlying Article 37 are directed toward establishing a list of hazardous substances which pose a threat to public health or the environment. The emergency rule adds perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service (CAS) No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to the list of hazardous substances in 6 NYCRR Section 597.3 (Section 597.3). The proposed rule, upon adoption, makes the amendments permanent.

3. NEEDS AND BENEFITS

The purpose of the emergency rule and proposed rule is to:

1. Add PFOA-acid, PFOA-salt, PFOS-acid, and the PFOS-salt to Section 597.3;

2. Allow fire-fighting foam containing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt to be used to fight fires (but not for any other purposes) on or before April 25, 2017; and

3. Correct the list of hazardous substances by providing units for the reportable quantities (RQs).

Needs and Benefits of Adding PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt to the List of Hazardous Substances

The Department promulgated an emergency rule on January 27, 2016 to add PFOA-acid to the list of hazardous substances in Section 597.3. Since then, the Department became aware of three additional substances that need to be added to the list of hazardous substances. These additional substances have physical, chemical, and toxicological properties similar to PFOA-acid. The Department decided to allow the January 27, 2016 emergency rule to expire and to undertake the emergency and proposed rule to include all four substances on the list of hazardous substances.

The Department has concluded that these four substances meet the definition of hazardous substance based upon the conclusion of the New York State Department of Health (NYSDOH) that the combined weight of evidence from human and experimental animal studies indicates that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. NYSDOH scientists have concluded that it is essential to list these chemicals as hazardous substances. See the Regulatory Impact Statement for additional information, including NYSDOH's letter requesting that these chemicals be added to the List of Hazardous Substances (Section 597.3).

There are at least three benefits of listing these substances as hazardous substances in Part 597. First, if a mixture containing one of these substances in concentrations of 1% or more is stored in an aboveground tank of 185 gallons or more or any size underground tank, the tank would be subject to the requirements of the Chemical Bulk Storage (CBS) regulations (6 NYCRR Parts 596 – 599) with the purpose of preventing leaks and spills to protect public health and the environment. Second, releases to the environment are prohibited (subdivision 597.4(a)). Any release of one pound or more of these substances must be reported to the Department's spill hotline (subdivision 597.4(b)). Third, if one of these substances is released, the Department is authorized to pursue clean-up of the contamination under one of the Department's remedial programs (6 NYCRR Part 375) and may expend funds under the "State Superfund" if a responsible party is unwilling or unable to undertake the remediation.

Need and Benefit of Allowing Continued Use of Fire-Fighting Foam

These four substances have been used in Aqueous Film-Forming Foam (AFFF). While their use was restricted or reportedly removed from new products by December 2015, AFFF containing these substances are likely stored at some facilities since the reported shelf-life of AFFF is up to 25 years. In accordance with existing 6 NYCRR subdivision 597.4(a), the release of a hazardous substance is prohibited. This rule adds a provision allowing entities with fire-fighting foam time to determine if stored foam contains these hazardous substances. If so, the facility would be required to arrange for proper disposal of the foam by April 25, 2017. Replacement foam may not contain a hazardous substance at a concentration that would result in the release of more than the RQ (one pound) when used as a fire-fighting foam. Prior to April 25, 2017, entities storing this foam would be allowed to use the foam, as needed, to fight fires to protect public safety but not for any other purpose such as training. If the foam is used to fight a fire and there is a release of one pound or more of a hazardous substance, the release must be reported to the Department's spill hotline to allow the Department to determine if remediation of the release is appropriate.

Need for Correction of the List of Hazardous Substances

A correction is being made to the tables listing hazardous substances. It was determined that the units for RQs were left off the table causing some uncertainty regarding when a release would need to be reported. This rule adds units back to the column heading of the table.

4. COSTS

Costs to Regulated Parties

Because the use of these chemicals is limited by United States Environmental Protection Agency (USEPA) and the CBS tank system requirements for handling and storing these chemicals do not apply until April 25, 2018, the Department expects that compliance costs will be minimal. For example, if a facility is storing one of these substances in a 5,000 gallon aboveground storage tank, the two-year registration fee would be $125. If the facility were to discontinue storage by April 25, 2018, when the stor-

age and handling standards go into effect, there would be no substantive costs beyond payment of the registration fee. If the facility were to continue to store one of these substances, it would be subject to the costs of complying with the handling and storage requirements in Parts 598 and 599.

With one possible exception (entities with fire-fighting form), the release prohibition should not present unusual compliance costs for persons who may be in possession of PFOA-containing or PFOS-containing substances. Since the Department recognizes the important societal interest of ensuring the availability of materials to control fires, persons have until April 25, 2017 to determine if foam contains hazardous substances and replace the foam if necessary. If fire-fighting foam contains a hazardous substance, it cannot be released to the environment after April 25, 2017. The Department anticipates that replacement foams would be purchased and that old foam containing a hazardous substance would be disposed of in accordance with applicable requirements. The cost to replace the foam ranges from $16 to $32 per gallon, depending on the amount and type of foam. Since use of these substances has been restricted or phased-out, the Department is uncertain how many regulated parties may be in possession of fire-fighting foams that contain one of these substances.

The costs of complying with the requirements of Part 375 to implement a remedial program where the four substances are primary contaminants will vary widely as costs depend upon many factors. Thus, it is not possible to meaningfully estimate potential remedial costs other than to note that remedial program costs for other hazardous substances range from the thousands to millions of dollars.

Costs to the Department, State, and Local Government

The Department will incur costs to administer the CBS program and to oversee of site remediation by responsible parties. In cases where a responsible party is unwilling or unable to undertake remediation, the costs of the remediation would be incurred by the Department (subject to efforts to recover the costs).

State and local governments will incur costs making determinations regarding whether products containing one of these substances are stored at their facilities.

5. LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements not already created by statute or described above would be imposed on local governments. This is not a local government mandate.

6. PAPERWORK

The emergency rule and proposed rule contain no substantive changes to existing reporting and record keeping requirements, except for those newly subject to this regulation.

7. DUPLICATION

The listing of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances in Part 597 causes no duplication, overlap or conflict with any other state or federal government programs or rules.

8. ALTERNATIVES

The only alternative to listing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances considered by the Department, the no action alternative, was not taken. The Department declined to take no action because, as determined by NYSDOH, the combined weight of evidence from human and experimental animal studies indicates that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of, or otherwise managed.

9. FEDERAL STANDARDS

Listing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances exceeds the current federal approach, as USEPA has not listed these substances as any of the substances defined as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C Section 9601, et seq., or under the applicable regulation, 40 CFR Part 302 (“Designation, Reportable Quantities, and Notification”). Under the Toxic Substances Control Act, USEPA worked with industry to voluntarily phase out the use of PFOA-related substances by December 2015, and proposed a significant new use rule, completed in 2002, to limit production and importation of PFOA-related substances.

10. COMPLIANCE SCHEDULE

A facility that stores one of these substances that is subject to the CBS registration requirements is required to submit its registration application to the Department when it becomes subject to regulation. If a facility is already storing one of these substances and is subject to the registration requirements, the requirement became effective on April 25, 2016, the effective date of this emergency rule. If a facility begins storing one of these substances and is subject to the registration requirements, it must obtain a valid registration certificate prior to storing the material. Facilities with existing storage are not required to comply with the handling and storage requirements for hazardous substances until April 25, 2018 (6 NYCRR subdivision 598.1(h)). The Department expects that facilities that currently store one of these substances will phase out storage of the substance prior to April 25, 2018, and, therefore, will not have significant CBS compliance requirements beyond the registration requirement.

Existing Part 597 prohibits the release of a hazardous substance to the environment (subdivision 597.4(a)). This emergency rule and proposed rule allow entities storing fire-fighting foam to use the foam until April 25, 2017 while they determine if the foam contains one of these hazardous substances. If the foam does contain one of the substances, the foam must not be released to the environment after April 25, 2017. However, if the foam is used to fight a fire and there is a release of one pound or more of a hazardous substance, the release needs to be reported to the Department’s spill hotline (subdivision 597.4(b)).

Listing these substances as hazardous substances results in sites contaminated with one of these substances being subject to the inactive hazardous waste disposal sites regulatory requirements of Part 375, which sets forth requirements for remediation. Remedial programs for a site tend to be complex, multi-phased, and take from a few to many years to complete.

Summary of Regulatory Flexibility Analysis

Full text of the Regulatory Flexibility Analysis for Small Businesses & Local Governments is available on the New York State Department of Environmental Conservation’s website at http://www.dec.ny.gov/regulations/104968.html

1. EFFECT OF RULE

The purpose of the emergency rule and proposed rule is to:

1. Add perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service (CAS) No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to 6 NYCRR Section 597.3;

2. Allow fire-fighting foam containing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt (all four substances) to be used to fight fires (but not for training or any other purposes) on or before April 25, 2017, a use which would not otherwise be allowed under the regulation since the release of a hazardous substance is prohibited; and

3. Correct the list of hazardous substances by providing units for reportable quantities (RQs).

The emergency rule and proposed rule apply statewide in all 62 counties of New York State (State). The listing of the hazardous substances has two effects. First, facilities storing all four substances are now (upon the effective date of the emergency rule) subject to registration requirements (6 NYCRR Part 596) with the New York State Department of Environmental Conservation (Department) under the Department’s Chemical Bulk Storage (CBS) program. Facilities must comply with the applicable handling and storage requirements (6 NYCRR Parts 598-599).

Production of all four substances has already been restricted or reportedly phased out and replaced with alternative substances. Facilities storing products containing any of the four substances manufactured prior to the manufacturing phase-out will be subject to CBS registration requirements. Older stocks of fire-fighting foam containing any of the four substances will be subject to the CBS registration requirements. If the stored foam contains PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt, the facility would be required to arrange for the proper disposal of the foam by April 25, 2017. Small businesses are not likely to store these foams in quantities (explained below). Large local government agencies (fire departments, fire districts) possibly maintain stocks of fire-fighting foam that could be subject to the registration requirement. The number of facilities that would be required to register as CBS facilities is expected to be small and go to zero as stocks of the four substances are eliminated.

Most facilities subject to the CBS regulations are municipal facilities, manufacturing facilities, and utilities. There are over 1,400 registered CBS facilities. The Department believes that the great majority of facility owners and operators are likely small businesses. Local governments have registered over 580 CBS facilities. The Department believes that the types of facilities registered by local governments are water and wastewater treatment facilities and are not expected to store any of the four substances.

The Department only collects information regarding the name, address, and contact information for the owner and operator of registered facilities. Hence, the Department cannot estimate the number of small businesses which are CBS regulated (6 NYCRR Parts 596 through 599) or will be regulated due to the emergency rule and proposed rule.

The second effect of the promulgation of this rule is the permanent prohibition of releases of any of the four substances to the environment. The prohibition takes effect on April 25, 2017 for fire-fighting foams. The release prohibition now applies to the four substances including any older stocks of fire-fighting foams and any material containing the four substances stored by small businesses or local governments. This will require local government and small businesses to dispose of materials containing

the four substances. Releases of listed hazardous substances above the reportable quantity (RQ) given in Part 597 (one pound for the four substances) must be reported to the Department's Spill Hotline (subdivision 597.4(b)).

The number of sites that will become remedial sites because of the addition of these four substances to Part 597 is unknown. The Department has placed one site on the Registry of Inactive Hazardous Waste Disposal Sites (Registry) as a result of adding PFOA-acid to Part 597 (Site Registry ID No. 442046). The Department expects that other sites that used the any of the four substances in commercial or industrial processes may have environmental contamination. Locations where disposal of the substances occurred or where the substances were components of materials released to the environment may become remedial sites subject to the requirements of Part 375.

The Department anticipates that remediation issues would be most significant for areas where the substances were either manufactured, used to make other products, released, or disposed of. Based upon currently available information, the four substances have not been manufactured in New York State, but have been used here to create other products. It is not known how many small businesses or local governments own properties that will be subject to the regulatory requirements of Part 375because of contamination from these four substances.

2. COMPLIANCE REQUIREMENTS

This rule makes no changes to any substantive requirement for CBS facilities other than to place the four substances on the list of hazardous substances in Part 597.

Facilities that store the any of the four substances in amounts and in tanks that make them subject to the registration requirements of 6 NYCRR Part 596 must include tank systems on facility registrations with the Department and pay the registration fee associated with the CBS program. The fees range from $50 per tank for tanks with capacities less than 550 gallons to $125 per tank for capacities greater than 1,100 gallons.

If a facility is already storing any of the four substances and is subject to the registration requirements, the registration requirement became effective on April 25, 2016, the effective date of this emergency rule. A facility planning to start storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt must obtain a valid registration certificate prior to storage. Facilities with existing storage of these substances are not required to comply with the handling and storage requirements for hazardous substances until April 25, 2018 (6 NYCRR subdivision 598.1(h)). The Department anticipates that facilities that currently store any of the four substances will phase out their storage of the substance prior to April 25, 2018 and therefore would not have substantive CBS compliance requirements beyond the registration requirement.

Listing the four substances as hazardous results in sites otherwise meeting regulatory criteria to be subject to the inactive hazardous waste disposal sites regulatory requirements of Part 375 for the first time. In these cases, requirements for investigation and cleanup are established by Part 375 and by Department orders and agreements with regulated entities. Part 375 sets forth site investigation requirements which determine the nature and extent of environmental contamination, evaluate remedial alternatives, design and construct a remedy, complete the operation and maintenance activities required to achieve the site remedial action objectives, and maintain any institutional or engineering controls which make the remedy effective. Remedial programs for a site tend to be complex, multi-phased, and take from a few to many years to complete.

3. PROFESSIONAL SERVICES

No new or additional professional services will be needed for small businesses or local governments to comply with this rule. Facilities continuing to store the substances after April 25, 2018, when the storage and handling standards go into effect, may need professional services to meet hazardous substances handling and storage requirements.

A small business or local government which becomes a remedial party subject Part 375 remedial program requirements, will require consulting and contractual services, including professional engineers or qualified environmental professionals as defined in Part 375 and contractual services needed to undertake site investigation field work, analyses of environmental samples, or other specialized services.

4. COMPLIANCE COSTS

Production of the four substances has been phased out and the substantive CBS tank system requirements for their handling and storage will not apply until April 25, 2018. The Department expects that the compliance costs for meeting the CBS requirements will be minimal. If the facility discontinues storage by April 25, 2018, when the storage and handling standards go into effect, there will be no other substantive costs.

The release prohibition will not present significant compliance costs for small businesses and local governments.

Part 375 compliance costs for remedial program implementation where any of the four substances are the primary contaminants will vary widely. Costs are related to the following: quantity released to the environment, media contaminated (e.g., soil, groundwater, surface water, sediment, bedrock), the horizontal and vertical extent of contamination, the accessibility of contamination, whether there are human or environmental receptors to protect while a remedial program is undertaken, the difficulty of removing the substances from the contaminated environmental media, the anticipated future use of the area of contamination, and other factors. It is not possible to meaningfully estimate the potential costs to small businesses and local governments resulting from listing the substances as hazardous. Remedial program costs for other hazardous substances have ranged from the thousands to millions of dollars on a case-by-case basis.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The economic and technological feasibility for small businesses or local governments related to compliance with this rule depends upon which requirements apply. If small businesses or local governments are required to comply with CBS registration requirements only, no significant impediments will be faced. If a CBS facility decides to store the substances after April 25, 2018, when the storage and handling standards go into effect, costs would be incurred to comply with handling and storage requirements. Costs could include design, construction, and maintenance of tank systems to meet the technical requirements for release prevention, release detection, and containment of potential spills. No technological feasibility issues will exist, but costs would be incurred commensurate with storage amounts.

The economic and technical feasibility of complying with the requirements to remediate a site contaminated by the substances for a small business or local government is explained above in compliance costs.

6. MINIMIZING ADVERSE IMPACT

The Department is adopting this emergency rule and proceeding with this proposed rule based upon the conclusion of NYSDOH that the combined weight of evidence from human and experimental animal studies indicates that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. See the Regulatory Impact Statement for additional information, including NYSDOH's letter requesting that these chemicals be added to the List of Hazardous Substances (Section 597.3).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department will ensure public notice and input by issuing public notices in the State Register and newspapers, publication in the Department's Environmental Notice Bulletin, holding a comment period of at least 45 days, and holding public hearings. Interested parties, including small businesses and local governments, will have the opportunity to submit comments and participate in public hearings. The Department will post relevant rule making documents on the Department's website.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

There can be no ameliorative actions or cure period regarding the prohibition against releasing the four substances to the environment because the prohibition is absolute and intended to prevent the harm that would come to public health. Prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. The concept of a cure period does not apply in the case of a remedial program.

If a facility subject to the CBS facility registration requirement for the any of the four substances fails to register its facility in accordance with Part 596, the facility owner/operator will be subject to penalties that have been in place and exercised by the Department for all types of parties for decades, including small businesses and local governments. Therefore, no additional ameliorative actions or cure period established for this rule regarding CBS registration or handling and storage requirements.

9. INITIAL REVIEW OF THE RULE

DEC would conduct an initial review of the rule within three years of the promulgation of the final rule.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS

There are 44 counties in New York State (State) that have populations of less than 200,000 people and 71 towns in non-rural counties where the population density is less than 150 people per square mile. Since the emergency rule and proposed rule apply statewide, they apply to all rural as well as non-rural areas of the State. The emergency rule adds perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service (CAS) No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to the list of hazardous substances in 6 NYCRR Section 597.3 (Section 597.3). This rule also provides time for facilities storing fire-fighting foam containing one or more of these newly listed hazardous substances to properly dispose

of it, and makes a correction to the tables of hazardous substances in Part 597 by providing units for reportable quantities (RQs). There is no reason to believe that the actions under this rule will disproportionally impact rural areas.

2. REPORTING, RECORDKEEPING, OTHER COMPLIANCE REQUIREMENTS, AND NEED FOR PROFESSIONAL SERVICES

This emergency rule and proposed rule makes no changes to reporting, recordkeeping, or other compliance requirements for Chemical Bulk Storage (CBS) facilities other than to place PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt on the list of hazardous substances in Section 597.3.

Facilities that store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt in specified quantities and use certain tanks that make them subject to the registration requirements of 6 NYCRR Part 596 must include these tank systems in their facility registration with the Department, and pay a registration fee associated with the CBS program. Facilities regulated under 6 NYCRR Parts 596-599 most commonly store hazardous substances in stationary aboveground tank systems with a capacity greater than 185 gallons.

A facility that stores PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt that is subject to the CBS registration requirements, as explained above, must submit its registration application to the Department and pay the commensurate fee at the time it becomes subject to regulation. If the facility is already storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt, and is subject to the registration requirements, the registration requirements became effective on April 25, 2016, the effective date of this emergency rule. If a facility plans to start storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt, and is subject to the registration requirement, it must obtain a valid registration certificate prior to storing the material. A facility with existing storage of PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt is not required to comply with the handling and storage requirements for hazardous substances until April 25, 2018 (subdivision 598.1(h)). Since the Department anticipates that facilities that currently store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt will phase out storage of the substance prior to April 25, 2018, they will not have substantive CBS compliance requirements regarding these chemicals beyond the registration requirement.

Existing Part 597 prohibits the release of a hazardous substance to the environment unless a release is authorized or is continuous and stable and has been reported to the Department (subdivision 597.4(a)). This rule in addition allows entities with fire-fighting foam to use the foam to fight fires on or before April 25, 2017 while they determine if the foam contains PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt. If the foam contains one of these hazardous substances, the foam must be disposed of in accordance with appropriate regulations by April 25, 2017. Replacement foam may not contain a hazardous substance at a concentration that would result in the release of more than the RQ (one pound) when used as a fire-fighting foam. However, if the foam is used to fight a fire and there is a release of a hazardous substance above the RQ stated in Part 597 for the substance (one pound for these hazardous substances), the release must be reported to the Department's spill hotline (subdivision 597.4(b)).

Listing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances results in sites contaminated with PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt being subject to the inactive hazardous waste disposal sites regulatory requirements of 6 NYCRR Part 375. In these cases, requirements for investigation and cleanup are established by Part 375 and by Department orders and agreements with regulated entities. Part 375 sets forth requirements for the investigation of site conditions to determine the nature and extent of environmental contamination, evaluate remedial alternatives, design and construct a remedy, complete the operation and maintenance activities required to achieve the remedial action objectives for the site, and maintain any institutional or engineering controls needed to maintain the effectiveness of the remedy. Remedial programs for a site tend to be complex, multi-phased, and take from a few to many years to complete.

No new or additional professional services are anticipated to be needed by facilities located in rural areas to comply with the emergency rule and proposed rule regarding the CBS requirements if they discontinue storing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt before the handling and storage requirements take effect on April 25, 2018. If facilities continue to store after April 25, 2018, when the storage and handling standards go into effect, facility owners/operators may need professional services to assist them in meeting the handling and storage requirements for hazardous substances.

If an owner/operator in a rural area becomes a remedial party subject to requirements to implement a remedial program under Part 375, it would likely require consulting and contractual services to assist in carrying out the remedial program. This could include professional engineers or qualified environmental professionals, as defined in Part 375, and contractual services needed to complete site investigation field work, analyses of environmental samples, or other specialized services.

3. COSTS

The Department does not anticipate a variation in compliance costs for different types of public and private entities in rural areas. Since PFOS-acid, PFOS-salt, and PFOS-related substances was restricted beginning in 2002 and, under the EPA's Stewardship Program addressing PFOA-related substances, eight companies voluntarily removed PFOA-acid, PFOA-salt, and PFOA-related substances from new products by December 2015, and because the substantive CBS tank system requirements for handling and storing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt will not apply until April 25, 2018, the Department expects that the compliance costs for meeting the CBS requirements will be minimal. Hazardous substances regulated under Parts 596-599 are most commonly stored in stationary aboveground tank systems with a capacity greater than 185 gallons. Registration fees apply to each regulated tank and depend upon the capacity of each tank. The fees range from $50 per tank for tanks with capacities less than 550 gallons to $125 per tank for capacities greater than 1,100 gallons. If a facility discontinues storage by April 25, 2018, when the storage and handling standards go into effect, there will be no other substantive costs.

The prohibition of releases of hazardous substances is not expected to present significant compliance costs for public or private entities in rural areas with the possible exception of entities in possession of fire-fighting foams (Aqueous Film Forming Foam - AFFF) that contain PFOA-related or PFOS-related substances. This emergency rule and proposed rule adds a provision to allow facilities with fire-fighting foam the time necessary to determine if stored foam contains one or more of these substances. If the stored foam contains one of these substances, the facility would be required to arrange for the disposal of the foam by April 25, 2017. Replacement foam may not contain a hazardous substance. The older foams may be disposed of as solid waste in a permitted landfill since these substances do not meet the definition of Resource Conservation and Recovery wastes when disposed properly. The cost to replace the foam ranges from $16 to $32 per gallon, dependent on the amount and type of foam that is being stored. Prior to April 25, 2017, entities storing this foam will be allowed to use the foam, as needed, to fight fires to protect public safety. However, if the foam containing one or more of these hazardous substances is released to the environment in an amount that exceeds the RQ (one pound), the release must be reported to the spill hotline to allow the Department to determine if any remediation of the release is appropriate.

The costs of complying with the requirements of Part 375 to implement a remedial program where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt are the primary contaminants, will vary widely as the costs depend upon many factors. These include the quantity released to the environment, the media contaminated (e.g., soil, groundwater, surface water, sediment, bedrock), the horizontal and vertical extent of contamination for each medium, the accessibility of the contamination, whether there are human or environmental receptors that must be protected while a remedial program is being undertaken, the difficulty of removing PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt from the contaminated environmental media, the future anticipated use of the area of contamination, and other factors. Because of the wide variety of scenarios, it is not possible to meaningfully estimate the potential costs to persons managing PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt in rural areas resulting from the listing of PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt as hazardous substances other than to note that remedial program costs for other hazardous substances can range from the thousands to millions of dollars on a case-by-case basis.

4. MINIMIZING ADVERSE IMPACT

The Department is adopting this emergency rule and proceeding with this proposed rule based upon the conclusion of the New York State Department of Health (NYSDOH) that the combined weight of evidence from human and experimental animal studies indicates that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. NYSDOH scientists have concluded that it is essential to list these chemicals as hazardous substances. See the Regulatory Impact Statement for additional information, including NYSDOH's letter requesting that these chemicals be added to the List of Hazardous Substances (Section 597.3).

This action does not lend itself to the mitigating measures listed in State Administrative Procedure Act section 202-bb(2), but there are existing requirements established in the regulations that help to minimize adverse impacts. For example, the CBS regulations allow a two-year period after a new chemical is added to the list of hazardous substances before the handling and storage requirements of Part 598 apply to facilities with existing storage of the chemical (subdivision 598.1(h)). In addition, the Department has determined through other rule making actions that the remaining regulatory compliance provisions, including the storage, handling, release prohibition, and disposal provisions, appropriately apply to persons managing hazardous substances in rural areas.

5. RURAL AREA PARTICIPATION

The Department is providing statewide outreach to persons who are subject to this emergency and proposed rule, including those in rural areas. The Department will ensure public notice and input by issuing public notices in the State Register, newspapers, and the Department's Environmental Notice Bulletin; holding a comment period of at least 45 days; and holding public hearings. Interested parties will have the opportunity to submit written comments and participate in the public hearings. The Department will also post relevant rule making documents on the Department's website.

6. INITIAL REVIEW OF THE RULE

The Department will conduct an initial review of the rule within three years of the promulgation of the final rule.

Job Impact Statement

1. NATURE OF IMPACT

Through the emergency rule and proposed rule, the New York State Department of Environmental Conservation (Department):

1. Adds perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to the list of hazardous substances in 6 NYCRR Section 597.3 (Section 597.3);

2. Allows fire-fighting foam containing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt to be used to fight fires (but not for training or any other purposes) on or before April 25, 2017, a use which would not otherwise be allowed under the regulation since the release of a hazardous substance is prohibited; and

3. Corrects the list of hazardous substances by providing units for reportable quantities (RQs).

The substantive effects of listing of these substances in Section 597.3 is to (1) make the handling and storage of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt subject to the registration and other regulatory standards for Chemical Bulk Storage (CBS) facilities (6 NYCRR Parts 596-599); (2) prohibit the unauthorized release of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt to the environment (subdivision 597.4(a)) and require that any releases above the RQ (one pound) be reported to the Department (subdivision 597.4(b)); and (3) make the investigation and remediation of releases of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt to the environment subject to the Department's remedial program requirements (6 NYCRR Part 375).

The substantive effect of allowing fire-fighting foam to be used to fight fires (but not for training or any other purposes) on or before April 25, 2017 is to provide entities the time necessary to determine if stored foam contains one or more of these hazardous substances and replace any foams as necessary. If stored foam contains one of these substances, a facility would have to arrange for the proper disposal of the foam in accordance with all local, state, and federal requirements. Replacement foam may not contain a hazardous substance at a concentration that would result in the release of more than the RQ (one pound) when used as a fire-fighting foam. The older foams may be disposed of as solid waste in a permitted landfill since these substances are not Resource Conservation and Recovery Act wastes when disposed properly.

The effect of correcting the tables listing hazardous substances is to include the units for RQs to remove uncertainty regarding when a release must be reported.

Under the federal Toxic Substances Control Act, the United States Environmental Protection Agency (USEPA) has worked with industry to voluntarily phase out the use of PFOA-related substances by December 2015, and proposed a significant new use rule (SNUR) to limit the production and importation of PFOA-related substances in anticipation of the phase-out deadline (80 FR 2885; January 21, 2015). USEPA completed the SNUR to limit the production and importation of PFOS-related substances in 2002.

Since production of PFOA-related and PFOS-related substances has already been reportedly phased out or restricted, and alternative substances have been developed to take the place of these hazardous substances, the Department does not expect this rule to have a significant impact on jobs and employment either in terms of lost jobs or the creation of new jobs. Employment opportunities should remain the same or may increase somewhat due to remediation activities.

2. CATEGORIES AND NUMBERS AFFECTED

Since PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt are reportedly no longer being produced in the United States, the CBS regulations would only apply to stored PFOA-containing or PFOS-containing materials produced before the phase-out. Since replacement materials are already in place and the number of facilities storing PFOA or PFOS in quantities large enough to be subject to the CBS regulations is expected to be small, the number of jobs affected is expected to be small. Existing employees may be required to arrange for the disposal of older stocks of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt containing materials, but this should not require the creation of new jobs or the loss of existing jobs.

Where PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt has previously been released to the environment in ways that make the resulting contamination subject to a 6 NYCRR Part 375 remedial program, a limited number of jobs may be created in order to complete the necessary investigations and remediation of the sites. Job categories would include, for example, drilling contractors and other heavy equipment operators, field investigation technicians, hydrogeologists, engineers, analytical chemists and technicians, and others with training and experience related to site remediation.

The number of sites that may become remedial sites because of the addition of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt to Section 597.3 is unknown. The Department has placed one site on the Registry of Inactive Hazardous Waste Disposal Sites (Registry) as a result of adding PFOA-acid to Section 597.3 (Site Registry ID No. 442046). The Department expects that other sites that used PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt in commercial or industrial processes may have PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt environmental contamination. Locations where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt disposal occurred or where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt were components of materials released to the environment may become remedial sites subject to the requirements of Part 375. Nationally, research by the United States Department of Defense (DoD) found that approximately 600 DoD sites are categorized as fire/crash/training areas and thus have the potential for contamination with perfluoroalkyl compounds (including PFOA-related and PFOS-related substances) due to historical use of aqueous film-forming foams (AFFF) [Strategic Environmental Research and Development Program (SERDP), FY 2014 Statement of Need (SON), Environmental Restoration (ER) Program Area, "In Situ Remediation of Perfluoroalkyl Contaminated Groundwater," SON Number: ERSON-14-02, October 25, 2012]. It is possible that the Department will list additional Registry sites. The work needed to investigate and remediate these sites may be accomplished by existing staff or new jobs may be added depending upon the number and complexity of sites.

3. REGIONS OF ADVERSE IMPACT

There are no regions of the State expected to be disproportionately impacted by the emergency rule and proposed rule as they apply statewide. There is no reason to expect that PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt issues will be concentrated in one area over another to any significant degree.

4. MINIMIZING ADVERSE IMPACT

For the reasons described above, the emergency rule and proposed rule are not expected to have a significant adverse impact on jobs and employment.

5. SELF-EMPLOYMENT OPPORTUNITIES

The emergency rule and proposed rule are not expected to impact self-employment opportunities.

6. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years of the promulgation of the final rule.

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Science-Based State Sea-Level Rise Projections

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

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

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

Statutory authority: Environmental Conservation Law, section 3-0319

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

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

Text of revised rule: *Chapter IV Quality Services*
Subchapter I Climate Change
Part 490 Projected Sea-Level Rise
490.1 Purpose

This Part establishes science-based projections of sea-level rise for New York State's tidal coast, including the marine coasts of Nassau, Suffolk and Westchester counties and the five boroughs of New York City, and the main stem of the Hudson River, north from New York City to the federal dam at Troy.

490.2 Applicability

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

490.3 Definitions

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

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

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

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

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

(e) 'ClimAID model outputs'. Projections based on the outputs of global climate models, downscaled to New York, and additional information, including information to account for anticipated changes in the rates of ice melt that cannot yet be more rigorously included in quantitative models.

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

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

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

(i) 'High projection'. The amount of sea-level rise that is associated with high rates of melt of land-based ice and is very unlikely (the 90th percentile of ClimAID model outputs) to be exceeded by the specified time interval.

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

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

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

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

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

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

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

490.4 Projections

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

(a) Mid-Hudson Region

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

(b) New York City/Lower Hudson Region

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

(c) Long Island Region

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

Revised rule compared with proposed rule: Substantial revisions were made in sections 490.1, 490.2 and 490.3.

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

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

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

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

Summary of Revised Regulatory Impact Statement

INTRODUCTION

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

STATUTORY AUTHORITY

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

LEGISLATIVE OBJECTIVES

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

NEEDS and BENEFITS

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

Stakeholder Outreach

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

Summary of Projection Format

Based in part on this input, the Department proposes to adopt five projections for each of three regions of the State. The three regions of the State are Long Island, New York City and the Lower Hudson River

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

Revisions to Part 490

The Department made substantial revisions to Part 490 in response to public comments received on the initial notice of proposed rulemaking. First, the Department substantially revised the definition of "high projection" in subdivision 490.3(i). Pursuant to this revision, in addition to being "very unlikely" to occur, the "high projection" is defined as being "associated with high rates of melt of land-based ice." This revision is intended to acknowledge the fact that, if the high projection is reached by a given time interval, it would be associated with high rates of melt of land-based ice. Second, the Department substantially revised the definition of the term "low projection" in subdivision 490.3(m). Pursuant to this revision, in addition to being "very likely" to be exceeded, the "low projection" is defined as being "consistent with historical rates of sea-level rise." This revision accounts for the fact that future sea-level rise is not projected to be consistent with historical trends, but is instead projected to accelerate with increased warming. In addition, the Department made changes to Sections 490.1 and 490.2 to expand upon the purpose and applicability of Part 490.

ClimAID Report

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

Comparison of ClimAID Report to Other Reports

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

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

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

Perhaps most importantly, the question for decision makers is not if a critical sea level will be reached, but when. Strauss (2013[3]) calculated that historic greenhouse gas emissions have already committed the globe to a mean sea-level rise of 6.2 feet over current levels. Even more conservative projections of rates of sea-level rise indicate sea-level rise of approximately six feet within the next 150 years. Thus, a full range of projections in Part 490 that includes higher values is appropriate to allow for consideration of a level of sea-level rise that will likely occur at some point, even if the timing of such occurrence is uncertain.

COSTS

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

LOCAL GOVERNMENT MANDATES

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

PAPERWORK

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

DUPLICATION

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

ALTERNATIVES

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

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

2) Other Reports – The Department considered basing its proposed projections on several alternative scientific reports other than the ClimAID report, including Parris et al., (2012[4]), completed for the National Climate Assessment, and Zhang et al., (2014[5]), prepared for RISE. The Department also reviewed and considered information contained in reports of the Intergovernmental Panel on Climate Change (Church et al., 2013[6]), New York State Sea Level Rise Task Force[7] and the New York City Panel on Climate Change.[8] The Department rejected basing the projections in Part 490 on any of these other reports because, among other reasons, the ClimAID report covers the entire tidal coast of the State, accounts for local and regional variations in sea-level rise, and incorporates the possibility of rapid ice melt.

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

FEDERAL STANDARDS

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

COMPLIANCE SCHEDULE

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

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

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

[3] Strauss. 2013. Op. cit.

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

[5] Zhang, Minghua, Henry Bokuniewicz, Wuyin Lin, Sung?128;Gheel Jang, and Ping Liu, 2014: Climate Risk Report for Nassau and Suffolk, New York State Resilience Institute for Storms and Emergencies (NYS RISE), NYS RISE Technical Report TR?128;0?128;14?128;01, 49 pp.

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

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

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

Revised Regulatory Flexibility Analysis

A revised RFASBLG is not required for Part 490. The Department is proposing this rulemaking to provide a common source of sea-level rise

projections for consideration within programs specified by the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014. Because the proposed rule will not impose any requirements on any entity, no small business or local governments will be directly affected by the rule.

Revised Rural Area Flexibility Analysis

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

Revised Job Impact Statement

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

Assessment of Public Comment

Comments Received from November 10, 2015 through December 28, 2015

The Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014 (CRRA), is intended to ensure that decisions regarding certain State permits and expenditures consider climate risk, including sea-level rise. CRRA created a new Environmental Conservation Law (ECL) § 3-0319 that requires the Department of Environmental Conservation (Department) to adopt regulations establishing science-based State sea-level rise projections. To fulfill this statutory requirement, the Department is establishing a new 6 NYCRR Part 490, Projected Sea-level Rise (Part 490). Part 490 establishes projections of sea-level rise in three specified geographic regions over various time intervals, but does not impose any requirements on any entity.

The Department's sea-level rise projections in Part 490 are based on sea-level rise projections included in Horton et al. (2014), prepared for the New York State Energy Research and Development Authority, also known as the ClimAID report. Pursuant to CRRA, the Department, in consultation with the Department of State, is also developing implementation guidance that will describe how to consider flooding, storm surge, and the sea-level rise projections in Part 490 in the programs specified by CRRA.

The Department formally proposed Part 490 on November 10, 2015 and accepted public comments through December 28, 2015. The Department received public comments from nine individuals during the public comment period. The Department has reviewed, summarized, and responded to all relevant public comments received during the public comment period. In response to comments, the Department substantially revised the express terms of Part 490, including the definitions of the terms "low projection" and "high projection." The Department received two public comments outside of the public comment period, which the Department has also addressed despite their being outside the scope of the rulemaking.

The vast majority of commenters supported the approach the Department has taken in developing Part 490. In particular, many commenters expressed support for basing State projections on the ClimAID report, including a high projection of approximately 6 feet of sea-level rise by 2100. Moreover, the City of New York described the benefits of statewide consistency, including that adoption of projections consistent with New York City Panel on Climate Change projections will allow for coordinated decision making and avoid unnecessary confusion of competing projections. The projections in Part 490 are based on the ClimAID report, including a high projection of approximately 6 feet of sea-level rise by 2100, and are consistent with New York City Panel on Climate Change projections.

Some commenters noted that no further requirements will be imposed by Part 490, and stated that they cannot understand why the adoption of scientific sea-level rise projections imposes no requirements on anyone. As explained in the Regulatory Impact Statement (RIS), the Department is promulgating Part 490 pursuant to ECL § 3-0319. This provision does not authorize the Department to impose additional requirements through this Part 490 regulation. In addition, pursuant to CRRA, the Department, in consultation with the Department of State, is also developing implementation guidance that will describe how to consider sea-level rise in the programs specified by CRRA. While Part 490 itself does not impose any requirements, it provides a common source of sea-level rise projections for consideration within the programs specified by CRRA.

One commenter suggested that six foot of sea level rise is so unlikely that it does not reach the threshold of "plausible." This commenter stressed the uncertainty regarding the rate of future ice melt, including the lack of consensus for ice sheet collapse, and the uncertainty related to the timing of sea-level rise in the event of rapid ice melt. The Department acknowledges the lack of expert consensus regarding the likely rate of ice sheet melt and potential for ice sheet collapse. In response to this and other comments, the Department substantially revised the definition of the term "high projection" to include that it is "associated with high rates of melt of land-based ice."

In any case, Part 490 includes a range of projections of sea-level rise. The projection distribution constitutes a range suitable for risk-based planning and review of projects of varying projected life times and criticality. Part 490 explicitly defines the "high projection" in the regulation as being "very unlikely" to occur. The Department maintains that it is prudent to include a high, albeit unlikely, projection to enable consideration of the consequences of low-probability but high-consequence events. The manner in which the high projection should be considered in the context of particular projects will be addressed through the CRRA implementation guidance currently being developed by the Department in consultation with the Department of State.

One commenter stated that, in order for the six foot of sea-level rise projection to be considered credible, the RIS must explain why certain conclusions of the Intergovernmental Panel on Climate Change (IPCC) were "ignored." The Department carefully reviewed these IPCC projections, which are based on process models that assume static or linear rates of ice sheet loss over Greenland and Antarctica. As explained in the RIS, for numerous reasons, the Department based the projections in Part 490 on the ClimAID projections, rather than on other more conservative, less protective projections based primarily on process modeling. As stated in the RIS, the Department acknowledges that the highest projections developed by some other studies are lower than the ClimAID high projections. The ClimAID projections incorporate expert judgment of ice loss based on accelerating rates of melt and seaward movement of ice, positive feedbacks and non-linearities that are not necessarily accounted for in the process-based and statistical modeling approaches described by the IPCC. In any case, Part 490 explicitly defines the high projection as "very unlikely."

One commenter suggested that the Department should adopt a "pledge and review" approach to sea-level rise values, under which projections would be based on observed rates of rise at specified tide gauges during 5-year review periods. First, ECL § 3-0319, as added by CRRA, requires the Department to consider certain specified information and reports in promulgating science-based State sea-level rise projections. Second, ECL § 3-0319 requires the Department to update its sea-level rise projection regulations at least every five years, which the Department will do through future action.

Moreover, while the Department has not yet determined the precise review process it will use, it has concerns with the pledge and review approach suggested. The first is its reliance on a limited number of tide gauges, given that local factors can affect sea-level change at individual stations so that significantly different trends are indicated, even from proximate stations. Secondly, the pledge and review approach would yield planning values based only on historical trends in rise or rates of rise, whereas CRRA requires consideration of future climate risk. As described in the RIS, the rate of sea-level rise is not projected to be constant based on historical values but is instead projected to accelerate with increased warming. In response to this and other comments, the Department substantially revised the definition of the term "low projection" to include that it is "consistent with historical rates of sea-level rise." Projections based solely on the pledge and review approach could be easily skewed by short-term, localized phenomena, and the approach would fail to account for acceleration of sea-level rise that would occur with projected warming.

One commenter raised several issues regarding the rulemaking procedure used to adopt Part 490. First, for example, this commenter claimed that this is an improper and illegal rulemaking as the proposed regulation has no context and cannot be understood by the regulated community. The Department disagrees, as this clam is incorrect. The promulgation of Part 490 complies with the State Administrative Procedure Act (SAPA) and all other rulemaking requirements. The Legislature established the context of Part 490 through the statutory language of CRRA. Moreover, the context of the regulation is further described in the RIS.

Furthermore, even before the formal proposal of Part 490 pursuant to SAPA, the Department held an extensive public stakeholder outreach process. As summarized in the RIS, this process included five public informational and listening sessions, at which Department staff presented background on CRRA, including the overall context of the regulation.

In addition, as explained in the RIS, Part 490 does not impose any requirements on any entity. Part 490 implements one component of CRRA by providing a common source of sea-level rise projections for consideration within the programs specified by CRRA. The adoption of Part 490 is the first step in the overall process to implement CRRA, as the Department is also currently preparing guidance, in consultation with the Department of State, regarding the implementation of CRRA. This guidance will

address, among other things, how consideration of the sea-level rise projections in Part 490 should be incorporated into each of the permitting and other programs enumerated in CRRA. CRRA requires this guidance to be adopted by January 1, 2017. Applicants for relevant permits or funding programs will not be required to consider Part 490's sea-level rise projections pursuant to CRRA until such guidance is adopted.

Second, this commenter also argued that precluding meaningful input while simultaneously putting into place a binding requirement affecting future regulatory enactments is illegal and is an improper attempt to insulate the regulation from challenge. Through the promulgation of Part 490, the Department neither precluded meaningful input nor put into place a binding requirement affecting future regulatory enactments. Rather than precluding meaningful input, as explained in the RIS, the Department provided several opportunities for input on Part 490, including through stakeholder outreach before the formal proposal of the regulation for public comment. Moreover, the Department will also provide additional opportunities for meaningful input on future CRRA implementation actions. Furthermore, the Department reiterated that Part 490 does not impose a binding requirement affecting future regulatory enactments. Finally, to the extent the Department undertakes any future regulatory enactments that incorporate Part 490, such future action will be subject to SAPA and other procedural rulemaking requirements, including an opportunity for public comment.

Third, the commenter also argued that the regulated community cannot meaningfully comment on the sea-level rise projection numbers in the absence of the remainder of the regulatory scheme. The RIS describes the manner in which Part 490 fits into the overall scheme of CRRA. The Legislature established the context of Part 490 through the statutory language of CRRA.

A primary reason for adopting Part 490 first, prior to the finalization of CRRA implementation guidance, is the statutory language of CRRA itself. Part 490 is the first step in the overall process to implement CRRA. The Department, in consultation with the Department of State, is currently developing CRRA implementation guidance, and applicants for relevant permits or funding programs will not be required to consider Part 490's sea-level rise projections pursuant to CRRA until such guidance is adopted.

The Department recognizes that the regulated community is interested in both the sea-level rise projections numbers in Part 490, as well as the manner in which consideration of these projections will be incorporated into the programs specified by CRRA. The Department will provide additional opportunities for meaningful input on future CRRA implementation actions. Furthermore, to the extent the Department undertakes any future regulatory enactments that incorporate Part 490, such future action will be subject to SAPA and other procedural rulemaking requirements, including an opportunity for public comment.

Finally, two commenters suggested that definitions should more clearly articulate the likelihood of particular rates of sea-level rise occurring. As described in the RIS, the projections included in Part 490 are not associated with specific probabilities. There is no way to describe an accurate probability distribution for various levels of future sea-level rise from the ClimAID projections. Rather, the Department's terminology and definitions provide a qualitative indication of the relative likelihood of the specified rise. The Department substantially revised the definitions of the terms "low projection" and "high projection" in response to these and other comments.

Department of Financial Services

EMERGENCY RULE MAKING

Business Conduct of Mortgage Loan Servicers

I.D. No. DFS-48-16-00001-E
Filing No. 1036
Filing Date: 2016-11-10
Effective Date: 2016-11-14

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 respect 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 February 7, 2017.

Text of rule and any required statements and analyses may be obtained from: Hadas A. Jacobi, Senior Attorney, 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 licensees 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. 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.

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 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 Impacts. 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, autho-

rizes 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 though 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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Life Insurance and Annuity Non-Guaranteed Elements

I.D. No. DFS-48-16-00006-P

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

Proposed Action: Addition of Part 48 (Regulation 210) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1106, 1113, 3201, 3203, 3209, 3219, 3220, 3223, 4216, 4221, 4223, 4224, 4231, 4232, 4238, 4239, 4240, 4511, 4513, 4518 and art. 24

Subject: Life Insurance and Annuity Non-Guaranteed Elements.

Purpose: To establish standards for the determination and readjustment of non-guaranteed elements for life insurance and annuities.

Substance of proposed rule (Full text is posted at the following State website:http://www.dfs.ny.gov): Section 48.0 sets forth the scope and purpose of the rule: to establish standards for the determination and any readjustment of certain non-guaranteed elements in life insurance policies and annuity contracts, or certificates thereunder, delivered or issued for delivery in this State, where those elements may vary at the insurer's or fraternal benefit society's discretion. The section also finds that a violation of Part 48 would constitute a trade practice constituting a determined violation, as defined in Insurance Law section 2402(c), in violation of section 2403.

Section 48.1 provides definitions applicable to the rule.

Section 48.2 sets forth standards and procedures for the determination and any readjustment of non-guaranteed elements.

Section 48.3 requires notification to policy owners of non-guaranteed elements at the time of issue and prior to any readjustment.

Section 48.4 requires insurers and fraternal benefit societies to file with the Superintendent documentation used in the determination and any readjustment of non-guaranteed elements and to maintain records documenting compliance with the rule.

Text of proposed rule and any required statements and analyses may be obtained from: William B. Carmello, New York State Department of Financial Services, One Commerce Plaza, 19th Floor, Albany, New York 12257, (518) 474-7929, email: William.Carmello@dfs.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority to promulgate 11 NYCRR 48 (Insurance Regulation 210) derives from Financial Services Law ("FSL") sections 202 and 302, and Insurance Law sections 301, 1106, 1113, 3201, 3203, 3209, 3219, 3220, 3223, 4216, 4221, 4223, 4224, 4231, 4232, 4238, 4239, 4240, 4510, 4511, 4513, 4518 and Article 24.

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

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

Insurance Law section 1106 provides that no foreign or alien insurer may be licensed to do any kind of insurance business, or combination of kinds of insurance business, that are not permitted to be done by domestic insurers under the Insurance Law.

Insurance Law section 1113 sets forth the kinds of insurance that may be authorized in this state, including life insurance and annuities.

Insurance Law article 24 prohibits unfair methods of competition and unfair or deceptive acts or practices. A violation of section 4224 is a defined violation under Article 24. The Superintendent may also find, in accordance with section 2405, that a particular practice is an unfair or deceptive method, act or practice. This rule puts regulated entities on notice that if the entity violates this Part the Superintendent will consider such activity to be an unfair or deceptive method act or practice.

Insurance Law section 3201 requires the prior approval of any life, annuity, accident and health, and credit unemployment policy form.

Insurance Law sections 3203, 3219, 3220 and 3223 set forth the required standard provisions for life insurance policies and annuity contracts.

Insurance Law section 3209 mandates disclosure requirements for the sale of life insurance, annuities and funding agreements and authorizes the Superintendent to promulgate regulations to implement the provisions of the section.

Insurance Law sections 4216 and 4238 set forth certain requirements for issuing group life insurance and group annuities. Sections 4216(c)(2) and 4238(d) establish certain requirements for group life insurance policies and group annuity contracts that provide for readjustment of the rate of premium.

Insurance Law sections 4221 and 4223 establish minimum nonforfeiture benefits for life insurance and annuities.

Insurance Law section 4224 proscribes unfair discrimination and other prohibited practices by insurers.

Insurance Law section 4231 establishes the rule for the distribution of surplus through the payment of dividends to eligible life insurance policyholders. Section 4231(g)(1)(D) establishes certain requirements for individual life insurance policies that provide for the prospective readjustment of the rate of premium. Section 4231(g)(1)(E) establishes certain requirements for any insurance policy, annuity or pure endowment contract, or funding agreement that provides for readjustment in the rate of premium, stipulated contribution, consideration, or deposit.

Insurance Law section 4232 establishes certain requirements for annuities and life insurance policies that provide for additional amounts to be credited to the contract or policy. Section 4232(a)(2) establishes certain requirements for annuities subject to Insurance Law section 4223 that credit additional amounts. Section 4232(b)(2) and (4) establish certain requirements for individual life insurance policies that credit additional amounts.

Insurance Law section 4239 authorizes the Superintendent to promulgate by regulation standards for the allocation and reporting of income and expenses of life insurers.

Insurance Law section 4240 authorizes a life insurer to issue variable products and to maintain the funds that support variable products (as well as other products) within separate accounts.

Insurance Law section 4510 sets forth the required and prohibited provisions for life insurance policies issued by fraternal benefit societies.

Insurance Law section 4511 sets forth the requirements and exceptions to which life insurance certificates and annuity contracts issued by fraternal benefit societies shall be subject.

Insurance Law section 4513 requires an annuity certificate or contract issued by a fraternal benefit society to conform to all applicable rules and regulations prescribed by the Superintendent.

Insurance Law section 4518 allows additional amounts of benefits, in addition to minimum benefits guaranteed, to be credited to individual life insurance policies issued by fraternal benefit societies.

2. Legislative objectives: Insurance Law sections 4216(c)(2), 4231(g)(1)(D), 4231(g)(1)(E), 4232(a)(2), 4232(b)(2), 4232(b)(4), 4238(d), and 4518 establish minimum requirements for the determination and readjustment of non-guaranteed elements in life insurance policies and annuity contracts, including any certificates thereunder. The Legislature enacted these provisions to help ensure that any determination or readjustment is made equitably and with full and adequate disclosure. This rule establishes necessary safeguards for the adequate protection of insureds.

3. Needs and benefits: This rule addresses a number of issues that have been highlighted by complaints received by the Department regarding the determination and readjustment of non-guaranteed elements in life insurance policies, particularly with respect to universal life, indeterminate premium term, and whole life insurance, and annuity contracts. The complaints have been filed by insureds whose policies lapsed or were about to lapse, in large part because the premiums they were paying were based on the current interest rate and charges under the policy at the time the policy was issued, and the interest rate under the policy decreased over time while the charges increased. The rule should assist consumers to better understand - at the time of purchase and upon any readjustment of non-guaranteed elements - how life insurance policies and annuity certificates and contracts with non-guaranteed elements subject to change at the discretion of the insurer or fraternal benefit society operate, and thereby reduce consumer dissatisfaction and the number of lapsed policies. The rule accomplishes this by requiring additional disclosures at the time the policy, contract, or certificate is issued and by requiring notice to be provided in advance of any change in the current scale of non-guaranteed elements, in order to give the owner enough time to address any projected insufficiency.

4. Costs: Readjustments to non-guaranteed elements, if any, are made at the discretion of the insurers and fraternal benefit societies subject to this rule, thereby making it difficult to establish a cost impact on insurers. Additional costs associated with mailing notices to consumers and submitting required documentation with the Department will occur upon readjustment to non-guaranteed elements. However, because readjustment of non-guaranteed elements typically is infrequent, the Department expects that any such costs to insurers and fraternal benefit societies will not be significant.

The statute already requires board-approved written criteria with regard to many insurance and annuity products, and insurers and fraternal benefit societies already utilize the services of qualified actuaries, so no new costs of significance should be incurred. The rule minimizes the impact of mailing costs because many notice requirements may be included in existing mailings.

The Department may incur costs under this rule, but any additional costs incurred by the Department should be minimal and the Department expects to absorb the costs in its ordinary budget.

The rule does not apply to other State agencies or local governments and accordingly there are no costs to the State or local governments.

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

6. Paperwork: Most of the required additional disclosure to consumers may be included in disclosure documents that insurers and fraternal benefit societies are already required to provide to consumers. Most of the additional documentation that the rule requires insurers and fraternal benefit societies to file with the Department may be included with their policy form filings. However, any readjustment of non-guaranteed elements will impose new paperwork requirements.

7. Duplication: The rule does not duplicate any existing State or federal laws or regulations.

8. Alternatives: When initially developing this rule in 2008, the Department conducted outreach to the insurance industry, which offered no viable alternatives and indicated that it was "unaware of any problems in the marketplace involving the determination of discretionary amounts[.]" However, in the intervening years, the largest volume of life insurance-related consumer complaints received by the Department involved changes to non-guaranteed elements, and implementation of these rules are critical to help life insurance annuity consumers. The Department considered not implementing the rule, but rejected this alternative for the reasons stated herein. However, the Department considered the comments and made adjustments to the proposal as appropriate.

9. Federal standards: There are no federal standards in this subject area.

10. Compliance schedule: The rule will become effective 120 days after publication in the State Register. Four months should be sufficient time for insurers and fraternal benefit societies to comply with the rule. Since the rule provides that the insurer or fraternal benefit society must provide 120-days' notice to consumers with respect to any changes in the non-guaranteed elements, this effectively provides insurers and fraternal benefit societies 120 days to come into compliance with such notice requirements, which the Department believes to be sufficient time.

Regulatory Flexibility Analysis

1. Small businesses: The Department of Financial Services ("Department") finds that this new part will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers and fraternal benefit societies that are authorized to do life insurance business in New York State, none of which comes within the definition of "small business" as defined in section 102(8) of the State Administrative Procedure Act. The Department reviewed filed reports on examination and annual statements of such authorized insurers and fraternal benefit societies and concludes that none of these entities comes within the definition of "small business," because there are none that are both independently owned and have fewer than one hundred employees.

2. Local governments: This rule does not impose any reporting, recordkeeping, or other compliance requirements on any local governments because it does not apply to local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers and fraternal benefit societies affected by this rule do business in every county in this state, including rural areas as defined in State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This new part requires insurers and fraternal benefit societies to file with the Department of Financial Services ("Department") documentation that standards for the determination and any readjustment of non-guaranteed elements for life insurance policies and annuity contracts are being met. It requires disclosure of the non-guaranteed elements and any readjustment to the consumer. It requires recordkeeping by the insurer of compliance with the Part and requires the use of professional services, namely, a qualified actuary, in the determination of the non-guaranteed elements.

3. Costs: Readjustments to non-guaranteed elements, if any, are made at the discretion of the insurers and fraternal benefit societies subject to this rule, thereby making it difficult to establish a cost impact on insurers. Additional costs associated with mailing notices to consumers and submitting required documentation with the Department will occur upon readjustment to non-guaranteed elements. However, because readjustment of non-guaranteed elements typically is infrequent, the Department expects that any such costs to insurers and fraternal benefit societies will not be significant.

The statute already requires board-approved written criteria with regard to many insurance and annuity products, and insurers and fraternal benefit societies already utilize the services of qualified actuaries, so no new costs of significance should be incurred. The rule minimizes the impact of mailing costs because many notice requirements may be included in existing mailings.

4. Minimizing adverse impact: The Department finds that this rule does not impose any additional burden on insurers or fraternal benefit societies located in rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State. As explained under Costs immediately above, the rulemaking should not have any adverse impact on rural areas.

5. Rural area participation: When initially developing this rule in 2008, the Department conducted outreach to the insurance industry, which includes insurers and fraternal benefit societies located in rural areas. Entities in rural areas will have an opportunity to participate in the rulemaking process once the proposed rule is published in the State Register and posted on the Department's website.

Job Impact Statement

The Department of Financial Services finds that this rule should not adversely impact jobs or employment opportunities, including self-employment opportunities in New York State. This new part establishes standards for the determination and readjustment by insurers and fraternal benefit societies of non-guaranteed elements in life insurance policies and annuity contracts. Insurers and fraternal benefit societies should not need to hire additional employees or independent contractors to comply with these new standards because they already determine and readjust non-guaranteed elements.

Department of Health

NOTICE OF ADOPTION

Early Intervention Program

I.D. No. HLT-46-15-00006-A
Filing No. 1041
Filing Date: 2016-11-15
Effective Date: 2016-11-30

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

Action taken: Amendment of Subpart 69-4 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2559-B

Subject: Early Intervention Program.

Purpose: To conform existing program regulations to federal regulations and state statute.

Substance of final rule: This notice of proposed rulemaking amends 10 NYCRR Subpart 69-4, which governs the Early Intervention Program (EIP), to begin to conform to federal regulations issued by the U.S. Department of Education (34 CFR Parts 300 and 303) and to conform to recent amendments to Title II-A of Article 25 of the Public Health Law (PHL).

Section 69-4.1(b) is revised to include "initial" procedures in the definition of "assessment"; the current definition only refers to "ongoing" procedures. The term "dominant language," as defined in § 69-4.1(j), is amended to provide that when used with respect to an individual who is limited English proficient, "dominant or native language" means the language or mode of communication normally used by the individual; or, in the case of a child, the language normally used by the child's parent. New paragraphs (1) and (2) are added to § 69-4.1(j), to clarify that: for evaluations and assessments of the child, dominant or native language means the language normally used by the child, if determined developmentally appropriate by qualified personnel conducting the evaluation and assessment; and that when used with respect to an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, "dominant or native language" means the mode of communication normally used by the individual.

The regulation amends the definition of "early intervention services" at subdivision (l)(1)(i) of § 69-4.1, by adding new clauses (a) through (e) that establish the five developmental domains to be addressed in individualized family service plans (IFSPs).

The definitions of "assistive technology" in § 69-4.1(l)(2)(i) and "health services" in § 69-4.1(l)(2)(xviii)(c)(5) are amended to exclude devices that are surgically implanted. Section 69-4.1(l)(2)(xviii)(c)(5)(i) and (ii) are added to clarify that: the exclusion of surgically implanted devices from the definition of assistive technology devices does not limit the child's right to receive early intervention services that are identified in the child's IFSP; and that the exclusion does not prohibit a provider from routinely checking that a hearing aid or external components of a surgically implanted device of a child with a disability are functioning properly.

A definition for "sign language and cued language services" is added at § 69-4.1(l)(2)(xiii). The definition of IFSP in § 69-4.1(w)(1)-(3) is amended to include the early intervention official in the team developing the IFSP, to add a reference to § 69-4.8 which sets forth procedures for evaluation and assessment, and to indicate that the IFSP must include matters specified in § 69-4.11 related to IFSP procedures and requirements. A new paragraph (4) is added to incorporate the timeliness requirement from federal regulations for implementation of the IFSP.

Subdivision (ao) of § 69-4.1 is amended to clarify the term "personally identifiable information" means the same as the term as defined in the federal Family Educational Rights and Privacy Act (FERPA), except that the term "student" and "school" as used in FERPA means "child" and "early intervention service providers," respectively.

Section 69-4.2, regarding the Early Intervention/Public Health Official's role in the Child Find System, is modified to add a new subdivision (b) to clarify that the Early Intervention Official (EIO) is not required to provide a multidisciplinary evaluation and assessment, or convene an IFSP meeting, for a child referred to the Early Intervention Program fewer than 45 days before his or her third birthday. Under these circumstances, the EIO must refer the child directly to the Committee on Preschool Special Education (CPSE) of the local school district in which the child resides. Section 69-4.3(a) is amended to add new primary referral sources included in federal regulation (including public agencies and staff in the child welfare system, domestic violence shelters and agencies, and homeless family shelters).

Service coordination responsibilities are amended in § 69-4.6(b) and (c) to conform to federal regulations. Section 69-4.6(b)(1) is amended to clarify that the responsibility to assist families in accessing services includes referring families to providers for needed services identified in the IFSP and making appointments for early intervention and other services. Section 69-4.6(b)(3) is amended to clarify that service coordinators are responsible for coordinating services provided to the family, and to add educational and social services as examples of the types of services requiring coordination. Section 69-4.6(b)(4) is amended to establish that written parental consent for services initiates the timeline within which services must be delivered. Section 69-4.6(c)(3) and (c)(4) are amended to clarify that service coordinators are responsible for referral and other activities to assist families in identifying available service providers, and for coordinating, facilitating, and monitoring early intervention services to ensure services are delivered timely.

New paragraphs (5), (6), and (9) are added to § 69-4.6(c), to require service coordinators to conduct follow-up activities to ensure services are provided, inform families of their rights and procedural safeguards, and coordinate the funding sources for services.

Multiple revisions are made to § 69-4.11, regarding IFSPs. More specifically, subparagraphs (i) and (ii) are added to § 69-4.11(a)(1) to identify the exceptional family circumstances under which the 45-day timeline from referral to initial IFSP meeting does not apply, including unavailability of the child or family or lack of parental consent to conduct the initial evaluation and assessment after documented repeated attempts. Clarification is provided in § 69-4.11(a)(7) and (9), consistent with federal requirements, that all members of the IFSP team, which includes the EIO, the parent, and other members specified in regulation, must agree on the IFSP for the plan to be deemed final.

Consistent with federal regulation, § 69-4.11(a)(10)(iv) is amended to require that the IFSP includes pre-literacy, language, and numeracy skills, as developmentally appropriate for the child. Section 69-4.11(a)(10)(viii) is amended to require the IFSP to include, to the extent appropriate, a statement of other services, including medical services, that the child and family needs or is receiving through other sources but are not required or funded by the early intervention program, and a description of the steps the service coordinator or family may take to assist the child and family in securing those other services. To comply with federal regulation and PHL § 2545(10), § 69-4.11(a)(10)(x) is amended to indicate that the projected dates for initiation of services must be as soon as possible, but no later than 30 days after the parent provides written consent for the services. The language further provides that if the parent and other members of the IFSP team determine that IFSP services must be initiated more than 30 days after the written parental consent is obtained, the services must be delivered no later than 30 days after the projected date of initiation of those services in the IFSP.

Section 69-4.11(a)(10)(xiii)(a), which governs transition activities is amended. Section 69-4.11(a)(10)(xiii) is amended to conform with federal regulations by specifying that the transition plan is a component of the IFSP and must include the services needed to facilitate the child's transition to other services. Section 69-4.11(a)(10)(xiii)(a)(1) and (2) are revised to reflect amendments to PHL § 2548 that place upon the service coordinator the responsibility to notify CPSE of a child's potential eligibility for services under Education Law § 4410, unless the parent objects; and to refer the child to CPSE, with parental consent. Section 69-4.11(a)(10)(xiii)(a)(4) is revised to reflect amendments to PHL § 2548 which require the service coordinator to convene a transition conference, with parental consent, to discuss services and program options and to establish a transition plan.

Regulations governing the systems complaint process at § 69-4.17 are amended to conform to federal regulations with respect to the filing of complaints. Section 69-4.17(i)(1)(i) clarifies that complaints must be submitted in writing. Section 69-4.17(i)(1)(ii) adds a new limitation of one year in which to file a complaint. Section 69-4.17(i)(1)(iii) requires a complainant to forward a copy of the complaint to the early intervention official, to any providers who are the subject of the complaint, and to the child's service coordinator, at the same time that the complaint is submitted to the Department. New subparagraph (iv) is added to § 69-4.17(i)(1) to delineate new required contents of a complaint, including: a statement of the alleged violation of a requirement of federal Part C regulations of the Individuals with Disabilities Education Act or the Public Health Law or regulations that govern the Early Intervention Program; the factors on which the complaint is based; and the signature and contact information of the complainant.

Section 69-4.17(i)(1)(v) is added to require that a complaint alleging a violation with respect to a specific child must include the name, date of birth and address of the child; the name of the provider, service coordinator and municipality serving the child; a description of the nature and facts

surrounding the complaint; and a proposed resolution to the extent known at the time the complaint is filed. Section 69-4.17(i)(2) is amended to replace the term "allegation" with "complaint" for consistency.

Amendments to § 69-4.17(i)(3) are to help ensure complainants are informed of the opportunity to submit additional information regarding the complaint; the option to engage in mediation; the right of the complainant to receive a written decision; and the opportunity for the subject of the complaint to respond to the complaint. Federal regulations, at 34 CFR 303.434(b)(3), require the complaint to include the signature and contact information for the complainant; for conformance, language regarding confidentiality for the complainant is removed from § 69-4.17(i)(3)(iii).

New § 69-4.17(i)(4) is added to permit extension of the complaint investigation timeline under certain conditions. Renumbered § 69-4.17(i)(5)(i) affords the subject of a complaint the opportunity to respond to the complaint. Section 69-4.17(i)(5)(ii) allows the Department to conduct an on-site investigation of the complaint, if necessary. Section 69-4.17(i) is also amended to remove the requirement to provide justification if the Department does not complete an on-site component of the complaint investigation. Section 69-4.17(i)(6) is amended to specify that the corrective action that the Department may require in response to an investigation of a complaint may include technical assistance or other actions described by the Department. New § 69-4.17(i)(7)-(9) specify procedures when a written complaint received is also the subject of an impartial hearing. New § 69-4.17(i)(10) clarifies that all parties, including parents, may request assistance from the Department in resolving concerns or problems related to the delivery of early intervention services, provided that the party is notified of the availability of complaint procedures upon receipt of the request by the Department.

Section 69-4.20, which sets forth procedures for the transition of children from the Early Intervention Program to other early childhood services, is amended to conform to amendments to PHL § 2548 by transferring the responsibility for transition of a child from the EIP to preschool special education programs and services from the EIO to the child's service coordinator. Section 69-4.20 is also amended to conform with federal regulations. Specifically, section 69-4.20(a) is amended to clarify that a transition plan is developed as part of the IFSP for every child exiting the EIP. Section 69-4.20(a)(1) specifies the timeframes for convening a transition conference for a child potentially eligible for preschool services under Education Law § 4410. Section 69-4.20(a)(2) adds a new requirement that reasonable efforts be made to convene a transition conference for a child not potentially eligible for preschool services to discuss other appropriate services the child may receive. Section 69-4.20(a)(3) clarifies that all meetings to develop the transition plan must meet the requirements for IFSP meetings in § 69-4.11(a)(2)-(5). Section 69-4.20(a)(4) requires the IFSP be developed with the child's family and specifies the required contents of the transition plan.

New § 69-4.20(b)(1)(iv) is added to require the service coordinator to confirm the transmission of the notification of a child's potential eligibility for services under Education Law § 4410. Section 69-4.20(b)(4) is amended to clarify timelines for the transition conference for a child potentially eligible for services under Education Law § 4410.

Section 69-4.30(c)(3), on reimbursement for early intervention services, is amended to authorize a service coordination rate methodology on a per month, per week, and/or service component basis with prior written notice to Early Intervention Officials.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 69-4.11(a)(10)(viii), (x) and 69-4.17(i)(1)(iv)(a).

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

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

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

Assessment of Public Comment

Comment: One commenter recommended further changes be made to the regulations as necessary to comply with federal regulations issued September 28, 2011.

Response: The Department will take this recommendation under advisement in a future regulatory amendment.

Comment: One commenter requested the definition of dominant language eliminate the term "dominant" and specify how native language applies to evaluation of children who are acquiring more than one language.

Response: The proposed amended definition is consistent with federal regulation. Current provisions in 10 NYCRR § 69-4.8(a)(14) addresses non-discriminatory evaluation and assessment procedures.

Comment: One commenter proposed amending the definitions for assistive technology and health services to add "or of an external component of the surgically implanted device", consistent with federal rules pertaining to Part B of the Individuals with Disabilities Education Act (IDEA).

Response: The current definitions are consistent with Part C of IDEA, with operates differently from Part B.

Comment: One commenter disagreed with including "cued language" in the definition of early intervention services.

Response: The addition of "cued language" complies with federal regulations.

Comment: One commenter recommended the Department provide procedural guidance to municipalities and Early Intervention Program (EIP) providers when a child has been referred to EIP fewer than 45 days before his or her third birthday.

Response: The Department will issue procedural guidance to municipalities and EIP providers.

Comment: One commenter noted that the proposed rules do not address when a child is referred to EIP 45 to 90 days before the child's third birthday.

Response: Department guidance provides that if a child is referred to EIP but is also age-eligible for services under Education Law § 4410, and the child has a disability or developmental delay that may impact the child's education, the early intervention official (EIO) may recommend to the parent that the parent refer the child directly to the Committee on Preschool Special Education (CPSE). The initial service coordinator must also explain to the parent that to ensure that the child continues to receive services when the child turns three, either through EIP or preschool special education programs and services, the child must also be referred to CPSE and be determined eligible for services under Education Law § 4410 by the child's third birthday.

Comment: One commenter suggested that the complete list of referral sources included in 34 Codes of Federal Regulation (CFR) § 303.303, as well as McKinney Vento liaisons be included in 10 NYCRR Subpart 69-4.

Response: Nothing in regulation or statute prevents unnamed referral sources from referring a child to EIP.

Comment: One commenter requested clarification regarding whether service coordinators are required to schedule appointments for families for EIP services and with other service providers. Several commenters were concerned the proposed rule adds new responsibilities to service coordinators by requiring service coordinators to coordinate provisions of early intervention services and other services, including educational and social, being received by the family.

Response: The proposed rule conforms to revisions to a federal regulation, at 34 CFR § 303.34(b)(1).

Comment: One commenter recommended adding "but no later than 30 days" after "as soon as possible" in 10 NYCRR § 69-4.6(b)(4) to ensure consistency with the proposed language in 10 NYCRR § 69-4.11(a). The commenter also recommended "at the frequency and intensity authorized by the Individualized Family Service Plan" be added to this provision.

Response: Consistent with the new language, service coordinators are required to implement the individualized family service plan (IFSP) not later than 30 days, as agreed upon by the team and consented to by the parent, including frequency and intensity. Service coordinators should be aware of procedures set forth in regulations regarding timeframes for timely delivery of services.

Comment: One commenter requested clarification regarding the responsibility of service coordinators to determine appropriate early intervention services are being provided and in a timely manner.

Response: The Department made this clarification to the proposed amendment.

Comment: One commenter requested clarification regarding proposed responsibility to coordinate funding sources for services. One commenter recommended amendments to 10 NYCRR § 69-4.6(c)(9) to include "such as Medicaid enrollment, collection of insurance information, and entry of Medicaid and insurance information into the New York Early Intervention System."

Response: There is no expectation service coordinators must interface with third party payers beyond current EIP regulatory requirements. Current regulation, at 10 NYCRR § 69-4.6(d), requires initial service coordinators to obtain, and parents to supply, any information and documentation to establish and periodically update an eligible child's third party payer information.

Comment: One commenter expressed concern the proposed revisions maintain a separate notification and referral process for children potentially eligible for services under Education Law § 4410.

Response: Federal regulation 34 CFR § 303.209(b)(i) requires the Department to notify the state and local education agencies of the potential transition of children. The New York State Education Department (SED) requires a separate referral, which is permitted under federal law.

Comment: One commenter expressed concern the proposed revisions

do not address the federal requirement for State-level notification by the Department to SED.

Response: The comment is outside the scope of the proposed rule.

Comment: One commenter recommended restructuring 10 NYCRR § 69-4.11(a)(1)(i)-(iii).

Response: The Department has made the requested amendments.

Comment: One commenter recommended the Department consider that the federal regulations may not have contemplated the municipality involvement as the EIO and payer when requiring agreement on the IFSP. A recommendation was made to provide guidance to EIOs on their role with the IFSP process in developing consensus and fostering agreement.

Response: The Department will take these recommendations under advisement.

Comment: One commenter found the new language allowing for an additional 30 days for initiation of services for those services that may take more than 30 days to initiate to be confusing and unnecessary.

Response: The Department views the proposed regulation as necessary since, as there are a variety of circumstances when an IFSP team may decide a service appropriately be initiated later than 30 days from the parent's consent to the IFSP.

Comment: One commenter stated the proposed regulations on complaint procedures are more burdensome to parents than what is required by federal regulations. One commenter noted the requirement that a complaint include a statement that there has been a violation to Part C of IDEA does not mirror federal regulation, expressing concern that requiring a statement on violation of State law and regulation would be difficult for parents to understand.

Response: The Department finds the proposed rule to be consistent with federal requirements under 34 CFR § 303.434(b)(1).

Comment: One commenter requested that the Department offer assistance to families who wish to utilize the systems complaint process. The commenter also proposed requiring collection of data on informal complaints and report the data to the public.

Response: The Department agrees there will be a need to produce materials and information and to provide support to families and others in the systems complaint process. The Department will examine the feasibility of collection of data on informal complaints.

Comment: Commenters expressed concern that revising the notification timeline, from 120 days to "not fewer than 90 days prior to the child's potential eligibility for services under the Education Law, section 4410" will negatively impact timely completion of the child's transition. One commenter expressed concern regarding conflicting timelines for convening of the transition conference contained within proposed regulations.

Response: The proposed regulations align with federal requirements under 34 CFR § 303.209(b) and are consistent with the current timelines required for a child's transition from EIP to services under Education Law § 4410. Additionally, there is nothing to prohibit earlier notification, but no sooner than nine months prior to the child's third birthday, to CPSE.

Comment: One commenter suggested the Department withdraw proposed regulations on transition.

Response: The proposed regulations are required to comply with federal regulations for Part C.

Comment: One commenter recommended the State notify CPSE of the potential transition of children to services under Education Law § 4410 by directly supplying lists of potentially eligible children.

Response: Due to the high volume of children exiting EIP each year statewide, it would not be feasible to create timely and complete lists, and securely transmit such lists from the Department to many different CPSEs.

Comment: One commenter noted current and proposed regulations that allow parents to orally object to notification to CPSE of a child's potential eligibility for services under Education Law § 4410 is not consistent with federal requirements.

Response: Consistent with federal regulations, a parent's oral objection, when documented, is equivalent to objecting in writing.

Comment: One commenter noted the proposed regulations do not include federal requirements that provide an option for parents to extend EIP services beyond a child's third birthday.

Response: The federal requirements referenced apply only to those states that participate in the Birth to Six option. New York has not elected to participate in this option.

Comment: One commenter noted the responsibility has shifted from the EIO to the service coordinator to explain that if the parent declines a transition conference, the parent may refer the child to CPSE for determination of eligibility. The commenter noted that a parent who declines a transition conference may not object to notification or referral of the child by the EIO to the CPSE for preschool special education evaluations.

Response: Under Part C of IDEA, the Department is required to notify the state education agency and ensure local education agencies are notified of potential transitions. SED requires a separate referral, which is permitted under federal law.

Comment: One commenter expressed concern that CPSE's required participation in transition conferences will result in a compliance problem.

Response: Under 34 CFR §§ 303.209(c)(1) and 300.124(c), CPSE is required to be invited to, and to attend, the transition conference.

Comment: One commenter recommended explicitly requiring documentation of transition activities in service coordination notes and the New York Early Intervention System (NYEIS).

Response: Current regulation, at 10 NYCRR § 69-4.26, requires documentation in NYEIS. The Department will issue further guidance on documentation in service coordination notes and in NYEIS.

Comment: One commenter stated the service coordinator should attend the transition conference.

Response: The proposed rule requires all meetings to develop the transition plan must meet the requirements in 10 NYCRR § 69-4.11(a)(2)-(5), which requires the service coordinator to participate in the meeting.

Comment: One commenter asked whether EIOs, therapists, and other team members must be present in all meetings to discuss the transition plan.

Response: The Department has clarified that required attendees at IFSP meetings must only attend meetings to develop the transition plan.

Comment: One commenter asked how a fixed payment for service coordination services would work.

Response: The fixed rates will be based on the child and family's participation from referral to initial IFSP and on monthly rates for ongoing service coordination.

Comment: One commenter stated parents are concerned that a capitated service coordination rate may provide an incentive for providers to deliver the least intensive and less expensive care possible.

Response: The Department will monitor the impact of this rate change on timeliness of IFSP and IFSP services and other factors.

Comment: Commenters recommended the Department consider a number of factors and align fees with new responsibilities in setting new service coordination rates, including: intensity of child and family needs, caseloads, task-based activities, agency administrative costs, service coordinator administrative responsibilities, travel time and costs, establishment of a mechanism to assess the adequacy of rates, and supervision. A cap on caseloads was recommended and provider involvement in the development of a plan for transitioning to a fixed payment system was requested.

Response: In establishing new service coordination rates, the Department will take factors into consideration to ensure adequate funding for these services and will monitor implementation. The proposed regulation requires notice to EIOs of the new rate methodology and will only apply to initial IFSPs and IFSP amendments on or after the date of such notice. The advice and assistance of the Early Intervention Coordinating Council will be sought in planning for implementation of new service coordination rates.

Comment: One commenter requested the Department publish service coordination rates in a proposed regulation amendment and another commenter requested the opportunity to review the methodology used by the Department.

Response: The Department has authority under Public Health Law § 2550 and 10 NYCRR § 69-4.30 to establish rates for EIP subject to the approval of the Division of Budget.

Comment: One commenter requested clarification to 10 NYCRR § 69-4.30(c)(3).

Response: The proposed provision allows the Commissioner to use a rate methodology, subject to the approval of the Director of the Budget, for providing service coordination services. The Commissioner must also provide prior written notice to EIOs on the rate methodology.

NOTICE OF ADOPTION

Medical Use of Marihuana

I.D. No. HLT-37-16-00023-A

Filing No. 1042

Filing Date: 2016-11-15

Effective Date: 2016-11-30

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

Action taken: Amendment of section 1004.1(a)(2) of Title 10 NYCRR.

Statutory authority: Public Health Law, art. 33, title V-A, section 3369-a

Subject: Medical Use of Marihuana.

Purpose: To authorize nurse practitioners to register with DOH in order to issue certifications to patients with qualifying conditions.

Text or summary was published in the September 14, 2016 issue of the Register, I.D. No. HLT-37-16-00023-P.

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

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

Assessment of Public Comment

The New York State Department of Health ("Department") received comments from various stakeholders, including but not limited to professional associations, practitioners, legislators and the general public, in response to the proposed amendment to 10 NYCRR § 1004.1 that would allow nurse practitioners ("NPs") to register with the Department to issue patient certifications for medical marijuana. The comments are summarized below with the Department's responses. Overall, the majority of comments received were in support of the proposed amendment, with many commenters recommending the inclusion of physician assistants in addition to NPs. The Department reviewed and assessed each comment and determined that no revisions were necessary. However, the Department intends to proceed with a separate Notice of Proposed Rulemaking to allow physician assistants to register with the Department to issue patient certifications for medical marijuana.

COMMENT: One commenter recommended that NPs be allowed to certify medical marijuana only in suburban and rural areas of upstate New York. The commenter further stated that NPs should be prohibited from issuing patient certifications for medical marijuana in Long Island and New York City, where the majority of the registered physicians practice, and stated that a 50-mile restrictive covenant should be placed on NPs outside of all major cities within New York State. The commenter stated that an NP should be required to have a collaborative agreement with a registered physician.

RESPONSE: Although there are registered practitioners located in New York City and Long Island, data published in the Department's Two-Year Report on the Medical Use of Marijuana demonstrates that there remains a need for additional practitioners who can issue patient certifications for medical marijuana. Pursuant to the New York State Education Law, an NP must have a collaborative agreement or relationship with a physician (depending on the circumstances). Within the scope of such arrangements, however, NPs are independently responsible for the care of their patients and do not require physician supervision or co-signature on their records or charts. No changes to the proposed regulation were made as a result of these comments.

COMMENT: Several comments were received in support of adding physician assistants (PAs) as practitioners who may issue patient certifications for medical marijuana.

- Several commenters stated that PAs should be included as a means of increasing patient access and that failing to include PAs will disadvantage patients receiving medical care from PAs who would otherwise qualify for medical marijuana.
- Several commenters stated that it is within the scope of practice of PAs to issue patient certifications for medical marijuana, and that this would be consistent with the ability of PAs to prescribe controlled substances.
- One commenter stated that the reasons for allowing NPs to issue patient certifications also apply to PAs, and that the Department would be acting in an anticompetitive manner if it were to adopt this amendment without also including PAs. The commenter stated that PAs receive a broad, graduate-level education over approximately 27 months, which consists of a didactic and a clinical phase. The commenter stated that by the time PA students complete their clinical rotations they have completed at least 2000 hours of supervised clinical practice in various settings. The commenter argued that this fully qualifies and equips PAs to diagnose, manage, and treat patients who present with conditions ranging from routine to complex. The commenter stated that it is vital to authorize PAs to certify patients for medical marijuana in order to ensure access for those patients throughout the State who receive their care from PAs, and to enable those patients to receive medical marijuana as part of their treatment without having to leave their practitioner.

RESPONSE: The Department will take these comments into consideration and intends to publish a Notice of Proposed Rulemaking that would enable PAs to issue patient certifications for medical marijuana. No changes to the proposed regulation were made as a result of these comments.

COMMENT: Several comments were received in support of adding NPs as practitioners.

- One commenter observed that NPs possess the skill, education and experience to diagnose patients as suffering from a "serious condition" and to determine whether a patient would benefit from medical marijuana.
- Several commenters observed that several other states already allow NPs to recommend medical marijuana.
- Several commenters observed that the addition of NPs will increase patient access to practitioners who can issue certifications.
- One commenter stated that the law already allows NPs to prescribe beneficial medications that can have risks if improperly used. The commenter also stated that New York passed the Nurse Practitioners Modernization Act in 2014 which allowed NPs to open their own practices, thereby demonstrating a degree of trust in NPs.
- One commenter expressed support for allowing NPs to issue certifications because, according to the commenter, it is increasingly difficult to secure an appointment with a pain management specialist. The commenter further stated that, because NPs can already prescribe pain medications, they should also have the ability to recommend medical marijuana.
- One commenter expressed support for allowing NPs to issue certifications because it would redress what, in the commenter's view, is inappropriate and unjustified discrimination against NPs in the current regulations.
- One commenter expressed support for allowing NPs to issue certifications because this will benefit patients in rural counties where fewer physicians are available.
- One commenter expressed support for allowing NPs to issue certifications and, in particular, the requirements that NPs must be in good standing and practicing within New York State, and that NPs must take a medical marijuana course approved by the Department. The commenter stated that the proposed regulation would increase access for patients living in rural areas and suffering from severe, debilitating, and life-threatening conditions, thereby reducing the disparity in availability throughout the state. The commenter further stated that the amendment would stimulate a greater number of eligible patients to participate in the medical marijuana program, while also enlarging the number of qualified health care providers able to issue certifications. The commenter stated that the proposed amendment would increase the amount of excise taxes and fees collected by the State, thereby benefitting those areas where medical marijuana is manufactured and dispensed, and it would increase jobs and employment opportunities in New York.

RESPONSE: The Department acknowledges the comments in support of the regulatory amendment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medical Use of Marihuana - Physician Assistants

I.D. No. HLT-48-16-00008-P

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

Proposed Action: Amendment of sections 94.2(e)(6) and 1004.1(a)(2) of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 3701 and 3369-a

Subject: Medical Use of Marihuana - Physician Assistants.

Purpose: To authorize physician assistants to register with DOH in order to issue certifications to patients with qualifying conditions.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Section 3701 of the Public Health Law (PHL), Section 94.2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, and in accordance with section 3369-a of the PHL, subdivision 1004.1(a)(2) of Title 10 is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

§ 94.2 Supervision and scope of duties.

(e) Prescriptions*, certifications* and medical orders may be issued by a licensed physician assistant as provided in this subdivision when assigned by the supervising physician:

* * *

(6) A licensed physician assistant, in good faith and acting within his or her lawful scope of practice, and to the extent assigned by his or her supervising physician, may register as a practitioner under Part 1004 of this Title to issue patient certifications for medical marihuana, to those patients under the care of such supervising physician.

* * *

§ 1004.1 Practitioner registration.

(a) No practitioner shall be authorized to issue a patient certification as set forth in section 1004.2 unless the practitioner:

* * *

(2) is licensed, in good standing as a physician and practicing medicine, as defined in article 131 of the Education Law, in New York State, or is certified, in good standing as a nurse practitioner and practicing, as defined in article 139 of the Education Law, in New York State*, or is licensed, in good standing as a physician assistant and practicing in*

New York State, as defined in article 131-B of the Education Law, under the supervision of a physician registered under this Part;

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner of Health is authorized pursuant to section 3369-a of the Public Health Law (PHL) to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of article 33 of the PHL. The Commissioner of Health is also authorized pursuant to section 3701 of the PHL to promulgate regulations defining and restricting the duties which may be assigned to physician assistants by their supervising physician, the degree of supervision required and the manner in which such duties may be performed.

Legislative Objectives:

The legislative objective of Title V-A is to comprehensively regulate the manufacture, sale and use of medical marihuana, by striking a balance between potentially relieving the pain and suffering of those individuals with serious medical conditions, as defined in section 3360(7) of the Public Health Law, and protecting the public against risks to its health and safety.

Needs and Benefits:

The regulatory amendments are necessary to allow physician assistants the ability to register with the Department to issue certifications for medical marihuana to patients under the care of such physician responsible for the physician assistant's supervision. Allowing physician assistants to certify patients to use medical marihuana will increase access to medical marihuana, benefiting patients suffering from one or more of the severe, debilitating or life threatening conditions enumerated in section 3360(7) of the Public Health Law. This regulatory amendment will particularly benefit those patients in rural counties where there are fewer physicians available to certify patients for medical marihuana.

Costs:

Costs to the Regulated Entity:

Physician assistants who are interested in registering with the Department and whose supervising physician is already registered with the Department to certify patients to use medical marihuana, will need to take a Department-approved medical use of marihuana course. Currently, the cost to take the required course is $249.

Costs to Local Government:

This amendment to the regulation does not require local governments to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

Costs to the Department of Health:

With the authorization of physician assistants, additional practitioner registrations will need to be processed by the Department. In addition, the Department anticipates an increase in the number of patients certified to use medical marihuana. Depending upon the number of physician assistants who are interested in registering with the Department, this regulatory amendment may result in an increased cost to the Department for additional staffing to provide registration and certification support. However, any resulting cost of additional staffing is greatly outweighed by the benefit to public health in offering increased access to an alternative treatment option for patients suffering from one of the qualifying serious conditions.

Local Government Mandates:

This amendment does not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

Physician assistants who certify patients to use medical marihuana will be required to maintain a copy of the patient's certification in the patient's medical record.

Duplication:

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

Alternatives:

The alternative would be to continue to limit the definition of "registered practitioner" solely to physicians and nurse practitioners.

Federal Standards:

Federal requirements do not include provisions for a medical marihuana program.

Compliance Schedule:

There is no compliance schedule imposed by these amendments, which shall be effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

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 under the proposed regulation. The regulatory amendment authorizing physician assistants is not a mandate imposed upon physician assistants. Hence, no cure period is necessary.

Rural Area Flexibility Analysis

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

Job Impact Statement

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Extension of the Air Conditioning Incentive Programs Application Date

I.D. No. PSC-48-16-00004-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 by Consolidated Edison Company of New York, Inc. to revise its steam tariff, P.S.C. No. 4, to extend the application deadline for its air conditioning incentive programs under Service Classification Nos. 2 and 3.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Extension of the air conditioning incentive programs application date.

Purpose: To consider extending the application date for its air conditioning incentive programs.

Substance of proposed rule: The Public Service Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison) to revise its steam tariff schedule, P.S.C. No. 4. Con Edison proposes to continue to accept applications for its air conditioning incentive programs under Service Classifications (SC) No. 2 – Annual Power Service and No. 3 – Apartment House Service, which are set to expire on December 31, 2016. Con Edison proposes to extend the incentive programs' application date until one day before commencement of a new steam rate plan. Con Edison also proposes several steam tariff changes of a housekeeping nature, including changes to the Table of Contents, website address and telephone number of Part 3 of the Service Application, and the Department of Public Service staff contact information in the Eligibility Section of SC No. 5. The proposed amendments have an effective date of February 19, 2017. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(16-S-0639SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Clarification of an Order Approving Tariff Amendments with Modifications, Issued October 14, 2016 in Cases 15-E-0745, et al

I.D. No. PSC-48-16-00005-P

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

Proposed Action: The Commission is considering The Citizens for Local Power and the Mid-Hudson Streetlight Consortium's petition for clarification of its Order Approving Tariff Amendments with Modifications, issued October 14, 2016 in Cases 15-E-0745, et al.

Statutory authority: Public Service Law, section 70-a

Subject: Clarification of an Order Approving Tariff Amendments with Modifications, issued October 14, 2016 in Cases 15-E-0745, et al.

Purpose: To consider the petition for clarification filed in Cases 15-E-0745, et al.

Substance of proposed rule: The Public Service Commission is considering a petition, filed by The Citizens for Local Power and the Mid-Hudson Streetlight Consortium, on October 31, 2016, for clarification of the Commission's Order Approving Tariff Amendments with Modifications, issued October 14, 2016, in Cases 15-E-0745, 15-E-0746, 15-E-0747, 15-E-0748, and 15-E-0749. The Citizens for Local Power and the Mid-Hudson Streetlight Consortium asks for clarification that the Commission's determination that companies not be allowed to collect for field audit surveys, also applies to Orange and Rockland Utilities, Inc. and Central Hudson Gas and Electric Corporation. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(15-E-0745SP2)

Department of Taxation and Finance

NOTICE OF ADOPTION

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith

I.D. No. TAF-34-16-00023-A
Filing No. 1037
Filing Date: 2016-11-10
Effective Date: 2016-11-10

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

Action taken: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 301-h(c), 509(7), 523(b) and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon for the period October 1, 2016 through December 31, 2016.

Text or summary was published in the August 24, 2016 issue of the Register, I.D. No. TAF-34-16-00023-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen D. O'Connell, Tax Regulations Specialist, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: tax.regulations@tax.ny.gov

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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith

I.D. No. TAF-48-16-00002-P

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

Proposed Action: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 301-h(c), 509(7), 523(b) and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon for the period January 1, 2017 through March 31, 2017.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (lxxxv) to read as follows:

	Motor Fuel			Diesel Motor Fuel	
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(lxxxiv) October - December 2016					
14.1	22.1	39.1	15.0	23.0	38.25
(lxxxv) January - March 2017					
14.1	*22.1*	*38.3*	*15.1*	*23.1*	*37.55*

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen D. O'Connell, Tax Regulations Specialist, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: tax.regulations@tax.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, 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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Division of Taxation and Finance Powers of Attorney

I.D. No. TAF-48-16-00003-P

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

Proposed Action: Amendment of sections 2370.5(b)(3), 2371.5(c)(2), 2390.1(c)(3), (g)(1); and repeal of section 2390.1(f) and (g)(2) of Title 20 NYCRR.

Statutory authority: Tax Law, section 171, subd. First

Subject: Division of Taxation and Finance Powers of Attorney.

Purpose: To simplify and expedite the process for filing Powers of Attorney with the Division of Taxation and Finance.

Text of proposed rule: Section 1. Paragraph (3) of subdivision (b) of section 2370.5 is amended to read as follows:

(3) The form shall contain, among other required information, the name and address of the principal, the name and address of the agent or authorized representative, and shall have attached thereto the principal's power of attorney, [acknowledged before a notary public,] permitting such agent or authorized representative to make a request for access to records on the principal's behalf. The agency form, completed in the required manner, shall be filed with the records access officer at the time of making the request for access to the department's records.

Section 2. Paragraph (2) of subdivision (c) of section 2371.5 is amended to read as follows:

(2) The prescribed form shall be a power of attorney, [acknowledged before a notary public,] appointing such authorized representative to make a request for access to and/or amendment or correction of such records on the principal's behalf and to obtain access to such records requested therein. Such power may also contain further authority to authorize such representative to take an appeal from denials of access and refusals of amendment or correction pursuant to section 2371.8 of this Part.

Section 3. Paragraph (3) of subdivision (c) of section 2390.1 is amended to read as follows:

(3) The division may, in its discretion, accept a copy [or a facsimile transmission (FAX)] of a power of attorney. The division may also require proof of the existence and validity of the original power of attorney.

Section 4. Subdivision (f) of section 2390.1 is REPEALED.

Section 5. Paragraph (2) of subdivision (g) of section 2390.1 is REPEALED and paragraph (1) of subdivision (g) of section 2390.1 is amended to read as follows:

(g)[(1)] A power of attorney must be filed and received in [the office of] the Division of Taxation in [which the matter is pending] *the manner prescribed by the Commissioner*. The power of attorney should be filed with the division in a conspicuous manner. Accordingly, a power of attorney should not be attached to, or incorporated in, any return, report or other document that is routinely filed with the division unless the return, report or other document specifically provides for such attachment or incorporation.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen D. O'Connell, Tax Regulations Specialist, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12207, (518) 530-4153, email: Kathleen.OConnell@tax.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: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations, such as may be necessary for the exercise of the Department's powers and performance of its duties.

2. Legislative objectives: In keeping with the Department's duties under section 171 First of the Tax Law, the proposed rule makes certain amendments streamlining and simplifying the process for filing the Powers of Attorney required to be filed in order for the Department to disclose documents or communicate with taxpayers or their representatives. These amendments balance the need to provide access to information with the secrecy requirements of Tax Law section 697(e) and related provisions. The rule amends the Public Access to Records regulations to eliminate the requirement that certain record requests be accompanied by a notarized power of attorney, which will simplify and expedite the process for obtaining such records. The rule also amends the Procedural regulations to eliminate the requirement that Division of Taxation and Finance Power of Attorney forms be notarized or witnessed in certain circumstances, while retaining the Division's authority to verify identity and authority to execute a power of attorney. The changes will allow the Division to simplify the Power of Attorney process and add some Power of Attorney functionality to its Online Services Accounts. Further, the rule would eliminate the automatic revocation of previously filed powers of attorney, which will enable taxpayers to retain multiple powers of attorney simultaneously, unless they affirmatively revoke previously filed powers of attorney.

The rule also provides that powers of attorney must be filed and received in the Division of Taxation in the manner prescribed by the Commissioner, rather than in the office in which a matter is pending. This will allow for expeditious centralized processing of powers of attorney by the Division.

3. Needs and benefits: The rule expedites the process for making certain record requests by amending the regulations governing public access to Division records to eliminate the requirement that these requests be accompanied by a notarized power of attorney. The rule also amends the Procedural regulations to eliminate the requirement that Division of Taxation and Finance Power of Attorney forms be notarized or witnessed in certain circumstances, while retaining the Division's authority to verify identity and authority to execute a power of attorney, which will allow the Division to simplify the Power of Attorney process and add some Power of Attorney functionality to its Online Services Accounts. Further, the rule would eliminate the automatic revocation of previously filed powers of attorney, which will enable taxpayers to retain multiple powers of attorney simultaneously, unless they affirmatively revoke previously filed powers of attorney. The rule generally furthers the administration of the tax law by enabling the Department to provide taxpayers with simplified forms and process such forms expeditiously. The rule imposes no additional burdens on regulated parties.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: The rule imposes no additional costs on regulated parties.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: No additional costs are imposed on the agency for the implementation and continuation of the rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: The rule imposes no local government mandates.

6. Paperwork: This rule will not require any new forms or information, although the Department is in the process of developing a new form for future use.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: The Department considered various alternatives, including broadening the elimination of the notary requirement for Powers of Attorney and making no changes to the regulations, and found no viable alternatives preferable to those implemented in the rule that satisfied the Department's legal and systems requirements.

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject area.

10. Compliance schedule: Because the information in question is already required to be submitted prior to representation by a power of attorney, taxpayers will continue to be required to submit powers of attorney when the rule becomes effective, upon publication of the Notice of Adoption in the State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because it will not impose any adverse economic impact or any additional reporting, recordkeeping, or other compliance requirement on small businesses or local governments. The rule amends the Public Access to Records regulations to eliminate the requirement that certain record requests be accompanied by a notarized power of attorney. The rule also amends the Procedural regulations to eliminate the requirement that Division of Taxation and Finance Power of Attorney forms be notarized or witnessed in certain circumstances, while retaining the Division's authority to verify identity and authority to execute a power of attorney, which will allow the Division to simplify the Power of Attorney process and add some Power of Attorney functionality to its Online Services Accounts. Further, the rule would eliminate the automatic revocation of previously filed powers of attorney, which will enable taxpayers to retain multiple powers of attorney simultaneously, unless they affirmatively revoke previously filed powers of attorney.

The rule also provides that powers of attorney must be filed and received in the Division of Taxation in the manner prescribed by the Commissioner, rather than in the office in which a matter is pending. This will allow for expeditious centralized processing of powers of attorney by the Division.

The purpose of the rule is to simplify and expedite the process whereby taxpayers file Powers of Attorney with the Division of Taxation and Finance.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on any rural areas. The rule amends the Public Access to Records regulations to eliminate the requirement that certain record requests be accompanied by a notarized power of

attorney. The rule also amends the Procedural regulations to eliminate the requirement that Division of Taxation and Finance Power of Attorney forms be notarized or witnessed in certain circumstances, while retaining the Division's authority to verify identity and authority to execute a power of attorney, which will allow the Division to simplify the Power of Attorney process and add some Power of Attorney functionality to its Online Services Accounts. Further, the rule would eliminate the automatic revocation of previously filed powers of attorney, which will enable taxpayers to retain multiple powers of attorney simultaneously, unless they affirmatively revoke previously filed powers of attorney.

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The purpose of the rule is to simplify and expedite the process whereby taxpayers file Powers of Attorney with the Division of Taxation and Finance.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no impact on jobs and employment opportunities. The rule amends the Public Access to Records regulations to eliminate the requirement that certain record requests be accompanied by a notarized power of attorney. The rule also amends the Procedural regulations to eliminate the requirement that Division of Taxation and Finance Power of Attorney forms be notarized or witnessed in certain circumstances, while retaining the Division's authority to verify identity and authority to execute a power of attorney, which will allow the Division to simplify the Power of Attorney process and add some Power of Attorney functionality to its Online Services Accounts. Further, the rule would eliminate the automatic revocation of previously filed powers of attorney, which will enable taxpayers to retain multiple powers of attorney simultaneously, unless they affirmatively revoke previously filed powers of attorney.

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The purpose of the rule is to simplify and expedite the process whereby taxpayers file Powers of Attorney with the Division of Taxation and Finance.

Workers' Compensation Board

NOTICE OF EXPIRATION

The following notices have expired and cannot be reconsidered unless the Workers' Compensation Board publishes new notices of proposed rule making in the NYS *Register.*

Medical Treatment Guideline Variances

I.D. No.	Proposed	Expiration Date
WCB-45-15-00025-P	November 10, 2015	November 9, 2016

Medical Authorizations

I.D. No.	Proposed	Expiration Date
WCB-45-15-00026-P	November 10, 2015	November 9, 2016

Medical Treatment Guideline Optional Prior Approval

I.D. No.	Proposed	Expiration Date
WCB-45-15-00027-P	November 10, 2015	November 9, 2016