

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.

CVS-26-16-00009-P June 29, 2016 June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00010-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00011-P	June 29, 2016	June 29, 2017

Education Department

EMERGENCY RULE MAKING

Eligible Score Band of an Appeal of the English Language Arts Regents Examination for Eligible English Language Learners (ELLs)

I.D. No. EDU-16-17-00008-E

Filing No. 499

Filing Date: 2017-06-30

Effective Date: 2017-07-03

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

Action taken: Amendment of section 100.5(d)(7) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 215(not subdivided), 305(1), (2), 2117(1), 3204(2) and (2-a)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption is the July 2017 Regents meeting, after publication of the proposed rule in the State Register on April 19, 2017 and expiration of the 45-day public comment period for State agency rule makings. Furthermore, pursuant to the State Administrative Procedure Act (SAPA), the earliest effective date of the proposed amendment, if adopted at the July meeting, would be August 2, 2017, the date a Notice of Adoption would be published in the State Register. However, the emergency measure adopted by the Board of Regents at the April 2017 meeting will expire on July 2, 2017. Therefore, a second emergency action is needed to ensure that the emergency rule adopted by the Board of Regents at its April 2017 meeting remains continuously in effect until it can be adopted as a permanent rule.

Emergency action is also necessary for the preservation of the general welfare in order to immediately adjust the eligible score band for an ap-

Department of Civil Service

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Civil Service publishes a new notice of proposed rule making in the *NYS Register*.

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00003-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00004-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00005-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00006-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00007-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-26-16-00008-P	June 29, 2016	June 29, 2017

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
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peal of the English Language Arts Regents examination passing scores for qualifying ELLs for the 2016-2017 school year.

Subject: Eligible Score Band of an Appeal of the English Language Arts Regents Examination for Eligible English Language Learners (ELLs).

Purpose: To align with the recent expansion of the eligible score band for appeals for certain regents examinations for all students.

Text of emergency rule: Subclause (1) of clause (b) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended as follows:

(1) has scored between [55 and 61] 55-59 on the required Regents examination in English language arts under appeal;

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-16-17-00008-EP, Issue of April 19, 2017. The emergency rule will expire August 28, 2017.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 215 authorizes the Regents and the Commissioner to require school districts to prepare and submit reports containing such information as they may prescribe.

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

Education Law section 2117(1) empowers the Regents and the Commissioner to require school districts to submit any information they deem appropriate.

Education Law section 3204(2) and (2-a) provide for instructional programs for pupils with limited English proficiency (LEP) to be conducted in accordance with regulations of the Commissioner. Education Law section 3204(3) authorizes the Commissioner to establish standards for the instruction of LEP children, and section 3204(6) requires the Commissioner to establish standards by regulation.

LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs).

NEEDS AND BENEFITS:

Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

COSTS:

(a) Costs to State government: The proposed amendment does not impose any additional costs on State government, including the State Education Department, beyond those costs imposed by the statutes.

(b) Costs to local government: The proposed amendment will not impose any significant costs on local governments.

(c) Costs to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon school districts. The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

PAPERWORK:

The proposed amendment will not require any additional paperwork beyond what is necessary to process current appeals.

DUPLICATION:

The proposed amendment is necessary to ensure compliance with Education Law sections 3204 and 4403, Title I and III of the ESEA, Title IV of the Civil Rights Act of 1964, and the EEOA and does not duplicate existing State or Federal requirements.

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment is necessary to ensure compliance with Education Law sections 3204 and 4403, Title I and III of the ESEA, Title IV of the Civil Rights Act of 1964, and the EEOA. These laws require states and school districts to provide ELL students with appropriate services to overcome language barriers. In addition, federal jurisprudence in landmark cases such as *Castañeda v. Pickard* established standards to ensure compliance with EEOA. For example, the *Castañeda* standard mandates that programs for language-minority students must be (1) based on a sound educational theory, (2) implemented effectively with sufficient resources and personnel, and (3) evaluated to determine whether they are effective in helping students overcome language barriers.

COMPLIANCE SCHEDULE:

It is anticipated that school districts and BOCES will be able to achieve compliance with the proposed amendment by its effective date. The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to each of the 689 public school districts and 37 boards of cooperative educational services (BOCES) in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in En-

lish Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

COMPLIANCE COSTS:

The proposed amendment will not impose any significant on school districts or BOCES.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZE ADVERSE IMPACT:

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts.

INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement long-range Regents policy relating to improving graduation outcomes for students who are English Language Learners. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements on school districts and BOCES located in rural areas. The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

3. COMPLIANCE COSTS:

The proposed amendment will not any costs on school districts or BOCES located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to adjust the eligible score band for an appeal of the English Language Arts Regents examination passing scores by qualifying English Language Learners (ELLs). Under the proposed amendment, qualifying ELLs will be eligible to appeal scores of 55-59, instead of the current 55-61, on the required Regents examination in English Language Arts. This proposed amendment is necessary to align to

amendments made by the Board of Regents at its March 2016 meeting which allow all students (including ELLs) to appeal scores of 60-64 on certain Regents examinations, so a separate appeal for ELLs from 60-61 is not necessary.

5. RURAL AREA PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement long-range Regents policy relating to improving graduation outcomes for students who are English Language Learners. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

In January 2015, the Board of Regents extended the Regents Examination appeal process to include a provision to allow eligible English language learners (ELLs) to appeal scores of 55-61 on the English Language Arts (ELA) Regents Examination. At its March 2016 meeting, the Board of Regents adopted a proposed amendment to expand the eligible score bands for appeals of Regents examinations for all students from 62-64 to 60-64. Due to this expansion of the eligible score band for such appeals for all students (including ELLs), it is necessary to adjust the eligible score band for appeals of the English Language Arts Regents examinations for qualifying ELLs by two points, from 55-61 to 55-59, to clarify that a separate appeal for ELLs who score between 60-61 on the ELA Regents Examination is not necessary.

Because it is evident from the nature of the proposed amendment 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.

Assessment of Public Comment

The agency received no public comment.

**EMERGENCY
RULE MAKING**

Unit of Study Requirements for Career and Technical Education in Grades 7 and 8

I.D. No. EDU-21-17-00007-E

Filing No. 497

Filing Date: 2017-06-30

Effective Date: 2017-06-30

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

Action taken: Amendment of section 100.4 of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The proposed amendment to section 100.4(c)(1) of the Regulations of the Commissioner of Education is necessary to ensure school districts have sufficient notice of the amendments and are able to implement them, as appropriate, beginning with the 2017-2018 school year.

A Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on May 24, 2017. 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 Act (SAPA) for a proposed rulemaking, would be the September 2017 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 27, 2017, the date a Notice of Adoption would be published in the State Register. In order to have these provisions in effect prior to the next school year, emergency action is

therefore necessary for the preservation of general welfare to ensure that school districts have sufficient notice of the amendments and are able to implement them, as appropriate, beginning with the 2017-2018 school year which commences on July 1, 2017.

Subject: Unit of Study Requirements for Career and Technical Education in Grades 7 and 8.

Purpose: To implement Regents policy relating to career and technical education units of study.

Text of emergency rule: Paragraph (1) of subdivision (c) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective July 1, 2017, as follows:

- (c) Units of study in grades 7 and 8.
- (1) Except as otherwise provided herein, all students shall be provided instruction designed to enable them to achieve, by the end of grade 8, State intermediate learning standards through:
- (i) English language arts, two units of study;
 - (ii) social studies, two units of study;
 - (iii) science, two units of study;
 - (iv) mathematics, two units of study;
 - (v) technology education, one unit of study, *provided that for the 2018-2019 school year and thereafter, this unit of study requirement shall be replaced by that described in subparagraph (xiii) of this subdivision;*
 - (vi) home and career skills, three quarters of a unit of study, *provided that for the 2018-2019 school year and thereafter, this unit of study requirement shall be replaced by that described in subparagraph (xiii) of this subdivision;*
 - (vii) physical education, as required by section 135.4(c)(2)(ii) of this Title;
 - (viii) health education, one half unit of study, as required by section 135.3(c) of this Title;
 - (ix) the arts, including one half unit of study in the visual arts, and one half unit of study in music;
 - (x) library and information skills, the equivalent of one period per week in grades 7 and 8;
 - (xi) languages other than English pursuant to section 100.2 (d) of this Part; [and]
 - (xii) career development and occupational studies[.]; *and*
 - (xiii) *for students in schools that have vacancies in teacher positions for the courses described in subparagraphs (v) and (vi) of this subdivision during the 2017-2018 school year, and for all students in the 2018-2019 school year and thereafter, career and technical education (i.e., technology education, family and consumer sciences, trade and technical subjects, business, agriculture, and/or health sciences), for a total of one and three fourths units of study.*

(2) The requirements for technology education, home and career skills, *career and technical education* and library and information skills may be met by the integration of the State learning standards of such subjects into other courses in accordance with the following criteria:

(i) In public schools, the unit of study requirements specified in subparagraphs (1)(v), (vi), [and/or] (xii) *and* (xiii) of this subdivision are met.

(ii) In public schools, the subjects of technology education, [and] home and career skills, *and any other career and technical education* shall be taught by persons certified to teach those subjects.

(iii) In public schools, library and information skills shall be taught by library media specialists and classroom teachers to ensure coordination and integration of library instruction with classroom instruction.

(iv) In nonpublic schools, the unit of study requirements specified in subparagraphs (1)(v), (vi), [and/or] (xii) *and* (xiii) of this subdivision may be met, or their equivalents may be met, by the incorporation of the State learning standards of such subjects into the syllabi for other courses and/or by appropriate results on examinations which demonstrate student mastery of the learning standards of such subjects. The chief administrative officer of a nonpublic school shall document the manner in which such nonpublic school has implemented the provisions of this subparagraph. Such documentation shall be in writing and available for review upon request by the commissioner.

(3) The unit of study requirement for technology education, [and/or] home and career skills, *and any other career and technical education* included in paragraph (1) of this subdivision may be initiated in grade 5, provided that in public schools such subjects shall be taught by teachers appropriately certified in [those areas] *career and technical education*.

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-21-17-00007-P, Issue of May 24, 2017. The emergency rule will expire September 27, 2017.

Text of 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides Commissioner shall have such further powers and duties as charged by the Regents.

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

Education Law section 309 charges Commissioner with general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes SED to alter the subjects of required instruction.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy relating to the required courses of study pertaining to middle level instruction in career and technical education units of study in grades 7 and 8.

3. NEEDS AND BENEFITS:

With respect to units of study for grades 7 and 8, current regulations require that all students complete the following by the end of grade 8:

- 2 units English Language Arts
- 2 units Mathematics
- 2 units Social Studies
- 2 units Science
- 1 unit Technology Education – May begin as early as grade 5, provided that in public schools, it must be taught by a certified Technology Education teacher (CTE)
- $\frac{3}{4}$ units Home and Careers Skills Course (Family and Consumer Sciences) – May begin as early as grade 5, provided that in public schools, it must be taught by a certified FACS teacher
- $\frac{1}{2}$ unit Visual Arts
- $\frac{1}{2}$ unit Music
- $\frac{1}{2}$ unit Health – May begin as early as grade 6, provided that in public schools, it must be taught by a certified health education teacher
- 1 unit Languages other than English – May begin in any grade prior to grade 8, provided that in public schools, it must be taught by a teacher certified in that area
- Physical Education – Minimum of 3 periods per week during one semester of each school year and two periods during the other semester (or a comparable time each semester)
- Library and Information Skills – The equivalent of 1 period per week in grades 7 and 8

Current Middle Level (Grades 5-8) CTE Requirements

Current regulations provide for the first formal introduction in CTE in two specific disciplines: Family and Consumer Sciences (FACS) and Technology Education. As noted above, both FACS and Technology Education instruction may begin as early as grade 5, provided that in public schools these subjects must be taught by teachers certified in those subjects. Students experience a total of 70 weeks or 1.75 units of study in grades 5-8 taught by certified teachers in FACS and Technology Education. These courses address not only CTE content, but also instruction in the intermediate CDOS standards providing the foundation students need to make informed selections of graduation pathways (including the CTE, STEM, or CDOS pathways) available to them when they enter high school.

Challenges

Districts face a number of challenges with the existing requirements:

1) There is shortage of certified teachers in the areas of FACS and Technology Education to fill the need across the state.

2) Middle level student experiences in CTE are limited to FACS and Technology Education which represent only 2 of 6 CTE content areas and may not directly address other relevant CTE content areas in business, health sciences, agriculture, or trade and technical education.

3) Opportunities to create sequential programs that align to high school pathways and course offerings are limited to only 2 of 6 areas in CTE.

Proposed Changes

The Department is proposing added flexibility to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways in order to address the challenges above. The Department is proposing to:

1) provide students with a broad-based introduction to Career and Technical Education through the lens of the 6 CTE content areas; and

2) allow districts to meet the unit of study requirement utilizing any of the 6 CTE content areas as a vehicle; and

3) provide guidance to districts on how to utilize available certified teachers and resources to repurpose the CTE experience at the middle level to better prepare students for available pathways in CTE, STEM, and CDOS at the high school level.

Benefits

- Currently CTE certification allows assignments in K-12 or 7-12. Opening the middle level requirement to all six CTE disciplines would expand the pool of teachers eligible for recruitment into open positions. Teachers certified in trade and technical subjects, business, agriculture or health sciences would become viable candidates for middle level positions.

- Districts will be better positioned to design meaningful articulated programs in any CTE discipline creating a link between middle and high school programs.

Options

Opening the door to various CTE disciplines would allow districts that are struggling to meet the current middle level CTE requirement, to create a new approach to CTE. Districts that have effective FACS and Technology Education programs could continue to meet the unit of study requirement in the traditional manner. Districts that wish to explore new ways to deliver this instruction can do so by creating articulated programs that better align to available CTE, STEM or CDOS pathways at the high school level. Programs could be created to address the intermediate standards and, when available, could also provide accelerated instruction in CTE for students in grade 8 so such students could earn credit toward a pathway in CTE, STEM, or CDOS before entering high school. Attachment A illustrates some examples of the various ways districts could meet the intermediate requirements in CTE under the proposed flexibility. Should the Regents adopt the proposed regulatory amendment, districts that have vacancies in teaching positions in FACS and/or Technology Education may begin to use this flexibility during the 2017-18 school year. All other districts must use this option beginning in the 2018-19 school year.

Current Initiative

Work is underway, led by members of the FACS, Business and Technology Education professional associations and supported by NYSED and the CTE Technical Assistance Center, to plan to enhance the existing 1 3/4 unit of middle level FACS and Technical Education by creating a foundational course called "Introduction to CTE." Should the Regents adopt the proposed regulatory amendment, this work will serve as a model for the other CTE disciplines. Introduction to CTE would:

- bridge middle level CTE to high school CTE; and
- expose students to all CTE content areas; and
- follow a module format allowing for flexibility in delivery; and
- foster acceleration into graduation pathways (CTE, STEM, CDOS)

that capitalize on students' interest.

Draft theme and content modules developed by the FACS Association are serving as models for further development by the Business, Technology, Agriculture, Health Sciences, and Trade and Technical education communities.

4. COSTS:

Cost to the State: none.

Costs to local government: none.

Cost to private regulated parties: none.

Cost to regulating agency for implementation and continued administration of this rule: none.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments but merely provides flexibility for school districts to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways.

6. PAPERWORK:

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

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed amendment is necessary to implement Regents policy relating to career and technical education units of study in grades 7 and 8. There were no significant alternatives considered.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated parties will be able to achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment implements Regents policy relating to the required courses of study pertaining to middle level instruction in career and technical education units of study in grades 7 and 8. As a result it does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each of the 689 public school districts in the State.

2. COMPLIANCE REQUIREMENTS:

The Department is proposing added flexibility to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways in order to address the challenges presented by the current regulatory requirements. The Department is proposing to:

1) provide students with a broad-based introduction to Career and Technical Education through the lens of the 6 CTE content areas; and

2) allow districts to meet the unit of study requirement utilizing any of the 6 CTE content areas as a vehicle; and

3) provide guidance to districts on how to utilize available certified teachers and resources to repurpose the CTE experience at the middle level to better prepare students for available pathways in CTE, STEM, and CDOS at the high school level.

Benefits

- Currently CTE certification allows assignments in K-12 or 7-12. Opening the middle level requirement to all six CTE disciplines would expand the pool of teachers eligible for recruitment into open positions. Teachers certified in trade and technical subjects, business, agriculture or health sciences would become viable candidates for middle level positions.

- Districts will be better positioned to design meaningful articulated programs in any CTE discipline creating a link between middle and high school programs.

Options

Opening the door to various CTE disciplines would allow districts that are struggling to meet the current middle level CTE requirement, to create a new approach to CTE. Districts that have effective FACS and Technology Education programs could continue to meet the unit of study requirement in the traditional manner. Districts that wish to explore new ways to deliver this instruction can do so by creating articulated programs that better align to available CTE, STEM or CDOS pathways at the high school level. Programs could be created to address the intermediate standards and, when available, could also provide accelerated instruction in CTE for students in grade 8 so such students could earn credit toward a pathway in CTE, STEM, or CDOS before entering high school. Attachment A illustrates some examples of the various ways districts could meet the intermediate requirements in CTE under the proposed flexibility. Should the Regents adopt the proposed regulatory amendment, districts that have vacancies in teaching positions in FACS and/or Technology Education may begin to use this flexibility during the 2017-18 school year. All other districts must use this option beginning in the 2018-19 school year.

Current Initiative

Work is underway, led by members of the FACS, Business and Technology Education professional associations and supported by NYSED and the CTE Technical Assistance Center, to plan to enhance the existing 1 3/4 unit of middle level FACS and Technical Education by creating a foundational course called "Introduction to CTE." Should the Regents adopt the proposed regulatory amendment, this work will serve as a model for the other CTE disciplines. Introduction to CTE would:

- bridge middle level CTE to high school CTE; and
- expose students to all CTE content areas; and
- follow a module format allowing for flexibility in delivery; and
- foster acceleration into graduation pathways (CTE, STEM, CDOS)

that capitalize on students' interest.

Draft theme and content modules developed by the FACS Association

are serving as models for further development by the Business, Technology, Agriculture, Health Sciences, and Trade and Technical education communities.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on school districts or charter schools.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on school districts or charter schools.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on school districts or charter schools.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the rule have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to each of the 689 public school districts in the State, including those in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The proposed rule generally does not impose any additional compliance requirements upon local governments but merely provides flexibility for school districts to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways. The proposed rule does not impose any additional professional services requirements on entities in rural areas.

3. COSTS:

The proposed amendment does not impose any costs on school districts or BOCES across the State, including those located in rural areas of the State, but merely provides flexibility for school districts that choose to meet the middle level CTE requirement in new and innovative ways.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on school districts or charter schools but merely provides flexibility for school districts to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways. Therefore, no alternatives were considered.

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 implements Regents policy to provide flexibility for school districts to allow the CTE requirement at the middle level (grades 5-8) to be met in new and innovative ways.

Because of the nature of the proposed amendment, 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.

EMERGENCY RULE MAKING

Education of Homeless Children and Youths (McKinney-Vento Homeless Assistance Act)

I.D. No. EDU-21-17-00008-E

Filing No. 496

Filing Date: 2017-06-30

Effective Date: 2017-06-30

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

Action taken: Amendment of section 100.2(x) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2), 3202(1), (8), 3209(1)(a), (7), 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The proposed amendment to section 100.2(x) of the Regulations of the Commissioner of Education is necessary to timely implement the statutory changes to Education Law § 3209, as amended by Chapter 56 of the Laws of 2017, to implement changes to McKinney-Vento made at the federal level as a result of the Every Student Succeeds Act.

A Notice of Emergency Adoption and Proposed Rule Making will be published in the State Register on May 24, 2017. 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 Act (SAPA) for a proposed rulemaking, would be the September 2017 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 27, 2017, the date a Notice of Adoption would be published in the State Register. In order to have these provisions in effect prior to the next school year, emergency action is therefore necessary for the preservation of general welfare to conform to the provisions of the new law for the 2017-2018 school year and to provide school districts in New York State with sufficient notice of the new requirements so that they can make educational placement decisions for homeless children and unaccompanied youth in the 2017-2018 school year.

Subject: Education of homeless children and youths (McKinney-Vento Homeless Assistance Act).

Purpose: Required by the Federal McKinney-Vento Homeless Assistance Act (42 U.S.C. section 11431 et seq.), as amended by ESSA.

Substance of emergency rule (Full text is posted at the following State website: <http://www.counsel.nysed.gov/rules/full-text-indices>): Below is a summary of the proposed amendment to Commissioner's regulation § 100.2(x) which conforms to the new Federal and State statutory provisions by revising the definitions section of the regulation to:

- Define feeder school and receiving school;
- Eliminate "awaiting foster care placement" from the definition of homeless child as of December 10, 2016;
- Define preschool; and
- Define school of origin to include feeder schools and preschools.

To be consistent with the recent McKinney-Vento changes, the proposed amendment allows the parent or guardian, or in the case of an unaccompanied youth, the youth (known as the designator) to make the initial designation of the school district and school he/she wants his/her child to attend and upon receipt of such designation, the school district will be required to determine whether the designation made by the designator is consistent with the best interests of the homeless child or youth.

In determining a homeless child's best interest, the school district must presume that keeping the homeless child or youth in the school of origin is in the child's or youth's best interest, except when doing so is contrary to the request of the designator.

When making a best interest determination, the school district must consider student-centered factors, including but not limited to factors related to the impact of mobility on achievement, education, the health and safety of the homeless child, giving priority to the request of the child's or youth's parent or guardian or the youth in the case of an unaccompanied youth.

If after considering student-centered factors, the LEA determines that it is not in the homeless child's best interest to attend the school of origin or the school designated by the designator, the local educational agency must provide a written explanation of the reasons for its determination, in a manner and form understandable to such parent, guardian, or unaccompanied youth. The information must also include information regarding the right to a timely appeal. The homeless child or youth must be enrolled in the school in which enrollment is sought by the designator during the pendency of all available appeals.

To conform to the new federal changes, the proposed amendment also requires the designated school district to immediately enroll the homeless child even if the child or youth is unable to produce records of immunization and/or other required health records and/or even if the child has missed application or enrollment deadlines during any period of homelessness, if applicable. However, the amendment does not require the immediate attendance of an enrolled student lawfully excluded from school temporarily pursuant to Education Law § 906 because of a communicable or infectious disease that imposes a significant risk to others.

The proposed amendment also requires that a student be allowed to maintain enrollment in the same school for the duration of homelessness, through the remainder of the school year in which the student becomes permanently housed, and possibly one additional year if it is the terminal grade for the student in that school.

The proposed amendment further requires that local departments of social services give completed designation forms to school districts and eliminates the requirement that school districts submit designation forms

to the New York State Education Department (NYSED or “the Department”) for all students identified as homeless, only those for whom the district is seeking tuition reimbursement (which is consistent with current practice).

The proposed amendment also makes the following revisions to the transportation provisions:

a. Clarifies that transportation beyond 50 miles is subject to a best interest determination using the same factors that school districts must use in reviewing school designations; and

b. Requires transportation to the school of origin, which includes preschool, through the remainder of the school year in which the student becomes permanently housed and for one additional year if it is the student’s terminal year in the school.

The provisions relating to the responsibilities of LEAs is also revised to:

a. Require continued enrollment and transportation during any enrollment dispute pending final resolution of all available appeals, including those commenced pursuant to Education Law § 310 (i.e., elimination of the stay provision);

b. Ensure that homeless children are provided with services comparable to services offered to other students in the designated district of attendance including preschool and other educational programs or services for which a homeless student meets the eligibility criteria, such as programs for students with disabilities, English language learners, after-school programs, school nutrition programs and transportation, career and technical education, and programs for gifted and talented students, and to the extent such child or youth is eligible, services under ESSA;

c. Include the updated LEA McKinney-Vento Liaison responsibilities in ESSA; and

d. Require that information about a homeless child’s living situation (e.g., homeless status, temporary address) be treated as a student education record and not be deemed to be directory information.

For the full text of the terms please visit: <http://www.regents.nysed.gov/common/regs/files/517p12a2.pdf>

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-21-17-00008-P, Issue of May 24, 2017. The emergency rule will expire September 27, 2017.

Text of 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Ed.L. § 101 continues the existence of the Education Department (NYSED), with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of NYSED, which is charged with the general management and supervision of public schools and the educational work of the State.

Ed.L. § 207 authorizes the Regents and Commissioner to adopt rules and regulations implementing State law regarding education.

Ed.L. § 215 provides the Commissioner with authority to require schools to submit reports containing such information as the Commissioner may prescribe.

Ed.L. § 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents’ educational policies. Ed.L. § 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law.

Ed.L. § 3202(1) specifies the school district of residence as the school district in which children residing in New York State are entitled to attend school without the payment of tuition. That section is intended to assure that each child residing within the State is able to attend school on a tuition-free basis in accordance with Article XI, section 1 of the New York State Constitution. Moreover, it is the policy of the Legislature, as expressed in Ed.L. section 3205(1) to require instruction for each child of compulsory school age within the State.

Ed.L. § 3202(8) provides that a homeless child, as defined in Ed.L. § 3209(1), over the age of five and under twenty-one years of age, who has not received a high school diploma, shall be entitled to attend a public school without the payment of tuition, in accordance with the provisions of Ed.L. § 3209.

Ed.L. § 3209 sets forth requirements for the education of homeless children. Ed.L. 3209 authorizes the Commissioner to promulgate regulations to carry out the provisions of the statute.

Ed.L. § 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and

authorizes the Commissioner to cooperate with federal agencies to implement such law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to conform Commissioner’s regulations to the federal McKinney-Vento Homeless Assistance Act (42 U.S.C. section 11431 et seq.), as amended by Title IX of the Every Student Succeeds Act of 2015 (Public Law 114-95) and Part C of Chapter 56 of the Laws of 2017.

3. NEEDS AND BENEFITS:

The Education for Homeless Children and Youth program is administered under Title VII-B of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) (“McKinney-Vento”), originally authorized in 1987 and most recently re-authorized in December 2015 by ESSA. Under McKinney-Vento, State educational agencies (SEAs) must ensure that each homeless child and youth has equal access to the same free, appropriate public education, including a public preschool education, as other children and youths. Several changes were made as a result of ESSA, including, but not be limited to:

1. Removes “awaiting foster care placement” from the definition of homeless (December 10, 2016);

2. Expands the definition of “school of origin” to include preschool and feeder schools;

3. Requires continued enrollment and transportation during any enrollment dispute pending final resolution of the dispute, including all available appeals;

4. Expands transportation to the school of origin through the remainder of the school year in which the student becomes permanently housed;

5. Requires SEAs and local educational agencies (LEAs) have policies to remove barriers to identification, enrollment and retention of children and youth who are homeless, including barriers to enrollment and retention due to outstanding fees or fines or absences;

6. Requires SEAs to have procedures that ensure that students who are homeless and who meet the relevant eligibility criteria do not face barriers to accessing academic and extra-curricular activities, including magnet schools, summer school, career and technical education, advanced placement courses, online learning and charter schools;

7. Requires that the State Plan describe how youth who are homeless will receive assistance from counselors to advise such youth and improve their readiness for college;

8. Requires that the State Plan ensure appropriate access to secondary education, including procedures to remove barriers that prevent youth from receiving appropriate for full or partial coursework completed while attending a prior school;

9. Requires LEAs to immediately enroll children and youth who are homeless even if they have missed application or enrollment deadlines during any period of homelessness;

10. Allows LEA liaisons to refer students and their families to needed housing services and to affirm eligibility for students and their families for homeless assistance programs funded by the United States Department of Housing and Urban Development if the liaison has received training;

11. Requires that information about a homeless child’s living situation (e.g., homeless status, temporary address) be treated as a student education record and not be deemed to be directory information.

In order to conform State law to the ESSA-related changes in McKinney-Vento, the Legislature and the Governor passed Part C of Chapter 56 of the Laws of 2017 amending Ed/L. § 3209. The proposed amendment conforms to the new federal and State statutory provisions by revising the definitions section of the regulation to:

a. Define feeder school and receiving school;

b. Eliminate “awaiting foster care placement” from the definition of homeless child as of December 10, 2016;

c. Define preschool; and

d. Define school of origin to include feeder schools and preschools.

To be consistent with the recent McKinney-Vento changes, the proposed amendment allows the parent or guardian, or in the case of an unaccompanied youth, the youth (known as the designator) to make the initial designation of the school district and school he/she wants his/her child to attend and upon receipt of such designation, the school district will be required to determine whether the designation made by the designator is consistent with the best interests of the homeless child or youth.

In determining a homeless child’s best interest, the school district must presume that keeping the homeless child or youth in the school of origin is in the child’s or youth’s best interest, except when doing so is contrary to the request of the designator.

When making a best interest determination, the school district must consider student-centered factors, including but not limited to factors related to the impact of mobility on achievement, education, the health and safety of the homeless child, giving priority to the request of the child’s or youth’s parent or guardian or the youth in the case of an unaccompanied youth.

If after considering student-centered factors, the LEA determines that it is not in the homeless child's best interest to attend the school of origin or the school designated by the designator, the LEA must provide a written explanation of the reasons for its determination, in a manner and form understandable to such parent, guardian, or unaccompanied youth. The information must also include information regarding the right to a timely appeal. The homeless child or youth must be enrolled in the school in which enrollment is sought by the designator during the pendency of all available appeals.

The proposed amendment also requires the designated school district to immediately enroll the homeless child even if the child or youth is unable to produce records of immunization and/or other required health records and/or even if the child has missed application or enrollment deadlines during any period of homelessness, if applicable. However, the amendment does not require the immediate attendance of an enrolled student lawfully excluded from school temporarily pursuant to Ed.L. § 906 because of a communicable or infectious disease that imposes a significant risk to others.

The proposed amendment also requires that a student be allowed to maintain enrollment in the same school for the duration of homelessness, through the remainder of the school year in which the student becomes permanently housed, and possibly one additional year if it is the terminal grade for the student in that school.

The proposed amendment further requires that local departments of social services give completed designation forms to school districts and eliminates the requirement that school districts submit designation forms to NYSED for all students identified as homeless, only those for whom the district is seeking tuition reimbursement (consistent with current practice). It also makes the following revisions to transportation:

a. Clarifies that transportation beyond 50 miles is subject to a best interests determination using the same factors that school districts must use in reviewing school designations; and

b. Requires transportation to the school of origin, which includes preschool, through the remainder of the school year in which the student becomes permanently housed and for one additional year if it is the student's terminal year in the school.

The responsibilities of LEAs are also revised to:

a. Require continued enrollment and transportation during any enrollment dispute pending final resolution of all available appeals, including those commenced pursuant to Ed.L. § 310 (i.e., elimination of the stay provision);

b. Ensure that homeless children are provided with services comparable to services offered to other students in the designated district of attendance including preschool and other educational programs or services for which a homeless student meets the eligibility criteria, such as programs for students with disabilities, ELLs, after-school programs, school nutrition programs and transportation, career and technical education, and programs for gifted and talented students, and to the extent such child or youth is eligible, services under ESSA;

c. Include the updated LEA McKinney-Vento Liaison responsibilities in ESSA; and

d. Require that information about a homeless child's living situation (e.g., homeless status, temporary address) be treated as a student education record and not be deemed to be directory information.

4. COSTS:

Cost to the State: The proposed amendment is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA of 2015 (Public Law 114-95) and Part C of Chapter 56 of the Laws of 2017. The State is required to comply with federal statutes as a condition to its receipt of federal funding. The proposed amendment will not impose any costs on the State beyond those imposed by State and federal statutes.

Costs to local government: The proposed amendment will not impose any costs on school districts beyond those imposed by State and federal statutes.

Cost to private regulated parties: The proposed amendment applies to school districts and does not impose any costs or compliance requirements on private parties.

Cost to regulating agency for implementation and continued administration of this rule: The proposed amendment will not impose any additional costs on NYSED beyond those imposed by State and federal statutes.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L. 114-95) and Part C of Ch. 56 of the L. of 2017. The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

6. PAPERWORK:

The proposed amendment will not impose any additional recordkeeping

or other paperwork requirements beyond those imposed by State and federal statutes.

7. DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements, and is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L. 114-95) and Part C of Ch. 56 of the L. of 2017.

8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed amendment is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L. 114-95) and Part C of Ch. 56 of the L. of 2017.

9. FEDERAL STANDARDS:

The proposed amendment is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L. 114-95) and Part C of Ch. 56 of the L. of 2017.

10. COMPLIANCE SCHEDULE:

It is anticipated parties will be able to achieve compliance with the rule by its effective date. The proposed amendment does not impose any compliance requirements beyond those required by State and federal statutes.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to conform Commissioner's Regulations to federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L. 114-95) and Part C of Ch. 56 of the L. of 2017. As a result it does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each of the 689 public school districts in the State.

2. COMPLIANCE REQUIREMENTS:

The Education for Homeless Children and Youth program is administered under Title VII-B of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) ("McKinney-Vento"), originally authorized in 1987 and most recently re-authorized in December 2015 by ESSA. Under McKinney-Vento, State educational agencies (SEAs) must ensure that each homeless child and youth has equal access to the same free, appropriate public education, including a public preschool education, as other children and youths. Several changes were made as a result of ESSA, including, but not be limited to:

1. Removes "awaiting foster care placement" from the definition of homeless (December 10, 2016);

2. Expands the definition of "school of origin" to include preschool and feeder schools;

3. Requires continued enrollment and transportation during any enrollment dispute pending final resolution of the dispute, including all available appeals;

4. Expands transportation to the school of origin through the remainder of the school year in which the student becomes permanently housed;

5. Requires SEAs and local educational agencies (LEAs) have policies to remove barriers to identification, enrollment and retention of children and youth who are homeless, including barriers to enrollment and retention due to outstanding fees or fines or absences;

6. Requires SEAs to have procedures that ensure that students who are homeless and who meet the relevant eligibility criteria do not face barriers to accessing academic and extra-curricular activities, including magnet schools, summer school, career and technical education, advanced placement courses, online learning and charter schools;

7. Requires that the State Plan describe how youth who are homeless will receive assistance from counselors to advise such youth and improve their readiness for college;

8. Requires that the State Plan ensure appropriate access to secondary education, including procedures to remove barriers that prevent youth from receiving appropriate for full or partial coursework completed while attending a prior school;

9. Requires LEAs to immediately enroll children and youth who are homeless even if they have missed application or enrollment deadlines during any period of homelessness;

10. Allows LEA liaisons to refer students and their families to needed housing services and to affirm eligibility for students and their families for

homeless assistance programs funded by the United States Department of Housing and Urban Development if the liaison has received training;

11. Requires that information about a homeless child's living situation (e.g., homeless status, temporary address) be treated as a student education record and not be deemed to be directory information.

In order to conform State law to the ESSA-related changes in McKinney-Vento, the Legislature and the Governor passed Part C of Chapter 56 of the Laws of 2017 amending Ed.L. § 3209. The proposed amendment conforms to the new federal and State statutory provisions by revising the definitions section of the regulation to:

- a. Define feeder school and receiving school;
- b. Eliminate "awaiting foster care placement" from the definition of homeless child as of December 10, 2016;
- c. Define preschool; and
- d. Define school of origin to include feeder schools and preschools.

To be consistent with the recent McKinney-Vento changes, the proposed amendment allows the parent or guardian, or in the case of an unaccompanied youth, the youth (known as the designator) to make the initial designation of the school district and school he/she wants his/her child to attend and upon receipt of such designation, the school district will be required to determine whether the designation made by the designator is consistent with the best interests of the homeless child or youth.

In determining a homeless child's best interest, the school district must presume that keeping the homeless child or youth in the school of origin is in the child's or youth's best interest, except when doing so is contrary to the request of the designator.

When making a best interest determination, the school district must consider student-centered factors, including but not limited to factors related to the impact of mobility on achievement, education, the health and safety of the homeless child, giving priority to the request of the child's or youth's parent or guardian or the youth in the case of an unaccompanied youth.

If after considering student-centered factors, the LEA determines that it is not in the homeless child's best interest to attend the school of origin or the school designated by the designator, the LEA must provide a written explanation of the reasons for its determination, in a manner and form understandable to such parent, guardian, or unaccompanied youth. The information must also include information regarding the right to a timely appeal. The homeless child or youth must be enrolled in the school in which enrollment is sought by the designator during the pendency of all available appeals.

The proposed amendment also requires the designated school district to immediately enroll the homeless child even if the child or youth is unable to produce records of immunization and/or other required health records and/or even if the child has missed application or enrollment deadlines during any period of homelessness, if applicable. However, the amendment does not require the immediate attendance of an enrolled student lawfully excluded from school temporarily pursuant to Ed.L. § 906 because of a communicable or infectious disease that imposes a significant risk to others.

The proposed amendment also requires that a student be allowed to maintain enrollment in the same school for the duration of homelessness, through the remainder of the school year in which the student becomes permanently housed, and possibly one additional year if it is the terminal grade for the student in that school.

The proposed amendment further requires that local departments of social services give completed designation forms to school districts and eliminates the requirement that school districts submit designation forms to NYSED for all students identified as homeless, only those for whom the district is seeking tuition reimbursement (consistent with current practice). It also makes the following revisions to transportation:

- a. Clarifies that transportation beyond 50 miles is subject to a best interests determination using the same factors that school districts must use in reviewing school designations; and
- b. Requires transportation to the school of origin, which includes preschool, through the remainder of the school year in which the student becomes permanently housed and for one additional year if it is the student's terminal year in the school.

The responsibilities of LEAs are also revised to:

- a. Require continued enrollment and transportation during any enrollment dispute pending final resolution of all available appeals, including those commenced pursuant to Ed.L. § 310 (i.e., elimination of the stay provision);
- b. Ensure that homeless children are provided with services comparable to services offered to other students in the designated district of attendance including preschool and other educational programs or services for which a homeless student meets the eligibility criteria, such as programs for students with disabilities, ELLs, after-school programs, school nutrition programs and transportation, career and technical education, and programs for gifted and talented students, and to the extent such child or youth is eligible, services under ESSA;

c. Include the updated LEA McKinney-Vento Liaison responsibilities in ESSA; and

d. Require that information about a homeless child's living situation (e.g., homeless status, temporary address) be treated as a student education record and not be deemed to be directory information.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on school districts or charter schools beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch. 56 of the L. of 2017.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on school districts or charter schools beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch. 56 of the L. of 2017.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on school districts or charter schools beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch. 56 of the L. of 2017.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the rule have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to each of the 689 public school districts in the State, including those in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The proposed rule generally does not impose any additional compliance requirements upon local governments beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch.56 of the Laws of 2017. The proposed rule does not impose any additional professional services requirements on entities in rural areas.

3. COSTS:

The proposed amendment does not impose any costs on school districts or BOCES across the State, including those located in rural areas of the State beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch.56 of the Laws of 2017.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on school districts or charter schools beyond those required by federal McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.), as amended by Title IX of ESSA (P.L.114-95) and Part C of Ch.56 of the Laws of 2017. Therefore, no alternatives were considered.

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 necessary to conform Commissioner's regulations to the federal McKinney-Vento Homeless Assistance Act (42 U.S.C. section 11431 et seq.), as amended by Title IX of the Every Student Succeeds Act of 2015 (Public Law 114-95) and Part C of Chapter 56 of the Laws of 2017. Because of the nature of the proposed amendment, 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.

Department of Financial Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Permitted Use of Nationwide Multistate Licensing System and Registry (NMLS) in Submissions to the Department

I.D. No. DFS-29-17-00004-EP

Filing No. 490

Filing Date: 2017-06-28

Effective Date: 2017-06-28

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

Proposed Action: Addition of Part 501 to Title 23 NYCRR.

Statutory authority: Banking Law, sections 10, 14, 359, 371, 498-b, 561, 587 and 649; Financial Services Law, sections 102, 201, 202, 301, 302, 309 and 408

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

Specific reasons underlying the finding of necessity: The Department of Financial Services (the "Department"), has determined that it is appropriate to begin accepting certain submissions through the Nationwide Multistate Licensing System and Registry ("NMLS") to ease the administrative burden on regulated entities and to ensure New York remains current on technological advances in the regulation of financial services in the State. The Department anticipates that the use of NMLS will prove both easier and more cost effective for those entities that choose to take advantage of the permitted use of NMLS, and thus will benefit New York markets for financial products and services.

It is critical for the protection of the public that appropriate rules and regulations are in place on and after July 1, 2017 to allow for the use of NMLS in making submissions to the Department. The NMLS is scheduled to be activated for the purposes set forth in the emergency Regulation on July 1 2017, and this regulation is necessary to allow the voluntary use of NMLS on and after that date. Although the Department has diligently developed regulations to allow NMLS submissions, due to the short time frame, it is necessary to promulgate the rules on an emergency basis for the furtherance of the general welfare.

Subject: Permitted use of Nationwide Multistate Licensing System and Registry (NMLS) in submissions to the Department.

Purpose: To provide for the voluntary use of NMLS to allow for electronic filing of submissions to the Department.

Text of emergency/proposed rule: I, Maria T. Vullo, Superintendent of Financial Services of the State of New York, pursuant to the authority granted by Banking Law Sections 10, 14, 359, 371, 498-b, 561, 587 and 649, and Financial Services Law Sections 102, 201, 202, 301, 302, 309 and 408, do hereby promulgate Part 501 of Title 23 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to take effect upon filing with the Secretary of State of New York, to read as follows:

PART 501

NATIONWIDE MULTISTATE LICENSING SYSTEM AND REGISTRY

§ 501.1 Nationwide Multistate Licensing System and Registry (NMLS).

(a) Subject to the requirements of this Part, the Superintendent may allow any application or other submission to or with regard to the Department to be made or executed through the Nationwide Multistate Licensing System and Registry ("NMLS").

(b) An applicant, licensee or other entity or individual may file an application or other submission through the NMLS only if the applicant, licensee, or other entity or individual agrees in a manner acceptable to the Superintendent to comply with all of the filing requirements imposed by the NMLS and by the Department including the payment of all fees required by the NMLS and by the Department.

(c) An applicant, licensee or other entity or individual that files an application or other submission through the NMLS shall comply with all of the filing requirements imposed by the NMLS and the Department including the payment of all fees required by the NMLS and by the Department.

(d) The Superintendent may accept the information required to be reported by an applicant, licensee or other entity or individual through the NMLS in connection with an application or other submission as satisfaction of the information that would otherwise be required to be reported to

the Department, notwithstanding the requirements imposed by any other regulation or procedure.

(e) Fees payable to the NMLS shall be the sole property of the NMLS and shall not be deemed revenue of the Department.

(f) Filing requirements as well as instructions and other information regarding use of the NMLS may be provided on the Department's website, the NMLS's website and/or in any other reasonable location or manner, as determined by the Superintendent in his or her sole discretion.

(g) The Superintendent may prohibit an entity or individual from using, or may withdraw its approval of the use of, the NMLS if an entity or individual violates any provision of this Part or if the use of the NMLS would be inconsistent with the purpose or intent of any applicable law, regulation, procedure, order or similar authority. The Superintendent may notify such entity or individual by any method the Superintendent deems reasonable, including but not limited to a statement on the Department's website or by an electronic communication to the user. All entities and individuals affected by such notification shall cease using NMLS in accordance with the time frame set forth in the notification.

(h) The provisions of this Part shall not apply to the use of the NMLS by mortgage bankers, mortgage brokers, mortgage loan servicers, mortgage loan originators or similar mortgage-related entities or individuals acting as such pursuant to Banking Law Articles 12-D or 12-E.

(i) For purposes of this part, all references to the Nationwide Multistate Licensing System or NMLS shall include all related computer systems, the Conference of State Bank Supervisors, and State Regulatory Registry LLC.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 25, 2017.

Text of rule and any required statements and analyses may be obtained from: Thomas Eckmier, Department of Financial Services, One State Street, New York, N.Y. 10004, (212) 709-1661, email: Tom.Eckmier@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: Financial Services Law (or "FSL") § 102 sets forth the "purpose" and "goals" of the Financial Services Law including, as relevant, to "establish a modern system of regulation, rule making and adjudication" and to ensure "the prudent conduct of the providers of financial products and services, through responsible regulation and supervision."

FSL § 201 sets forth a declaration of policy for the Department of Financial Services (the "Department") and, as relevant, states that the Superintendent shall take such actions as the superintendent believes necessary to "foster the growth of the financial industry in New York and spur state economic development through judicious regulation and vigilant supervision."

FSL § 202 establishes the Superintendent of Financial Services and provides the Superintendent with broad rights, powers, duties and discretion with respect to matters under the Financial Services Law, the Banking Law, and the Insurance Law.

FSL § 301 sets forth the powers of the Superintendent under relevant law.

FSL § 302 sets forth the power of the Superintendent to prescribe, withdraw or amend rules and regulations involving financial products and services, including in effectuating and interpreting the provisions of the Financial Services Law, the Banking Law, and the Insurance Law, and in governing the procedures to be followed in the practice of the Department.

FSL § 309 states that, in addition to other remedies, the Superintendent may seek to obtain injunctions to restrain persons from acting in violation of the Financial Services Law, the Banking Law, and the Insurance Law.

FSL § 408 provides that the Superintendent may, among other things, levy civil penalties for violations of the Financial Services Law and the regulations issued thereunder.

Banking Law (or "BL") § 10 sets forth a declaration of policy, including that banking institutions will be regulated in a manner to insure safe and sound conduct and maintain public confidence.

BL § 14 references, without limitation, the policy of BL § 10 and sets forth certain powers of the Superintendent under the Banking Law, including the power to "make, alter and amend orders, rules and regulations not inconsistent with law" and, under certain enumerated circumstances, to "make variations from the requirements" of the Banking Law, provided such variations are "in harmony with the spirit of the law."

BL § 359 authorizes the Superintendent to promulgate regulations as may be necessary for the proper conduct of the business of licensed lenders, as well as for enforcement of the licensed lender article (BL Article 9).

BL § 371 authorizes the Superintendent to promulgate regulations as may be necessary for the proper conduct of the business of licensed check

cashers, as well as for enforcement of the licensed check casher article (BL Article 9-A).

BL § 498-b authorizes the Superintendent to promulgate regulations as may be necessary for the proper conduct of the business of licensed sales finance companies, as well as for enforcement of the sales finance company article (BL Article 11-B).

BL § 561 authorizes the Superintendent to promulgate regulations as may be necessary for the proper conduct of the business of licensed premium finance agencies, as well as for enforcement of the premium finance agency article (BL Article 12-B).

BL § 587 authorizes the Superintendent to promulgate regulations as may be necessary for the proper conduct of the business of licensed budget planners, as well as for enforcement of the budget planner article (BL Article 12-C).

BL § 649 authorizes the Superintendent to promulgate regulations as may be necessary or appropriate for the enforcement of the licensed money transmitter article (BL Article 13-B).

2. Legislative objectives: To ease administrative burden on regulated entities where prudent and to ensure New York remains current on technological advances in the regulation of financial services in the State.

3. Needs and benefits: This rule will allow regulated entities and applicants, which choose to do so, to use the Nationwide Multistate Licensing System and Registry (“NMLS”) in making submissions to the Department. The Department anticipates that this will prove both easier and more cost effective for those entities which choose to take advantage of the permitted use of NMLS.

4. Costs: The rule will impose no cost to the Department, as the rule does not increase the total amount of submissions to the Department. As the rule allows but does not require the use of NMLS in the making of submissions to the Department, there is no cost to any entity to comply with the regulation. If an individual or entity chooses to make use of NMLS to make submissions, there will be fees charged by NMLS for which the individual or entity will be responsible to pay. Use of NMLS under the regulation is voluntary, and should an individual or entity choose not to use NMLS there will be no costs to that individual or entity.

5. Local government mandates: This rule imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The rule does not require any additional reporting requirements, forms, or paperwork. The rule merely allows submissions, already required by law, to be made electronically via NMLS.

7. Duplication: This rule does not duplicate or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: Many of the Department’s regulated entities already use NMLS in their dealings with other states and would like permission to use NMLS in making submissions to the Department. While the alternative of not promulgating a regulation in response to this industry preference, and thus not permitting the use of NMLS in making submissions to the Department, was considered, the Department determined it was necessary in the interest of remaining current on technological advances in the regulation of financial services in the State and of easing administrative burdens on regulated entities and applicants where prudent.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: As the rule permits but does not require the use of NMLS, it will not take any time to achieve compliance with the rule.

Regulatory Flexibility Analysis

1. Effect of rule: The Department of Financial Services (the “Department”) does not anticipate that the rule will impact any local government as the rule only applies to entities regulated by the Department and applicants for various Department authorizations. While the rule applies to applicants and entities regulated by the Department, which include small businesses, the rule is permissive rather than prescriptive, and the Department anticipates that any small business which takes advantage of the permitted use of the Nationwide Multistate Licensing System and Registry (“NMLS”) will see both increased efficiencies and cost savings.

2. Compliance requirements: The rule permits on a voluntary basis the use of the NMLS in the making of submissions to the Department. As the rule does not require the use of NMLS, no small business or local government will be required to take any affirmative acts in order to comply with the rule.

3. Professional services: No small business or local government will need to obtain professional services to comply with this rule. As the rule merely permits the use of NMLS on a voluntary basis, the need for any additional professional services which may be needed to use the NMLS can be avoided by continuing to make submissions in hard-copy form.

4. Compliance costs: No small business or local government will incur any costs to comply with this rule. The Department anticipates that all regulated entities who decide to take advantage of the use of NMLS in

making submissions to the Department will see a cost savings. Any perceived cost to any small business or local government can be avoided by continuing to make hard-copy submissions to the Department rather than utilizing NMLS.

5. Economic and technical feasibility: As the rule permits but does not require the use of the NMLS there will be no economic or technical feasibility issues with complying with the rule. If economic or technical capabilities make the use of NMLS pursuant to the rule unfeasible, any small business or local government may continue to make submissions in hard-copy form.

6. Minimizing adverse impact: There will be no adverse impact of this rule on any entity subject to it. The rule allows, but does not require, the use of the NMLS in making submissions to the Department.

7. Small business and local government participation: The Department will comply with SAPA § 202-b(6) by publishing the proposed rule in the State Register and posting the proposed rule on the Department’s website. In developing the rule, the Department was cognizant of industry preference for the use of NMLS over hard-copy submissions.

Rural Area Flexibility Analysis

The Department of Financial Services (the “Department”) finds that this regulation, which permits the use of the Nationwide Multistate Licensing System and Registry (“NMLS”) in making submissions to the Department, does not impose any additional burden on persons located in rural areas, and will not have an adverse impact on rural areas. This regulation applies uniformly to regulated entities and applicants that do business in both rural and non-rural areas of New York State, and simply allows, on a voluntary basis, regulated entities and applicants to make certain submissions electronically to the Department through the NMLS rather than make, as is currently required, hard-copy submissions to the Department. This regulation will not impose any additional costs on rural areas.

Job Impact Statement

This rule should have little or no negative impact on jobs or employment opportunities in this state. The rule simply allows, on a voluntary basis, a broader range of regulated entities and applicants to make certain submissions electronically to the Department through the Nationwide Multistate Licensing System and Registry rather than make, as is currently required, hard-copy submissions to the Department.

NOTICE OF ADOPTION

Valuation of Individual and Group Accident and Health Insurance Reserves

I.D. No. DFS-17-17-00003-A

Filing No. 500

Filing Date: 2017-06-30

Effective Date: 2017-07-19

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

Action taken: Amendment of Part 94 (Regulation 56) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517

Subject: Valuation of Individual and Group Accident and Health Insurance Reserves.

Purpose: To adopt the 2013 Individual Disability Income Valuation Table.

Text or summary was published in the April 26, 2017 issue of the Register, I.D. No. DFS-17-17-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Amanda Fenwick, New York State Department of Financial Services, One Commerce Plaza, Albany, New York 12257, (518) 474-7929, email: amanda.fenwick@dfs.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office for People with Developmental Disabilities

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Home and Community Based Services (HCBS) Waiver and Non-Waiver Enrolled Respite Services

I.D. No. PDD-29-17-00005-EP

Filing No. 495

Filing Date: 2017-06-30

Effective Date: 2017-06-30

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

Proposed Action: Amendment of Parts 633, 635 and 686 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

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

Specific reasons underlying the finding of necessity: The emergency adoption of amendments that create five separate categories of Respite and amends the reimbursement fees for such services is necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system. Respite services are provided to individuals with developmental disabilities who are unable to care for themselves and are furnished on a short-term basis due to, the absence of or need for, temporary relief of primary caregivers.

The emergency amendments amend the existing regulations for HCBS Waiver Respite to create categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services and amends current reimbursement rates to now reimburse such services on a fee schedule determined according to the four Department of Health (DOH) regions. The regulations must be filed on an emergency basis to ensure continuity of critical services for individuals with developmental disabilities. Additionally, the emergency filing is necessary to incorporate service design changes based on stakeholder feedback as well as federal government approval requirements regarding the proposed service changes.

Subject: Home and Community Based Services (HCBS) Waiver and Non-Waiver Enrolled Respite Services.

Purpose: To amend the existing regulations for HCBS Waiver Respite and create five separate categories of Respite.

Text of emergency/proposed rule: Existing paragraph 635-10.5(h)(1) and (h)(2) are renumbered to (h)(2) and (h)(3) and a new (h)(1) is added as follows:

(1) *Applicability* – The provisions of this subdivision apply to all individuals enrolled in the OPWDD HCBS Waiver and non-waiver enrolled individuals who receive Respite services, including Provider Directed or Agency Supported Self-Directed Respite. Respite services for Family Care recipients is referenced in Section 687.9.

Paragraph 635-10.5(h)(4) is repealed and a new 635-10.5(h)(4) is added as follows:

(4) *Effective July 1, 2017, Respite services must be authorized and delivered as one of the following types of service categories:*

(i) *In-Home Respite services.* Services provided in a person's family home and may include staff accompanying the person to non-certified community settings.

(ii) *Camp Respite services.* Services provided at site-based locations that possess a permit under Subpart 7 of the New York State Sanitary Code.

(iii) *Site-Based Respite services.* Services are provided on a property that the provider owns, leases, or for which the provider pays property costs or usage fees. The property may be:

a) An OPWDD licensed free-standing respite facility;

b) A Systemic, Therapeutic Assessment, Resources and Treatment (START) Resource Center;

c) A Certified residential setting (e.g. Individualized Residential Alternative (IRA) or Community Residence); or

d) A certified or non-certified community setting that the

provider owns, rents or for which the provider pays property costs or usage fees.

(iv) *Recreational Respite services.* Services provided with a focus on recreational activities and/or community integration activities. Recreational Respite services are delivered in a community setting which the provider does not own or for which the provider does not pay property costs or usage fees.

(v) *Intensive Respite services.* Services provided based on an individual's level of need rather than the location. Individuals must be authorized to receive these services by OPWDD Regional Offices.

(a) *High behavioral needs* – Services provided to individuals with high behavioral needs that meet the qualifications for additional staffing supports and are overseen by 1) a licensed psychologist and/or a licensed clinical social worker as defined under New York State Education Law; or 2) a Behavioral Intervention Specialist (BIS) as defined by Paragraph 633.16(b)(32); or 3) a START Clinical Team Leader.

(1) An individual receiving Intensive Respite services for individuals with high behavioral needs must have a Plan that is developed by a licensed professional, START Team Member, or BIS that will instruct Respite staff on the implementation of Respite staff actions to address the individual's high behavioral needs.

(2) Respite staff must be trained in the implementation of the Plan by the licensed professional, START Team Member, or BIS and the Plan must be reviewed by the licensed professional, START Team Member, or BIS every six (6) months at a minimum or as needed based on the individual's changing needs or schedule for service use.

(3) Respite staff must be trained, as clinically necessary, in positive behavioral approaches and strategies to better support an individual during the delivery of Respite services. Depending on the needs of the individual or setting, Respite staff may receive training consistent with the requirements of the OPWDD-approved training course on the use of positive behavioral approaches, strategies and/or supports and physical intervention techniques as described in Subparagraphs 633.16(i)(3)(i) and (ii).

(4) The agency delivering the Intensive Respite services for individuals with high behavioral needs directly employs or contracts with a licensed professional, START Team Member and/or BIS who is assigned to the Intensive Respite services program, directly oversees and/or provides Respite services, and whose staffing costs are assigned to the Respite program for cost reporting system.

(5) The use of any medications or mechanical devices prescribed by a physician or health care provider for the purposes of treatment or protection due to self-injurious, aggressive, or otherwise destructive behavior must only be used as part of a physician or health care provider's order and therefore should not be incorporated into a Plan developed or used for Intensive Respite services. The use of these interventions should only be used as prescribed by a physician or other health care provider.

(6) The Plan must not include any physical interventions as defined in Paragraph 633.16(b)(23).

(7) If a behavior support plan meeting all Section 633.16 requirements has been approved, and the plan can be implemented using the resources available in the Respite setting, the plan may be used by appropriately trained staff for providing Intensive Respite services for individuals with high behavioral needs. These plans may include restrictive/intrusive interventions or right limitations, with the exception of exclusionary time-out. In these cases, all regulatory expectations, obligations, and responsibilities related to Section 633.16 will supersede any requirements of this Part.

(8) Exclusionary time out is prohibited in Intensive Respite services.

(9) Nothing in this Part will prevent the use of an emergency intervention by Respite staff to help prevent an individual in their care from seriously injuring him/herself or others. Emergency techniques to prevent or minimize injury may be used only for as long as the duration of the event, with the least restrictive intervention being utilized. The use of any emergency physical intervention will require adherence to Subparagraphs 633.16(j)(1)(vi) through (ix). These events may constitute a reportable incident under Part 624 and should be reported in accordance with the requirements of that Part.

(b) *High medical needs* – Services provided to individuals with high medical needs that meet the qualifications for additional staffing supports and are overseen by licensed clinical professionals including, but not limited to: a Physician; Physician Assistant (PA); Special Assistant; Registered Professional Nurse (RN); Nurse Practitioner; Clinical Nurse Specialist; and/or a Licensed Practical Nurse (LPN).

(1) An individual receiving Intensive Respite services for individuals with high medical needs must have a Plan of Nursing Services (PONS) that is developed by an RN. The PONS instructs Respite staff on the implementation of Respite staff actions to address the individual's high medical needs.

(2) *Respite staff must be trained in the implementation of the PONS by the RN. The PONS must be reviewed by the RN annually at a minimum, or as needed based on the individual's changing needs or schedule for service use.*

(3) *The agency delivering the Intensive Respite services for individuals with high medical needs must directly employ or contract with an RN who is assigned to the Intensive Respite services program. The RN must provide direct oversight in the administration of the PONS, or must provide oversight in the delegation of certain tasks described within the PONS. The RN staffing costs are assigned to the Respite program for cost reporting system.*

(4) *Direct hands-on nursing services that cannot be delegated must be accessed via State Plan private duty nursing in accordance with regulations and guidance issued by the New York State Department of Health.*

(c) *Billing limits - Intensive Respite services for individuals with high behavioral needs or high medical needs may be provided to individuals in any of the above Respite categories (e.g. Intensive Respite may be provided In-Home or in a Site-Based Respite setting). The billing for Intensive Respite services for individuals remains subject to the same billing limits that apply to the category in which the Intensive Respite Services are provided as described below in paragraph (5).*

Paragraph 635-10.5(h)(5) is repealed and a new 635-10.5(h)(5) is added as follows:

(i) *Billing limits:*

(i) *Non-overnight Respite services are those an individual receives for a portion of the day but not overnight. For all Respite Services described in paragraph (4), except In-Home Respite services, the provider may bill for up to ten (10) hours of service provision of Respite services in a calendar day when not associated with overnight service provisions. For In-Home Respite services, there is no daily billing limit associated with non-overnight services.*

(ii) *Overnight Respite is defined as Respite services provided to a person on two (2) consecutive days when Respite staff are providing oversight to a person during nighttime hours. Overnight Respite Services may be delivered for In-Home, Site Based, Camp, and Intensive Respite service categories.*

a) *Billing for Overnight Respite services at the full hourly fee is limited to no more than forty-two (42) days in a one-hundred-eighty (180) day period for an individual. After the forty-two (42) days, any continued overnight billing will be limited to the regional average daily rate paid for Supervised IRA services on a Per Diem basis.*

b) *Billing for Overnight Respite in a Camp setting is limited to fourteen (14) days per calendar year per individual.*

Paragraph 635-10.5(h)(7) is repealed and a new 635-10.5(h)(7) is added as follows:

(7) *Authorization processes.*

(i) *In-Home, Camp, Site-Based and Recreational Respite services:*

(a) *An individual must receive authorization from an OPWDD Regional Office for Respite services. Respite units may be used for any of the above Respite categories based on the individual's interests and the availability of services.*

(b) *It is the provider's responsibility to ensure that the appropriate category of Respite is billed for the Respite service delivered.*

(ii) *Intensive Respite services:*

(a) *An individual must receive authorization from an OPWDD Regional Office if the individual meets documented behavioral support and/or medical support needs during the hours Respite is provided in order to maintain the health and safety of the individual or others in the Respite environment, such as peers or staff.*

(b) *Intensive Respite services for individuals with high behavioral and/or high medical needs must have a documented plan and/or PONS developed and implemented prior to Intensive Respite service delivery. Provider agencies must meet the qualifications in Subparagraph (4)(v) above in order to receive and maintain authorization to deliver Intensive Respite services.*

New paragraph 635-10.5(h)(8) is added as follows:

(8) *Transportation. Transportation to and from Respite services may be included in a provider's billable Respite time if the provider is responsible for providing transportation to the individual receiving Respite services. Transportation time must not include travel time for staff when traveling to and from the service delivery location without the accompaniment of the individual receiving Respite services.*

New paragraph 635-10.5(h)(9) is added as follows:

(9) *Service documentation. Service documentation must be contemporaneous with Respite service provision. Service documentation must include the following elements:*

(i) *Individual's name and, if applicable, the Medicaid ID (CIN);*

(ii) *Identification of the waiver service provided;*

(iii) *Identification of the category of Respite service provided;*

(iv) *The name of the agency providing the Respite service;*

(v) *The date the service was provided;*

(vi) *The start time and stop time for each continuous period of Respite service;*

(vii) *Verification of service provision by the Respite staff person who delivered the service (accomplished with providing the staff person's signature and title); and*

(viii) *The date the service was documented (the date must be contemporaneous with service provision).*

New paragraph 635-10.5(h)(10) is added as follows:

(10) *Individualized Service Plan (ISP)/Life Plan (LP). The ISP/LP must include the following elements related to the Respite service:*

(i) *Respite must be included as a waiver service the individual receives;*

(ii) *For frequency and duration, the ISP/LP must specify that the frequency is "hourly" and the duration is "ongoing"; and*

(iii) *The effective date for Respite services must be on or before the first day the agency bills for Respite services.*

New paragraph 635-10.5(h)(11) is added as follows:

(11) *Document retention. All documentation must be retained for a period of at least six (6) years from the billing date of the Respite service.*

New paragraph 635-10.5(h)(12) is added as follows:

(12) *Liability for services. Liability for Respite services must be determined in accordance with Sub-part 635-12 of this Part.*

Existing subparagraph 686.15(a)(1)(i)(a) is deleted and a new subparagraph 686.15(a)(1)(i)(a) is added as follows:

(a) *Overnight Respite may be provided for no more than forty-two (42) days in a one-hundred-eighty (180) day period. After the forty-two (42) days, any continued overnight billing will be limited to the regional average daily rate paid for Supervised IRA services.*

Part 633.16(a)(1)(ii)(a) is amended as follows:

(a) *Free standing respite, except as described in Part 635-10.5(h).*

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 27, 2017.

Text of rule and any required statements and analyses may be obtained from: Office of Counsel, Bureau of Policy and Regulatory Affairs, Office for People With Developmental Disabilities (OPWDD), 44 Holland Avenue 3rd Floor, Albany, NY 12229, (518) 474-7700, email: rau.unit@opwdd.ny.gov

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment and an E.I.S. is not needed.

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:**

a. OPWDD has the statutory responsibility to provide and encourage the provision of appropriate programs, supports, and services in the areas of care, treatment, habilitation, rehabilitation, and other education and training of persons with developmental disabilities, as stated in the New York State (NYS) Mental Hygiene Law Section 13.07.

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

c. OPWDD has the statutory authority to adopt regulations concerned with the operation of programs and the provision of services, as stated in the NYS Mental Hygiene Law Section 16.00.

d. OPWDD has the authority to prescribe the terms and conditions for issuance of an operating certificate, as stated in the NYS Mental Hygiene Law Section 16.05.

2. **Legislative Objectives:** The proposed regulations further legislative objectives embodied in sections 13.07, 13.09(b), 16.00 and 16.05 of the Mental Hygiene Law. The regulations amend the existing regulations for both HCBS Waiver and non-waiver Respite to create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule across the four Department of Health (DOH) regions.

3. **Needs and Benefits:** The proposed regulations amend the existing regulations for HCBS Waiver and non-waiver Respite and create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Reimbursement for the new

five separate categories of Respite on a fee schedule across the four Department of Health (DOH) regions.

The proposed regulations amend day time and overnight billing limits.

The proposed regulations amend the authorization process for an individual to receive Respite services, and the length of time an individual can receive services.

The proposed regulations will revise daily documentation requirements for Respite services.

4. Costs:

a. Costs to the agency and to the State and its local governments:

There is no anticipated impact on Medicaid expenditures as a result of the proposed regulations. The regulations merely amend the existing regulations for HCBS Waiver and non-waiver Respite to create five separate categories of Respite. Consequently, there are no anticipated costs for the State in its role of paying for Medicaid costs.

These regulations will not have any fiscal impact on local governments, as the contribution of local governments to Medicaid has been capped. Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level.

There are no anticipated costs to OPWDD in its role as a provider of services to comply with the new requirements. The amendments merely amend the existing regulations for HCBS Waiver and non-waiver Respite to create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule across the four Department of Health (DOH) regions.

b. Costs to private regulated parties:

There are no anticipated costs to regulated providers to comply with the proposed regulations. The amendments merely amend the existing regulations for HCBS Waiver and non-waiver Respite to create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule across the four Department of Health (DOH) regions.

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

6. Paperwork: Providers will experience an increase in paperwork as a result of the proposed regulations because the regulations require providers to document the different models of Respite provisions according to specified guidelines.

7. Duplication: The proposed regulations do not duplicate any existing State or Federal requirements on this topic.

8. Alternatives: OPWDD did not consider any other alternatives to the proposed regulations. The regulations are necessary to create the five new Respite categories and to change how Respite is reimbursed.

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

10. Compliance Schedule: OPWDD is planning to adopt the proposed amendments as soon as possible within the timeframes mandated by the State Administrative Procedure Act. The proposed regulations were discussed with and reviewed by representatives of providers in advance of this proposal. Additionally, beginning in December 2016, OPWDD has conducted several trainings with OPWDD Respite providers regarding the changes detailed in these proposed regulations. OPWDD expects that providers will be in compliance with the proposed requirements at the time of their effective date.

Regulatory Flexibility Analysis

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

The proposed regulations amend the existing regulations for HCBS Waiver and non-waiver Respite and create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule determined according to the four Department of Health (DOH) regions. The amendments will not result in costs or new compliance requirements for regulated parties and consequently, the amendments will not have any adverse effects on providers of small business and local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not being submitted because the 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 professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the amendments.

The proposed regulations amend the existing regulations for HCBS Waiver and non-waiver Respite and create five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule determined according to the four Department of Health (DOH) regions. OPWDD expects that providers will be in compliance with the proposed requirements at the time of their effective date. The amendments will not result in costs or new compliance requirements for regulated parties and consequently, the amendments will not have any adverse effects on providers in rural areas and local governments.

Job Impact Statement

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

The proposed regulations amend existing regulations for HCBS Waiver and non-waiver Respite and creates five separate categories of Respite including In-Home, Camp, Site-Based, Recreational, and Intensive Respite Services. Respite is currently reimbursed using provider-specific rates and this change will now reimburse such services on a fee schedule determined according to the four Department of Health (DOH) regions. The amendments will not result in costs, including staffing costs, or new compliance requirements for providers and consequently, the amendments will not have a substantial impact on jobs or employment opportunities in New York State.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition to Submeter Gas

I.D. No. PSC-29-17-00006-P

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

Proposed Action: The Public Service Commission is considering a petition, filed by LaGuardia Gateway Partners, to submeter gas at LaGuardia Airport Central Terminal B, Flushing, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 5(1), 65(1), 66(1), (2), (3), (4), (8), (12) and (14)

Subject: Petition to submeter gas.

Purpose: To consider the petition of LaGuardia Gateway Partners, to submeter gas at LaGuardia Airport Central Terminal B, Flushing, NY.

Substance of proposed rule: The Public Service Commission is considering the petition filed by LaGuardia Gateway Partners, on May 11, 2017, to submeter natural gas to thirteen commercial tenants and provide central heat and refrigeration to the LaGuardia Airport Central Terminal Building 'B' in Flushing, New York, located in the service territory of National Grid. The full text of the petition may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. 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.

(17-G-0285SP1)

Susquehanna River Basin Commission

INFORMATION NOTICE

Susquehanna River Basin Commission Final Rule

SUMMARY: This document contains rules that would amend the regulations of the Susquehanna River Basin Commission (Commission) to clarify application requirements and standards for review of projects, add a subpart to provide for registration of grandfathered projects, and revise requirements dealing with hearings and enforcement actions. These rules are designed to enhance the Commission's existing authorities to manage the water resources of the basin and add regulatory clarity.

DATES: This rule is effective July 1, 2017, except for the amendments to § 806.4(a)(1)(iii) and (a)(2)(iv) and the addition of subpart E to part 806 which are effective January 1, 2018.

ADDRESSES: Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, Esq., General Counsel, telephone: 717-238-0423, ext. 1312; fax: 717-238-2436; e-mail: joyler@srbc.net. Also, for further information on the final rulemaking, including the comment response document, visit the Commission's website at www.srbc.net.

SUPPLEMENTARY INFORMATION: Notice of proposed rulemaking was published in the Federal Register on September 21, 2016 (81 FR 64812); New York Register on October 5, 2016; Pennsylvania Bulletin on October 8, 2016; and Maryland Register on October 14, 2017. The Commission convened four public hearings: on November 3, 2016, in Harrisburg, Pennsylvania; on November 9, 2016, in Binghamton, New York; on November 10, 2016, in Williamsport, Pennsylvania; and on December 8, 2016, in Annapolis, Maryland. A written comment period was held open through January 30, 2017.

The Commission received 14 written public comments in addition to testimony received at the public hearings. The Commission has prepared a comment response document, which is available to the public at www.srbc.net. Comments that led to a change to the proposed rulemaking and their responses are discussed below.

Registration of Grandfathered Projects, Subpart E and § 806.4(a)(1)(iii) and (a)(2)(iv)

Comment: The Commission should allow projects to register a grandfathered amount previously determined by the Commission if it is not seeking a higher amount through the registration process.

Response: The Commission agrees that previous grandfathering determinations should be honored if the project wishes to register that amount. A new paragraph (c) is added in § 806.44 allowing the Executive Director to use past grandfathering determinations, and revisions are made to § 806.42(b) allowing the Commission to waive certain registration information if a project is relying on a past grandfathering determination.

Comment: Ongoing reporting requirements need to be linked to member jurisdiction reporting to avoid duplication of effort and confusion.

Response: The Commission agrees with the commenter that it is important to avoid unnecessary duplication of effort with state law requirements. Section 806.43(c) notes that if quantity reporting is required by the member jurisdiction where the project is located, the Commission may accept that reporting to satisfy the requirements of this paragraph. This evidences the Commission's intent to use its best efforts to accept state reporting requirements where appropriate. The Commission will add language to §§ 806.42(a)(6) and 806.43(c) to clarify its intention to rely on member jurisdiction reporting where it is able, and that any additional reporting required will be because it is not duplicated by the member jurisdiction. A new § 806.43(d) is added to emphasize the commitment of the Commission and its member jurisdiction to share all reporting data and to further the goal of creating a unified data set for all agencies involved.

Comment: The proposed rule at § 806.4(a)(1)(iii)(A) and (a)(2)(iv)(A) changes the current rule that allows a grandfathered consumptive use an additional increase of up to 20,000 gpd and a grandfathered withdrawal an additional increase of up to 100,000 gpd before review and approval of the grandfathered activity is triggered. This leeway should be restored for grandfathered projects.

Response: In most instances, the registration process will allow grandfathered projects sufficient margin for operational flexibility. However, the Commission agrees that the registration process should not put a project in jeopardy of needing review and approval subsequent to registration absent a change to the project. A new factor is added as § 806.44(b)(4) that allows the Executive Director to consider whether the grandfathered amount includes an operational margin of safety.

Comment: The proposed rule provides that the determination of the grandfathered quantity will be based on the most recent data. This may be too restrictive and projects should be allowed to submit more than the last five years of data and where such data is submitted, the Executive Director should base the determination under § 806.44 on the peak 30-day average for withdrawals and consumptive uses shown by the data.

Response: The Commission agrees that the factor as written could be clarified and the final rule reflects a revision to § 806.44(b)(1) to allow more than a minimum of five years of data to be submitted and that the Executive Director will consider the withdrawal and use data and the peak consecutive 30-day average shown by all the data submitted.

Consumptive Use Mitigation, § 806.22

Comments: The Commission should not adopt the Consumptive Use Mitigation Policy and the changes to the Consumptive Use Mitigation Rule.

The Commission should not shift the responsibility for physical consumptive use mitigation to project sponsors because project sponsor based mitigation will be more balkanized and less effective and the Commission has powerful tools to set up projects to provide such mitigation from the Compact.

The mitigation plan proposal should be removed or smaller projects should be able to have an abbreviated consumptive use mitigation alternative analysis.

New consumptive use mitigation requirements should not be applied retroactively to existing projects upon renewal.

The proposed rule should be revised to allow greater use of groundwater storage and quarries and be more flexible with respect to the "no impacts" to surface water requirements for such mitigation.

The Commission should focus its mitigation requirements to the low flow period.

All references to water critical planning areas should be removed. Article 11 of the Compact provides for designation of protected areas. This concept appears to circumvent those procedures.

Water critical areas should not be based on member jurisdiction planning areas and it should not be a mechanism to require mitigation for pre-compact consumptive use.

Response: The Commission has reviewed the detailed comments regarding how the Commission requires consumptive use mitigation and the options of projects to provide such mitigation. The Commission will further examine and reevaluate its policies and procedures for consumptive use and consumptive use mitigation in a more comprehensive fashion. As a result, the Commission will not move forward with the changes to the Consumptive Use Mitigation Policy and the consumptive use mitigation rule as follows. The definition of "water critical area" in § 806.3 is removed and all references to water critical areas are removed from §§ 806.22 and 808.1. The reference and changes associated with a mitigation plan in § 806.22(b) are removed. The changes associated with amending the 90 day mitigation requirement to 45 days in § 806.22(b)(1)(i) and (ii) are removed and reserved for the reevaluation process for consumptive use mitigation described above.

Project Review Application Procedures and Standards for Review and Approval—18 CFR Part 806, Subparts B and C

Comment: The Commission should clarify how the alternatives analysis under § 806.14(b)(2)(v) differs from the previous provision in the current rules at § 806.14(b)(1)(iii) and specify what is expected from applicants.

Response: The purpose for this requirement is to document the project sponsor's consideration of alternatives during planning of the proposed project to include, but not be limited to, identification of reasonable alternatives to the proposed water withdrawal project, the extent of the project sponsor's economic and technical investigation, the adequacy of the source to meet the demand, an assessment of the potential environmental impact, and measures for avoidance or minimization of adverse impact of each alternative. Specifically, the alternatives analysis should include identification of reasonable alternative water sources and locations, including opportunities for uses of lesser quality waters; project footprint and infrastructure; opportunities for water conservation or water saving technology; requirements of the uses of the water as related to the proposed locations; the economic feasibility of the alternative(s) and technical opportunities or limitations identified in the evaluation of reasonable alternate sites. The Commission is preparing a draft policy to

outline how alternative analyses should be conducted and evaluated, and will release it for public comment prior to consideration for Commission adoption. In addition, on final rulemaking, the Commission will adjust the language of § 806.14(b)(1)(v) to make clear that the analysis is needed only for new projects and for major modifications that seek to increase the surface water withdrawal.

Comment: The Commission should reconcile the application requirements in § 806.14 to recognize that the potential for waiver of the aquifer testing requirements in § 806.12.

Response: The Commission agrees and has revised § 806.14(b)(2)(i) and (d)(2)(i).

Comment: The Commission should clarify whether renewals that involve a major modification should be handled under the new application and major modification standards in § 806.14(a) and (b) or in the renewal standards in § 806.14(c) and (d).

Response: The Commission agrees that the rule should be clarified and proposes changes to § 806.14(c) and 806.14(d)(2), (4) and (6) to establish that renewal applications, with either minor or major modifications, are subject to § 806.14(c) and (d).

Comment: The Commission should accept other types of certified mail proof of delivery beyond the US Postal Service under § 806.15(g).

Response: The Commission agrees and § 806.15(g) is revised to include the verified return delivery receipt from a comparable delivery service to the U.S. Postal Service.

Comment: The Commission should revise § 806.15(b)(3) to clarify which property is subject to the notice requirements and should read "where the property of such property owner is served by a public water supply."

Response: The Commission agrees and the final rulemaking is revised accordingly.

Comment: The Commission should exempt AMD passive treatment systems from the requirements for mining and construction dewatering under §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5).

Response: The Commission has not extended its review jurisdiction over passive AMD treatment facilities and nothing in the proposed rule was meant to alter that long standing determination. Accordingly, the final rule contains revisions to §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5) to remove the word "gravity-drained" and clarify its application to "AMD facilities that qualify as a withdrawal."

Miscellaneous Changes

Comment: Including in § 808.2(a) that the 30 day appeal period can run from publication on the Commission's website creates issues, including knowing whether the appeal period runs from publication on the website or the Federal Register and the fact that it is not always clear when something is posted to a website or is easily found on the website.

Response: The final rule revises § 808.2(a) to remove this language. The 30-day appeal period for third party appeals will run from the date of publication in the Federal Register.

Comment: The addition of "or other fluids associated with the development of natural gas resources" to the definition of "production fluids" under § 806.3 is inaccurate and over-inclusive. The revised definition of production fluids would cause confusion with the member jurisdiction terminology. The commenter is supportive of the stated goal of this change and proposed additional language to be added in other parts of regulations.

Response: The final rule removes the change to the definition of "production fluid." The revision proposed by the commenter will be evaluated for inclusion in a future rulemaking.

Comment: The addition of "consumptive use" to the definition of "facility" in § 806.3 is unwarranted as the definition of "facility" matches the definition in the Compact.

Response: The final rule will remove the amendment to the definition of "facility". However, the definition of facility includes plants, structures, machinery and equipment acquired, constructed, operated or maintained for the beneficial use of water resources that includes the consumptive use of water.

The Commission also is making additional housekeeping changes on the final rulemaking:

1) § 806.6(b)(6) (related to transfers of approvals) was added to recognize registered grandfathered aspects of a project under subpart E.

2) The phrase "hydro report" in § 806.14(d)(2)(ii) was clarified to "hydrogeologic report".

3) The word "Commission's" is removed from § 806.41(c).

Transition Issues

As noted in the DATES section, this rule will take effect on July 1, 2017, with the exception of the adoption of subpart E (related to registration of grandfathered projects) and the corresponding changes to § 806.4(a)(1)(iii) and (a)(2)(iv), which take effect on January 1, 2018.

Coincident with the authorization to adopt this final rulemaking, the Commission also adopted a Regulatory Program Fee Schedule that sets forth the fee for registration for grandfathered projects. This fee schedule is available on the Commission's website at www.srbc.net/policies/policies.htm.

List of Subjects in 18 CFR Parts 806 and 808

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission amends 18 CFR parts 806 and 808 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

1. The authority citation for part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509, et seq.

2. Amend § 806.1 by revising paragraphs (a) and (f) to read as follows:
§ 806.1 Scope.

(a) This part establishes the scope and procedures for review and approval of projects under section 3.10 of the Susquehanna River Basin Compact, Pub. L. 91-575, 84 Stat. 1509, et seq., (the compact) and establishes special standards under section 3.4(2) of the compact governing water withdrawals, the consumptive use of water, and diversions. The special standards established pursuant to section 3.4(2) shall be applicable to all water withdrawals and consumptive uses in accordance with the terms of those standards, irrespective of whether such withdrawals and uses are also subject to project review under section 3.10. This part, and every other part of 18 CFR chapter VIII, shall also be incorporated into and made a part of the comprehensive plan.

(f) Any Commission forms or documents referenced in this part may be obtained from the Commission at 4423 North Front Street, Harrisburg, PA 17110, or from the Commission's website at www.srbc.net.

3. In § 806.3, add, in alphabetical order, a definition for "Wetlands" to read as follows:

§ 806.3 Definitions.

Wetlands. Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

4. Amend § 806.4 by revising paragraphs (a) introductory text, (a)(1)(iii), (a)(2) introductory text, and (a)(2)(iv) and adding paragraph (a)(3)(vii) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) Except for activities relating to site evaluation, to aquifer testing under § 806.12 or to those activities authorized under § 806.34, no person shall undertake any of the following projects without prior review and approval by the Commission. The project sponsor shall submit an application in accordance with subpart B of this part and shall be subject to the applicable standards in subpart C of this part.

(1) ***

(iii) With respect to projects that existed prior to January 23, 1971, any project:

(A) Registered in accordance with subpart E of this part that increases its consumptive use by any amount over the quantity determined under § 806.44;

(B) Increasing its consumptive use to an average of 20,000 gpd or more in any consecutive 30-day period; or

(C) That fails to register its consumptive use in accordance with subpart E of this part.

(2) Withdrawals. Any project, including all of its sources, described below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in §§ 806.21 and 806.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph (a)(2) shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, § 806.5, or part 801 of this chapter. The taking or removal of water by a public water supplier indirectly through another public water supply system or another water user's facilities shall constitute a withdrawal hereunder.

(iv) With respect to groundwater projects that existed prior to July 13, 1978, surface water projects that existed prior to November 11, 1995, or projects that existed prior to January 1, 2007, with multiple sources

involving a withdrawal of a consecutive 30-day average of 100,000 gpd or more that did not require Commission review and approval, any project:

(A) Registered in accordance with subpart E of this part that increases its withdrawal by any amount over the quantity determined under § 806.44;

(B) Increasing its withdrawal individually or cumulatively from all sources to an average of 100,000 gpd or more in any consecutive 30-day period; or

(C) That fails to register its withdrawals in accordance with subpart E of this part.

(3) ***

(vii) The diversion of any flowback or production fluids from hydrocarbon development projects located outside the basin to an in-basin treatment or disposal facility authorized under separate government approval to accept flowback or production fluids, shall not be subject to separate review and approval as a diversion under this paragraph (c)(3), provided the fluids are handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction.

5. Amend § 806.6 by adding paragraph (b)(6) to read as follows:
§ 806.6 Transfer of approvals.

(b) ***

(6) The project is registered under subpart E of this part.

6. Amend § 806.11 by revising paragraph (b) to read as follows:
§ 806.11 Preliminary consultations.

(b) Except for project sponsors of electric power generation projects under § 801.12(c)(2) of this chapter, preliminary consultation is optional for the project sponsor (except with respect to aquifer test plans under § 806.12) but shall not relieve the sponsor from complying with the requirements of the compact or with this part.

7. Amend § 806.12 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 806.12 Constant-rate aquifer testing.

(a) Prior to submission of an application pursuant to § 806.13, a project sponsor seeking approval for a new groundwater withdrawal, a renewal of an expiring groundwater withdrawal, or an increase of a groundwater withdrawal shall perform a constant-rate aquifer test in accordance with this section.

(f) Review of submittals under this section may be terminated by the Commission in accordance with the procedures set forth in § 806.16.

8. Revise § 806.14 to read as follows:

§ 806.14 Contents of application.

(a) Applications for a new project or a major modification to an existing approved project shall include, but not be limited to, the following information and, where applicable, shall be subject to the requirements in paragraph (b) of this section and submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters, the project location displayed on a map with a 7.5-minute USGS topographic base, and evidence of legal access to the property upon which the project is proposed.

(3) Project description, including: purpose, proposed quantity to be withdrawn or consumed, if applicable, and identification of all water sources related to the project including location and date of initiation of each source.

(4) Anticipated impact of the project, including impacts on existing water withdrawals, nearby surface waters, and threatened or endangered species and their habitats.

(5) The reasonably foreseeable need for the proposed quantity of water to be withdrawn or consumed, including supporting calculations, and the projected demand for the term of the approval.

(6) A metering plan that adheres to § 806.30.

(7) Evidence of coordination and compliance with member jurisdictions regarding all necessary permits or approvals required for the project from other federal, state or local government agencies having jurisdiction over the project.

(8) Project estimated completion date and estimated construction schedule.

(9) Draft notices required by § 806.15.

(10) The Commission may also require the following information as deemed necessary:

(i) Engineering feasibility.

(ii) Ability of the project sponsor to fund the project.

(b) Additional information is required for a new project or a major modification to an existing approved project as follows.

(1) Surface water. (i) Water use and availability.

(ii) Project setting, including surface water characteristics, identification of wetlands, and site development considerations.

(iii) Description and design of intake structure.

(iv) Anticipated impact of the proposed project on local flood risk, recreational uses, fish and wildlife, and natural environment features.

(v) For new projects and major modifications to increase a withdrawal, alternatives analysis for a withdrawal proposed in settings with a drainage area of 50 miles square or less, or in a waterway with exceptional water quality, or as required by the Commission.

(2) Groundwater—(i) With the exception of mining related withdrawals solely for the purpose of dewatering; construction dewatering withdrawals and withdrawals for the sole purpose of groundwater or below water table remediation generally which are addressed in paragraph (b)(6) of this section, the project sponsor shall provide an interpretative report that includes all monitoring and results of a constant-rate aquifer test consistent with § 806.12 and an updated groundwater availability estimate if changed from the aquifer test plan, unless a request for a waiver of the requirements of § 806.12 is granted. The project sponsor shall obtain Commission approval of the test procedures prior to initiation of the constant-rate aquifer test.

(ii) Water use and availability.

(iii) Project setting, including nearby surface water features.

(iv) Groundwater elevation monitoring plan for all production wells.

(v) Alternatives analysis as required by the Commission.

(3) Consumptive use. (i) Consumptive use calculations, and a mitigation plan consistent with § 806.22(b).

(ii) Water conservation methods, design or technology proposed or considered.

(iii) Alternatives analysis as required by the Commission.

(4) Into basin diversions. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(c).

(ii) Identification of the source and water quality characteristics of the water to be diverted.

(5) Out of basin diversions. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(b).

(ii) Project setting.

(6) Other projects. Other projects, including without limitation, mine dewatering, construction dewatering, water resources remediation projects, and AMD remediation facilities that qualify as a withdrawal.

(i) In lieu of aquifer testing, report(s) prepared for any other purpose or as required by other governmental regulatory agencies that provides a demonstration of the hydrogeologic and/or hydrologic effects and limits of said effects due to operation of the proposed project and effects on local water availability.

(ii) [Reserved]

(c) All applications for renewal of expiring approved projects, including those with minor or major modifications, shall include, but not be limited to, the following information, and, where applicable, shall be subject to the requirements in paragraph (d) of this section and submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters, the project location displayed on map with a 7.5-minute USGS topographic base, and evidence of legal access to the property upon which the project is located.

(3) Project description, to include, but not be limited to: purpose, proposed quantity to be withdrawn or consumed if applicable, identification of all water sources related to the project including location and date of initiation of each source, and any proposed project modifications.

(4) The reasonably foreseeable need for the requested renewal of the

quantity of water to be withdrawn or consumed, including supporting calculations, and the projected demand for the term of the approval.

(5) An as-built and approved metering plan.

(6) Copies of permits from member jurisdictions regarding all necessary permits or approvals obtained for the project from other federal, state, or local government agencies having jurisdiction over the project.

(7) Copy of any approved mitigation or monitoring plan and any related as-built for the expiring project.

(8) Demonstration of registration of all withdrawals or consumptive uses in accordance with the applicable state requirements.

(9) Draft notices required by § 806.15.

(d) Additional information is required for the following applications for renewal of expiring approved projects.

(1) Surface water. (i) Historic water use quantities and timing of use.

(ii) Changes to stream flow or quality during the term of the expiring approval.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose.

(2) Groundwater—(i) The project sponsor shall provide an interpretative report that includes all monitoring and results of any constant-rate aquifer testing previously completed or submitted to support the original approval. In lieu of a testing report, historic operational data pumping and elevation data may be considered, as a request for waiver of the requirements of § 806.12. Those projects that did not have constant-rate aquifer testing completed for the original approval that was consistent with § 806.12 or sufficient historic operational pumping and groundwater elevation data may be required to complete constant-rate aquifer testing consistent with § 806.12, prepare and submit an interpretative report that includes all monitoring and results of any constant-rate aquifer test.

(ii) An interpretative report providing analysis and comparison of current and historic water withdrawal and groundwater elevation data with previously completed hydrogeologic report.

(iii) Current groundwater availability analysis assessing the availability of water during a 1-in-10 year recurrence interval under the existing conditions within the recharge area and predicted for term of renewal (i.e., other users, discharges, and land development within the groundwater recharge area).

(iv) Groundwater elevation monitoring plan for all production wells.

(v) Changes to the facility design.

(vi) Any proposed changes to the previously authorized purpose.

(3) Consumptive use. (i) Consumptive use calculations, and a copy of the approved plan or method for mitigation consistent with § 806.22.

(ii) Changes to the facility design.

(iii) Any proposed changes to the previously authorized purpose.

(4) Into basin diversion. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(c).

(ii) Identification of the source and water quality characteristics of the water to be diverted.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose.

(5) Out of basin diversion. (i) Historic water use quantities and timing of use.

(ii) Changes to stream flow or quality during the term of the expiring approval.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose.

(6) Other projects. Other projects, including without limitation, mine dewatering, water resources remediation projects, and AMD facilities that qualify as a withdrawal.

(i) Copy of approved report(s) prepared for any other purpose or as required by other governmental regulatory agencies that provides a demonstration of the hydrogeologic and/or hydrologic effects and limits of said effects due to operation of the project and effects on local water availability.

(ii) Any data or reports that demonstrate effects of the project are consistent with those reports provided in paragraph (d)(6)(i) of this section.

(iii) Demonstration of continued need for expiring approved water source and quantity.

(iv) Changes to the facility design.

(v) Any proposed changes to the previously authorized purpose.

(e) A report about the project prepared for any other purpose, or an

application for approval prepared for submission to a member jurisdiction, may be accepted by the Commission provided the said report or application addresses all necessary items on the Commission's form or listed in this section, as appropriate.

(f) Applications for minor modifications must be complete and will be on a form and in a manner prescribed by the Commission. Applications for minor modifications must contain the following:

(1) Description of the project;

(2) Description of all sources, consumptive uses and diversions related to the project;

(3) Description of the requested modification;

(4) Statement of the need for the requested modification; and

(5) Demonstration that the anticipated impact of the requested modification will not adversely impact the water resources of the basin.

(g) For any applications, the Executive Director or Commission may require other information not otherwise listed in this section.

9. Amend § 806.15 by revising paragraph (a), adding paragraph (b)(3), and revising paragraph (g) to read as follows:

§ 806.15 Notice of application.

(a) Except with respect to paragraphs (h) and (i) of this section, any project sponsor submitting an application to the Commission shall provide notice thereof to the appropriate agency of the member State, each municipality in which the project is located, and the county and the appropriate county agencies in which the project is located. The project sponsor shall also publish notice of submission of the application at least once in a newspaper of general circulation serving the area in which the project is located. The project sponsor shall also meet any of the notice requirements set forth in paragraphs (b) through (f) of this section, if applicable. All notices required under this section shall be provided or published no later than 20 days after submission of the application to the Commission and shall contain a description of the project, its purpose, the requested quantity of water to be withdrawn, obtained from sources other than withdrawals, or consumptively used, and the address, electronic mail address, and phone number of the project sponsor and the Commission. All such notices shall be in a form and manner as prescribed by the Commission.

(b) * * *

(3) For groundwater withdrawal applications, the Commission or Executive Director may allow notification of property owners through alternate methods where the property of such property owner is served by a public water supply.

* * * * *

(g) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt or the verified return receipt from a comparable delivery service for the notifications to agencies of member States, municipalities and appropriate county agencies required under paragraph (a) of this section. The project sponsor shall also provide certification on a form provided by the Commission that it has published the newspaper notice(s) required by this section and made the landowner notifications as required under paragraph (b) of this section, if applicable. Until these items are provided to the Commission, processing of the application will not proceed. The project sponsor shall maintain all proofs of publication and records of notices sent under this section for the duration of the approval related to such notices.

* * * * *

10. Amend § 806.21 by revising paragraphs (a) and (c)(1) to read as follows:

§ 806.21 General standards.

(a) A project shall be feasible and not be detrimental to the proper conservation, development, management, or control of the water resources of the basin.

* * * * *

(c) * * *

(1) The Commission may suspend the review of any application under this part if the project is subject to the lawful jurisdiction of any member jurisdiction or any political subdivision thereof, and such member jurisdiction or political subdivision has disapproved or denied the project. Where such disapproval or denial is reversed on appeal, the appeal is final, and the project sponsor provides the Commission with a certified copy of the decision, the Commission shall resume its review of the application. Where, however, an application has been suspended hereunder for a period greater than three years, the Commission may terminate its review. Thereupon, the Commission shall notify the project sponsor of such termination and that the application fee paid by the project sponsor is forfeited. The project sponsor may reactivate the terminated application by reapplying to the Commission, providing evidence of its receipt of all necessary governmental approvals and, at the discretion of the Commission, submitting new or updated information.

11. Amend § 806.22 by revising paragraphs (b) introductory text, (b)(3), (e), and (f)(3) and (9) to read as follows:
 § 806.22 Standards for consumptive use of water.

(b) Mitigation. All project sponsors whose consumptive use of water is subject to review and approval under § 806.4, § 806.5, § 806.6, or § 806.17 shall mitigate such consumptive use. Except to the extent that the project involves the diversion of the waters out of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section. Mitigation may be provided by one or a combination of the following:

(3) Provide monetary payment to the Commission, for all water consumptively used over the course of a year, in an amount and manner prescribed by the Commission.

(e) Approval by rule for consumptive uses. (1) General rule. Except with respect to projects involving hydrocarbon development subject to the provisions of paragraph (f) of this section, any project who is solely supplied water for consumptive use by public water supply may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule.

(2) Notification of intent. Prior to undertaking a project or increasing a previously approved quantity of consumptive use, the project sponsor shall submit a notice of intent (NOI) on forms prescribed by the Commission, and the appropriate application fee, along with any required attachments.

(3) Time of notice. Within 20 days after submittal of an NOI under paragraph (e)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

(4) Metering, daily use monitoring, and quarterly reporting. The project sponsor shall comply with metering, daily use monitoring, and quarterly reporting as specified in § 806.30.

(5) Standard conditions. The standard conditions set forth in § 806.21 shall apply to projects approved by rule.

(6) Mitigation. The project sponsor shall comply with mitigation in accordance with paragraph (b)(2) or (3) of this section.

(7) Compliance with other laws. The project sponsor shall obtain all necessary permits or approvals required for the project from other federal, state or local government agencies having jurisdiction over the project. The Commission reserves the right to modify, suspend or revoke any approval under this paragraph (e) if the project sponsor fails to obtain or maintain such approvals.

(8) Decision. The Executive Director may grant, deny, suspend, revoke, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule previously granted hereunder, and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

(9) Term. Approval by rule shall be effective upon written notification from the Executive Director to the project sponsor, shall expire 15 years from the date of such notification, and shall be deemed to rescind any previous consumptive use approvals.

(f) ****

(3) Within 20 days after submittal of an NOI under paragraph (f)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

(9) The Executive Director may grant, deny, suspend, revoke, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule granted hereunder, and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any approval hereunder shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4(a). Any sources of water approved pursuant to this section shall be further subject to any approval or authorization required by the member jurisdiction.

12. Amend § 806.23 by revising paragraphs (b)(2) and (b)(3)(i) and adding paragraph (b)(5) to read as follows:

§ 806.23 Standards for water withdrawals.

(b) ****

(2) The Commission may deny an application, limit or condition an approval to ensure that the withdrawal will not cause significant adverse impacts to the water resources of the basin. The Commission may consider, without limitation, the following in its consideration of adverse impacts: Lowering of groundwater or stream flow levels; groundwater and surface water availability, including cumulative uses; rendering competing supplies unreliable; affecting other water uses; causing water quality degradation that may be injurious to any existing or potential water use; affecting fish, wildlife or other living resources or their habitat; causing permanent loss of aquifer storage capacity; affecting wetlands; or affecting low flow of perennial or intermittent streams.

(3) ****

(i) Limit the quantity, timing or rate of withdrawal or level of drawdown, including requiring a total system limit.

(5) For projects consisting of mine dewatering, water resources remediation, and AMD facilities that qualify as a withdrawal, review of adverse impacts will have limited consideration of groundwater availability, causing permanent loss of aquifer storage and lowering of groundwater levels provided these projects are operated in accordance with the laws and regulations of the member jurisdictions.

13. Amend § 806.30 by revising the introductory text and paragraph (a)(4) and adding paragraph (a)(8) to read as follows:

§ 806.30 Monitoring.

The Commission, as part of the project review, shall evaluate the proposed methodology for monitoring consumptive uses, water withdrawals and mitigating flows, including flow metering devices, stream gages, and other facilities used to measure the withdrawals or consumptive use of the project or the rate of stream flow. If the Commission determines that additional flow measuring, metering or monitoring devices are required, these shall be provided at the expense of the project sponsor, installed in accordance with a schedule set by the Commission, and installed per the specifications and recommendations of the manufacturer of the device, and shall be subject to inspection by the Commission at any time.

(a) ****

(4) Measure groundwater levels in all approved production and other wells, as specified by the Commission.

(8) Perform other monitoring for impacts to water quantity, water quality and aquatic biological communities, as specified by the Commission.

14. Amend § 806.31 by revising paragraphs (d) and (e) to read as follows:

§ 806.31 Term of approvals.

(d) If the Commission determines that a project has been abandoned, by evidence of nonuse for a period of time and under such circumstances that an abandonment may be inferred, the Commission may revoke the approval for such withdrawal, diversion or consumptive use.

(e) If a project sponsor submits an application to the Commission no later than six months prior to the expiration of its existing Commission docket approval or no later than one month prior to the expiration of its existing ABR or NOI approval, the existing approval will be deemed extended until such time as the Commission renders a decision on the application, unless the existing approval or a notification in writing from the Commission provides otherwise.

15. Add subpart E to read as follows:

Subpart E-Registration of Grandfathered Projects
 Sec.

806.40 Applicability.

806.41 Registration and eligibility.

806.42 Registration requirements.

806.43 Metering and monitoring requirements.

806.44 Determination of grandfathered quantities.

806.45 Appeal of determination.

§ 806.40 Applicability.

(a) This subpart is applicable to the following projects, which shall be known as grandfathered projects:

(1) The project has an associated average consumptive use of 20,000 gpd or more in any consecutive 30-day period all or part of which is a pre-compact consumptive use that has not been approved by the Commission pursuant to § 806.4.

(2) The project has an associated groundwater withdrawal average of 100,000 gpd or more in any consecutive 30-day period all or part of which was initiated prior to July 13, 1978, that has not been approved by the Commission pursuant to § 806.4.

(3) The project has an associated surface water withdrawal average of 100,000 gpd or more in any consecutive 30-day period all or part of which was initiated prior to November 11, 1995, that has not been approved by the Commission pursuant to § 806.4.

(4) The project (or an element of the project) has been approved by the Commission but has an associated consumptive use or water withdrawal that has not been approved by the Commission pursuant to § 806.4.

(5) Any project not included in paragraphs (a)(2) through (4) of this section that has a total withdrawal average of 100,000 gpd or more in any consecutive 30-day average from any combination of sources which was initiated prior to January 1, 2007, that has not been approved by the Commission pursuant to § 806.4.

(6) Any source associated with a project included in paragraphs (a)(2) through (5) of this section regardless of quantity.

(b) A project, including any source of the project, that can be determined to have been required to seek Commission review and approval under the pertinent regulations in place at the time is not eligible for registration as a grandfathered project.

§ 806.41 Registration and eligibility.

(a) Project sponsors of grandfathered projects identified in § 806.40 shall submit a registration to the Commission, on a form and in a manner prescribed by the Commission, by December 31, 2019.

(b) Any grandfathered project that fails to register under paragraph (a) of this section shall be subject to review and approval under § 806.4.

(c) Any project that is not eligible to register under paragraph (a) of this section shall be subject to review and approval under § 806.4.

(d) The Commission may establish fees for obtaining and maintaining registration in accordance with § 806.35.

(e) A registration under this subpart may be transferred pursuant to § 806.6.

§ 806.42 Registration requirements.

(a) Registrations shall include the following information:

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Description of the project and site in terms of:

(i) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters.

(ii) Project purpose.

(3) Identification of all sources of water, including the date the source was put into service, each source location (including latitude and longitude coordinates in decimal degrees accurate to within 10 meters), and if applicable, any approved docket numbers.

(4) Identification of current metering and monitoring methods for water withdrawal and consumptive use.

(5) Identification of current groundwater level or elevation monitoring methods at groundwater sources.

(6) All quantity data for water withdrawals and consumptive use for a minimum of the previous five calendar years. If the project sponsor registering submitted the water withdrawal and consumptive use data for the previous five calendar years to a member jurisdiction, that data will satisfy this requirement. A project sponsor registering may provide supplementary data related to water withdrawals and consumptive use quantities. If quantity data are not available, any information available upon which a determination of quantity could be made.

(7) For consumptive use, description of processes that use water, identification of water returned to the Basin, history of the use, including process changes, expansions and other actions that would have an impact on the amount of water consumptively used during the past five calendar years.

(8) Based on the data provided, the quantity of withdrawal for each individual source and consumptive use the project sponsor requests to be grandfathered by the Commission.

(9) Any ownership or name changes to the project since January 1, 2007.

(b) The Commission may require any other information it deems necessary for the registration process or waive any information required under paragraph (a) of this section for projects relying on a prior determination of the Commission.

§ 806.43 Metering and monitoring requirements.

(a) As a part of the registration process, the Commission shall review the current metering and monitoring for grandfathered withdrawals and consumptive uses.

(b) The Commission may require a metering and monitoring plan for the project sponsor to follow.

(c) Project sponsors, as an ongoing obligation of their registration, shall report to the Commission all information specified in the grandfathering determination under § 806.44 in a form and manner determined by the Commission. If water withdrawal and consumptive use quantity reporting is required by the member jurisdiction where the project is located, the Commission shall accept that reported quantity to satisfy the requirements of this paragraph (c), unless the Commission finds that additional data is needed that is not required by the member jurisdiction.

(d) Any data generated or collected under paragraph (c) of this section will be made available to the member jurisdictions in a manner and timeframe mutually agreeable to both the Commission and the jurisdiction.

§ 806.44 Determination of grandfathered quantities.

(a) For each registration submitted, the Executive Director shall determine the grandfathered quantity for each withdrawal source and consumptive use.

(b) In making a determination, the following factors should be considered:

(1) The withdrawal and use data and the peak consecutive 30-day average shown by the data;

(2) The reliability and accuracy of the data and/or the meters or measuring devices;

(3) Determination of reasonable and genuine usage of the project, including any anomalies in the usage;

(4) Whether the grandfathered amount includes an operational margin of safety; and

(5) Other relevant factors.

(c) The Executive Director, in lieu of a determination under paragraph (b) of this section, may accept a previous grandfathering determination by the Commission at the request of the project sponsor.

§ 806.45 Appeal of determination.

(a) A final determination of the grandfathered quantity by the Executive Director must be appealed to the Commission within 30 days from actual notice of the determination.

(b) The Commission shall appoint a hearing officer to preside over appeals under this section. Hearings shall be governed by the procedures set forth in part 808 of this chapter.

PART 808—HEARINGS AND ENFORCEMENT ACTIONS

16. The authority citation for part 808 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509, et seq.

17. Revise § 808.1 to read as follows:

§ 808.1 Public hearings.

(a) Required hearings. A public hearing shall be conducted in the following instances:

(1) Addition of projects or adoption of amendments to the comprehensive plan, except as otherwise provided by section 14.1 of the compact.

(2) Review and approval of diversions.

(3) Imposition or modification of rates and charges.

(4) Determination of protected areas.

(5) Drought emergency declarations.

(6) Hearing requested by a member jurisdiction.

(7) As otherwise required by sections 3.5(4), 4.4, 5.2(e), 6.2(a), 8.4, and 10.4 of the compact.

(b) Optional hearings. A public hearing may be conducted by the Commission or the Executive Director in any form or style chosen by the Commission or Executive Director in the following instances:

(1) Proposed rulemaking.

(2) Consideration of projects, except projects approved pursuant to memoranda of understanding with member jurisdictions.

(3) Adoption of policies and technical guidance documents.

(4) When it is determined that a hearing is necessary to give adequate consideration to issues related to public health, safety and welfare, or protection of the environment, or to gather additional information for the record or consider new information on a matter before the Commission.

(c) Notice of public hearing. At least 20 days before any public hearing required by the compact, notices stating the date, time, place and purpose of the hearing including issues of interest to the Commission shall be published at least once in a newspaper of general circulation in the area affected. In all other cases, at least 20 days prior to the hearing, notice shall be posted on the Commission Web site, sent to the parties who, to

the Commission's knowledge, will participate in the hearing, and sent to persons, organizations and news media who have made requests to the Commission for notices of hearings or of a particular hearing. With regard to rulemaking, hearing notices need only be forwarded to the directors of the New York Register, the Pennsylvania Bulletin, the Maryland Register and the Federal Register, and it is sufficient that this notice appear in the Federal Register at least 20 days prior to the hearing and in each individual state publication at least 10 days prior to any hearing scheduled in that state.

(d) Standard public hearing procedure. (1) Hearings shall be open to the public. Participants may be any person, including a project sponsor, wishing to appear at the hearing and make an oral or written statement. Statements shall be made a part of the record of the hearing, and written statements may be received up to and including the last day on which the hearing is held, or within 10 days or a reasonable time thereafter as may be specified by the presiding officer.

(2) Participants are encouraged to file with the Commission at its headquarters written notice of their intention to appear at the hearing. The notice should be filed at least three days prior to the opening of the hearing.

(e) Representative capacity. Participants wishing to be heard at a public hearing may appear in person or be represented by an attorney or other representative. A governmental authority may be represented by one of its officers, employees or by a designee of the governmental authority.

(f) Description of project. When notice of a public hearing is issued, there shall be available for inspection, consistent with the Commission's Access to Records Policy, all plans, summaries, maps, statements, orders or other supporting documents which explain, detail, amplify, or otherwise describe the project the Commission is considering. Instructions on where and how the documents may be obtained will be included in the notice.

(g) Presiding officer. A public hearing shall be presided over by the Commission chair, the Executive Director, or any member or designee of the Commission or Executive Director. The presiding officer shall have full authority to control the conduct of the hearing and make a record of the same.

(h) Transcript. Whenever a project involving a diversion of water is the subject of a public hearing, and at all other times deemed necessary by the Commission or the Executive Director, a written transcript of the hearing shall be made. A certified copy of the transcript and exhibits shall be available for review during business hours at the Commission's headquarters to anyone wishing to examine them. Persons wishing to obtain a copy of the transcript of any hearing shall make arrangements to obtain it directly from the recording stenographer at their expense.

(i) Joint hearings. The Commission may conduct any public hearings in concert with any other agency of a member jurisdiction.

18. Revise § 808.2 to read as follows:

§ 808.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by a final action or decision of the Executive Director shall file a written appeal with the Commission within 30 days of the receipt of actual notice by the project sponsor or within 30 days of publication of the action in the Federal Register. Appeals shall be filed on a form and in a manner prescribed by the Commission and the petitioner shall have 20 days from the date of filing to amend the appeal. The following is a non-exclusive list of actions by the Executive Director that are subject to an appeal to the Commission:

(1) A determination that a project requires review and approval under § 806.5;

(2) An approval or denial of an application for transfer under § 806.6;

(3) An approval of a Notice of Intent under a general permit under § 806.17;

(4) An approval of a minor modification under § 806.18;

(5) A determination regarding an approval by rule under § 806.22(e) or (f);

(6) A determination regarding an emergency certificate under § 806.34;

(7) Enforcement orders issued under § 808.14;

(8) A finding regarding a civil penalty under § 808.15(c);

(9) A determination of grandfathered quantity under § 806.44;

(10) A decision to modify, suspend or revoke a previously granted approval; and

(11) A records access determination made pursuant to Commission policy.

(b) The appeal shall identify the specific action or decision being appealed, the date of the action or decision, the interest of the person

requesting the hearing in the subject matter of the appeal, and a statement setting forth the basis for objecting to or seeking review of the action or decision.

(c) Any request not filed on or before the applicable deadline established in paragraph (a) of this section hereof will be deemed untimely and such request for a hearing shall be considered denied unless the Commission, upon written request and for good cause shown, grants leave to make such filing nunc pro tunc; the standard applicable to what constitutes good cause shown being the standard applicable in analogous cases under Federal law. Receipt of requests for hearings pursuant to this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Petitioners shall be limited to a single filing that shall set forth all matters and arguments in support thereof, including any ancillary motions or requests for relief. Issues not raised in this single filing shall be considered waived for purposes of the instant proceeding. Where the petitioner is appealing a final determination on a project application and is not the project sponsor, the petitioner shall serve a copy of the appeal upon the project sponsor within five days of its filing.

(e) The Commission will determine the manner in which it will hear the appeal. If a hearing is granted, the Commission shall serve notice thereof upon the petitioner and project sponsor and shall publish such notice in the Federal Register. The hearing shall not be held less than 20 days after publication of such notice. Hearings may be conducted by one or more members of the Commission, or by such other hearing officer as the Commission may designate.

(1) The petitioner may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected member State. The decision of the Executive Director on the request for stay shall not be appealable to the Commission under this section and shall remain in full force and effect until the Commission acts on the appeal.

(2) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

(i) Irreparable harm to the petitioner.

(ii) The likelihood that the petitioner will prevail.

(f) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing, the party seeking such hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule. If a hearing is granted, the Commission shall refer the matter for hearing to be held in accordance with § 808.3, and appoint a hearing officer.

(g) If a hearing is not granted, the Commission may set a briefing schedule and decide the appeal based on the record before it. The Commission may, in its discretion, schedule and hear oral argument on an appeal.

(h)(1) A request for intervention may be filed with the Commission by persons other than the petitioner within 20 days of the publication of a notice of the granting of such hearing in the Federal Register. The request for intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance. The hearing officer(s) shall determine whether the person requesting intervention has standing in the matter that would justify their admission as an intervener to the proceedings in accordance with Federal case law.

(2) Interveners shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses.

(i) Where a request for an appeal is made, the 90-day appeal period set forth in section 3.10 (6) and Federal reservation (o) of the compact shall not commence until the Commission has either denied the request for or taken final action on an administrative appeal.

19. Revise § 808.11 to read as follows:

§ 808.11 Duty to comply.

It shall be the duty of any person to comply with any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, staff directives or any other requirement of the Commission.

20. Revise § 808.14 to read as follows:

§ 808.14 Orders.

(a) Whether or not an NOV has been issued, the Executive Director may issue an order directing an alleged violator to cease and desist any action or activity to the extent such action or activity constitutes an

alleged violation, or may issue any other order related to the prevention of further violations, or the abatement or remediation of harm caused by the action or activity.

(b) If the project sponsor fails to comply with any term or condition of a docket or other approval, the commissioners or Executive Director may issue an order suspending, modifying or revoking approval of the docket. The commissioners may also, in their discretion, suspend, modify or revoke a docket approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) The commissioners or Executive Director may issue such other orders as may be necessary to enforce any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(d) It shall be the duty of any person to proceed diligently to comply with any order issued pursuant to this section.

(e) The Commission or Executive Director may enter into a Consent Order and Agreement with an alleged violator to resolve non-compliant operations and enforcement proceedings in conjunction with or separately from settlement agreements under § 808.18.

21. Revise § 808.15 to read as follows:

§ 808.15 Show cause proceeding.

(a) The Executive Director may issue an order requiring an alleged violator to show cause why a penalty should not be assessed in accordance with the provisions of this chapter and section 15.17 of the compact. The order to the alleged violator shall:

(1) Specify the nature and duration of violation(s) that is alleged to have occurred.

(2) Set forth the date by which the alleged violator must provide a written response to the order.

(3) Identify the civil penalty recommended by Commission staff.

(b) The written response by the project sponsor should include the following:

(1) A statement whether the project sponsor contests that the violations outlined in the Order occurred;

(2) If the project sponsor contests the violations, then a statement of the relevant facts and/or law providing the basis for the project sponsor's position;

(3) Any mitigating factors or explanation regarding the violations outlined in the Order; and

(4) A statement explaining what the appropriate civil penalty, if any, should be utilizing the factors at § 808.16.

(c) Based on the information presented and any relevant policies, guidelines or law, the Executive Director shall make a written finding affirming or modifying the civil penalty recommended by Commission staff.

22. Amend § 808.16 by revising paragraphs (a) introductory text and (a)(7), adding paragraph (a)(8), and revising paragraph (b) to read as follows:

§ 808.16 Civil penalty criteria.

(a) In determining the amount of any civil penalty or any settlement of a violation, the Commission and Executive Director shall consider:

* * * * *

(7) The length of time over which the violation occurred and the amount of water used, diverted or withdrawn during that time period.

(8) The punitive effect of a civil penalty.

(b) The Commission and/or Executive Director retains the right to waive any penalty or reduce the amount of the penalty recommended by the Commission staff under § 808.15(a)(3) should it be determined, after consideration of the factors in paragraph (a) of this section, that extenuating circumstances justify such action.

23. Revise § 808.17 to read as follows:

§ 808.17 Enforcement of penalties, abatement or remedial orders.

Any penalty imposed or abatement or remedial action ordered by the Commission or the Executive Director shall be paid or completed within such time period as shall be specified in the civil penalty assessment or order. The Executive Director and Commission counsel are authorized to take such additional action as may be necessary to assure compliance with this subpart. If a proceeding before a court becomes necessary, the penalty amount determined in accordance with this part shall constitute the penalty amount recommended by the Commission to be fixed by the court pursuant to section 15.17 of the compact.

24. Revise § 808.18 to read as follows:

§ 808.18 Settlement by agreement.

(a) An alleged violator may offer to settle an enforcement action by agreement. The Executive Director may enter into settlement agreements to resolve an enforcement action. The Commission may, by Resolution, require certain types of enforcement actions or settlements to be submitted to the Commission for action or approval.

(b) In the event the violator fails to carry out any of the terms of the settlement agreement, the Commission or Executive Director may reinstitute a civil penalty action and any other applicable enforcement action against the alleged violator.

Dated: June 21, 2017.

Stephanie L. Richardson,
Secretary to the Commission.

Workers' Compensation Board

NOTICE OF ADOPTION

Paid Family Leave

I.D. No. WCB-08-17-00010-A

Filing No. 506

Filing Date: 2017-07-10

Effective Date: 2017-07-19

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

Action taken: Addition of section 355.9 and Part 380; amendment of Parts 355, 358, 360, 361 and 376 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 205, 221 and 226

Subject: Paid Family Leave.

Purpose: Identify requirements and process for implementation of paid family leave program.

Substance of final rule: Section 355.2(c) is amended to explicitly exclude certain persons under the Black Car Operator's Fund and the New York Jockey Injury Fund from the definition of employee.

Sections 355.4 and 355.8 are amended to include standards for benefits at least as favorable in plans providing for paid family leave.

A new section 355.9 has been added to include paid family leave definitions.

A new subpart 380-1 clarifies applicability.

Subpart 380-2 has been added to describe eligibility for paid family leave and the types of qualifying events necessary to take paid family leave. Qualifying events for paid family leave include leave to care for a child after birth or placement for adoption or foster care within the first 12 months after the birth or placement; for a qualifying exigency arising from the service of a family member in the armed forces of the United States; or to care for a family member with a serious health condition as defined in section 355.9.

Section 380-2.5 provides that employees working 20 or more hours per week become eligible after 26 consecutive weeks of work, and employees who work less than 20 hours a week become eligible on the 175th day of work, and describes the rate of paid family leave for part-time workers, as well as establishing 26 weeks as the maximum amount of disability and paid family leave benefits that may be taken in a year.

Section 380-2.6 provides for an optional waiver for an employee whose regular work schedule never achieves the 26 weeks or 175 days in a 52 consecutive week period required to become eligible for paid family leave.

Subpart 380-3 has been added to explain the notice requirements for taking paid family leave. If the leave is foreseeable, the employee is required to give the employer at least 30 days advance notice – if they fail to do so, the self-insured employer or carrier may file a partial denial of the family leave claim for up to 30 days. If notice is not practicable, the employee must notify the employer as soon as it is practicable.

A new subpart 380-4 describes the notice of claim and certification requirements for a paid family leave claim, including medical certification and HIPAA authorization. For leave taken to care for a family member with a serious health condition, the employee must obtain medical certification from the health provider with information about the patient's health condition, and the estimation of frequency and duration of leave necessary, among other information. For a qualifying exigency, the employee must provide a copy of the military member's active duty orders and/or other documentation supporting the leave.

For leave to bond with a child, the birth mother must provide a birth certificate or documentation of pregnancy or birth from a health care provider including the mother's name and birth or due date. A second parent must provide a birth certificate, documentation from a health care provider, voluntary acknowledgment of paternity or court order of filiation. An adoptive parent must submit documentation showing an adoption is in

process, or documentation illustrating the leave is to further the adoption. A foster parent must submit a letter from the county or city department of social services or local volunteer agency.

A new subpart 380-5 provides information about filing a claim, as well as the payment and denial process of a paid family leave claim, including uninsured employers. The employee must complete the Request for Paid Family Leave on the form designated by the carrier, and, if the carrier allows it, may file the claim in advance if the leave is foreseeable. The carrier will provide the employee with contact information and any missing information, and within 18 days will pay or deny a completed claim. Section 380-5.5 also provides that when the employer is uninsured, such claims will be paid from the Special Fund for Disability Benefits. Part 380-5.6 provides a framework for method of payment of claims.

Subpart 380-6 has been added to explain the benefit rate and use of accruals by an employee in conjunction with paid family leave.

Subpart 380-7 has been added to detail employer obligations under paid family leave, including collecting contributions, continuing health insurance (as long as the employee continues contributing to the cost as before paid family leave), and maintaining paid family leave insurance coverage as an individual business owner. Employers may deduct contributions before paid family leave becomes effective, and must post a notice concerning paid family leave. Subpart 380-7 also provides information about continuing deductions while an employee is out on leave.

A new subpart 380-8 provides for reinstatement of the employee to the same or a comparable job upon returning from paid family leave, as well as a process for discrimination or retaliation claims if reinstatement is denied after being formally requested by the employee. The Board will schedule hearings to determine a discrimination case.

Subpart 380-9 has been added to provide a process for disputes related to paid family leave. Any claim-related dispute arising under the paid family leave statute will be eligible for, and subject to, arbitration. This Subpart outlines the arbitration process and fee structure, including requiring a \$25 filing fee by the initiating party which is refundable by the carrier should the employee prevail. It also provides that all disputes shall be resolved by desk arbitration unless the arbitrator finds further development of the record necessary.

Subpart 380-10 has been added to provide for public employers that opt-in for voluntary coverage for paid family leave. A public employer may opt-in for paid family leave only. It outlines a process for providing coverage for public employees who are or are not represented by an employee organization as described in section 212-b. Subpart 380-10 also provides that if the public employer already offers disability leave benefits and wishes to provide paid family leave benefits, both must be offered under a single insurance policy.

Subpart 361 is amended to provide that Article 9 benefits (both disability and paid family leave) to employees will meet the requirements of the Superintendent of Financial Services.

Part 361.1 has been amended to provide for including paid family leave in the self-insurance regulations, including the option for self-insurers under section 204 to also self-insure for paid family leave or purchase a paid family leave policy from an insurance carrier.

Part 361.2 has been amended to make clear that self-insurers are responsible for covering the cost of paid family leave if it exceeds the statutory maximum contribution which may be collected from employees.

Part 361.3 has been amended to indicate that the security deposit for a self-insurer for both paid family leave and disability benefits will be combined, and outlines the process for the surety bond.

Part 361.4 has been amended to include clarifying information about self-insurer reports to be submitted to the Department of Financial Services, and outlines what information will be required in those reports.

Part 361.5 has been amended to restrict the use of third-party administrators to those licensed by the Workers' Compensation Board.

Parts 361.6 and 361.7 have been amended to fix capitalization and numeration.

Part 376 has been amended to change chairman to Chair, and to reflect the minimum amount of deposit for disability benefits only.

Final rule as compared with last published rule: Nonsubstantive changes were made in Subparts 380-2, 380-5 and 380-8.

Revised rule making(s) were previously published in the State Register on May 24, 2017.

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

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text still seek to implement the paid family leave program in a way that accomplishes the goals

highlighted in the Regulatory Impact Statement. These changes, while some of them are substantial, do not affect the meaning of any statements in the document.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text still seek to implement the paid family leave program in a way that accomplishes the goals highlighted in the Regulatory Impact Statement. These changes, while some of them are substantial, do not affect the meaning of any statements in the document.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text still seek to implement the paid family leave program in a way that accomplishes the goals highlighted in the Regulatory Impact Statement. These changes, while some of them are substantial, do not affect the meaning of any statements in the document.

Revised Job Impact Statement

A revised Job Impact Statement is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text still seek to implement the paid family leave program in a way that accomplishes the goals highlighted in the Regulatory Impact Statement. These changes, while some of them are substantial, do not affect the meaning of any statements in the document.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Chair and Board received approximately 58 formal written comments. Approximately 22 of those were form letters from employee advocacy groups. All of the comments received were reviewed and assessed. The full Assessment of Public Comment summarizing, analyzing, and responding to the comments received exceeds 2,000 words. This document is a summary of the full Assessment of Public Comment. A copy of the full assessment is posted on the Board's website at wcb.ny.gov.

The Board received multiple comments asking for employers not to be required to provide paid family leave benefits to employees who do not live and work in New York. Section 203 of the WCL requires employees in the employment of a covered employer to be provided paid family leave benefits. Section 201(6)(B) and (C) of the WCL controls when an employee is in employment for the purpose of Article 9 of the WCL. Employees who work in New York State, with only incidental work outside the state, are covered. If an employee works in another state, and only incidentally works in New York, they are not in covered employment. If an employee does not perform his or her work in any other single state, he or she is in covered employment if some of his or her work is performed in New York and the employee is either: (1) based in New York; (2) controlled from New York; or (3) the employee lives in New York. (WCL § 201(6)(C)). The Board will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage. Because the criteria for covered employment is set forth in statute, it cannot be changed by regulation. Accordingly, no changes to the regulations has been made.

The Board received a comment concerned that employees who have a qualifying event, such as the birth of a child, in 2017 may be able to take leave under their employer's policies in 2017 and then take paid family leave in 2018. Section 204(2) of the WCL states the amount of paid family leave employees are entitled to after January 1, 2018, and section 201(15) of the WCL permits employees to take leave to bond with a child anytime during the first 12 months after the child's birth. The Board cannot change the statutory benefit. Starting in 2018, periods of federal FMLA leave for the same qualifying event will usually run concurrently with paid family leave under section 205(2)(c) and 206(4) of the WCL as well as section 380-2.5(g) of the proposed regulations. Accordingly, no change to the regulations has been made.

The Board received a comment asking whether employers are required to begin employee deductions on July 1, 2017. The Board responded to a similar question in the assessment of public comment published on May 24, 2017, "section 380-2.4(d) is permissive in allowing, but not requiring employers to begin taking deductions on July 1, 2017." Accordingly, no change to the regulations has been made.

The Board received a comment requesting clarification in the regulations if 380-2.5(b) permits employees who work less than 20 hours per

week to take leave after working 175 days, or after 175 calendar days of employment. Since the section states an employee is eligible to take leave after “working 175 days in such employment,” it means after the 175th day worked. The Board believes the language as written is sufficient, so no change to the regulations is required.

The Board received a comment which asked for section 380-2.5(d) to clarify if paid time off in which employee deductions were made count toward an employee who works less than 20 hours per week’s eligibility. The paragraph currently states such time is “counted as consecutive weeks, consecutive work weeks. . . .” The sentence has been changed to clarify that paid time off in which deductions have been made also counts toward the number of work days necessary for employees who work less than 20 hours per week to be eligible to take leave.

The Board received a comment concerned that the calculation of an employee’s average daily rate of pay for intermittent leave under section 380-2.5(c)(3) could reduce an employee’s pay if the week the employee goes on leave is counted. This section has been amended to state the conversion from average weekly wage should be done using the same time period used in calculating the average weekly wage under section 355.9(2), which permits the 8 week period to exclude a final partial week.

The Board received a comment asking for section 380-2.5(c)(3) to clarify if an employee’s average daily rate should be calculated using a fractional average number of days per week worked. Yes, this section has been updated to clarify that average number of days worked per week can include fractions in order to accurately convert an employee’s average weekly wage to average daily wage.

The Board received a comment asking for section 380-2.5 to clarify whether an employee that acquires eligibility and is seasonally laid off has to fulfill an eligibility period again when they are rehired. Section 203 of the WCL states an employee who completes 26 consecutive weeks of employment can take an unpaid leave of absence with the employer’s agreement and immediately become eligible for leave upon their return. Accordingly, no change to the regulations has been made.

The Board received a comment which requested clarification for section 380-2.6(a) – whether employers are required to provide the option of the waiver or whether it is permissive. This subdivision has been amended to state employers “shall” provide employees who qualify the option to sign a waiver, rather than “may.”

Three comments asked for the time period for calculating employees’ maximum amount of paid family leave to match the FMLA. Section 380-2.8 states that the 52 consecutive week period for calculating an employee’s maximum paid family leave duration is computed retroactively for each day leave is claimed. The FMLA gives employers four different choices for calculating the 12 month period for employees’ maximum leave, including a rolling 12-month period measured backward from the date an employee uses leave (29 CFR 825.200(b)). If an employer uses calendar year periods for FMLA leave, their employees may already be able to stack leave by taking leave at the end of one year and begging of another. Employers can choose to use similar rolling lookback methods for calculating employees’ maximum paid family leave and FMLA leave. Accordingly, no change to the regulations has been made.

A comment asked for section 380-2.9 to be amended to add more protections to ensure all employees covered by a collectively bargained plan are provided paid family leave benefits at least as beneficial as those required by Article 9 of the WCL. Section 211(5) of WCL permits the Board to accept a collectively bargained plan and relieve an employer of their obligation to provide paid family leave benefits under Article 9. 12 NYCRR Subpart 358-3 describes the approval process before a plan is accepted. The Board has also amended section 380-2.9 to clarify paid family leave in conjunction with collective bargaining agreements.

The Board received a comment from insurance carriers expressing concern with the requirement that carriers provide employees who pre-filed a claim a confirmation of receipt of the completed claim within one business day, because many insurance companies will find it impossible to process information and determine whether the claim is complete in one day. Section 380-5.3(b) requires carriers to send a list of the items necessary to complete the pre-filed claim within 5 days of receiving the request for paid family leave. After a carrier sends the list and the employee responds, the carrier needs to check if what has been received is the missing item. Because of time necessary to process incoming mail and for a person to verify the item received was what was requested, section 380-5.3(b)(4) has been amended to give carriers three days to acknowledge receipt. The 18 days to pay or deny the claim runs from the day of receipt.

The Board received two comments asking for section 380-7.2(b) to clarify what employers can use the employee contribution for, and what surplus contributions are. The Department of Financial Services sets the maximum employee contribution annually pursuant to section 209(3) and (5) of the WCL. It must be no more than an employee’s share of the paid family leave coverage premium amount set under section 4235(n)(1) of the Insurance Law. Section 380-7.2(b)(3) states employers shall use their

employees’ contributions to provide paid family leave benefits, which means to pay for a policy or self-insure in accordance with 12 NYCRR Part 361. Section 380-7.2(b)(3) requires employers to return to their employees any surplus amount withheld that exceeds the actual cost of the paid family leave policy, to comply with section 209(5) of the WCL. The Board has determined no changes to the regulations are required.

The Board received several form letter comments which asked for Subpart 380-7 to be amended to make employers who do not provide health insurance coverage to employees on paid family leave liable to their employees for the employees’ medical costs while on leave. An employers’ cancellation of health insurance in violation of section 203(c) of the WCL may be grounds for a discrimination claim under section 120 of the WCL, but there is no separate penalty provided for by statute. Accordingly, no change to the regulations has been made.

The Board received a comment from a contractors association taking issue with the reinstatement provisions of the revised proposed regulations. Because reinstatement is included in the statute at section 203-b of the WCL, this cannot be removed by regulation. Therefore, no change to the regulations has been made.

The Board received several form letters which asked for a provision to be added to the proposed regulations explicitly stating that nothing in the regulations reduces or infringes on employee’s rights under any other law, including New York’s Human Rights Law. The Workers’ Compensation Board does not have jurisdiction over other areas of law outside of the Workers’ Compensation Law. An employee may have a variety of state or federal claims based on a set of circumstances that gives rise to a paid family leave discrimination claim, but it is beyond the scope of the regulations to say what effect a paid family leave discrimination determination would have under other areas of law. Accordingly, no change to the regulations has been made.

The Board received a comment suggesting that section 380-9.10(c) measure the 10 days for payment from date filed rather than service to be consistent with other areas of the Workers’ Compensation Law. The Board agrees, and has made this change.

The Board received several form letters commending the changes in the republished proposed regulations which removed the 120-day filing requirement in section 380-8.1 for formal requests for reinstatement, clarified a period of leave for an employee’s own disability under the FMLA does not count toward their maximum amount of paid family leave in section 380-2.5(g)(4), and requires insurers state the basis for the denial of a paid family in section 380-5.4(a)(1).

The Board received several comments from small employers and individuals expressing concerns about the adverse effect of paid family leave on small employers. As addressed in the previous Assessment of Public Comment, “the statute defines a covered employer as one with one or more employee, and this cannot be modified by regulation.” Therefore, no change has been made.