RULE MAKING ACTIVITIES

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

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

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

Department of Financial Services

NOTICE OF ADOPTION

Charges for Professional Health Services

I.D. No. DFS-39-16-00007-A

Filing No. 899

Effective Date: 2018-01-09

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

Action taken: Amendment of section 68.6 (Regulation 83) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 302; Insurance Law, sections 301, 2601, 5221 and art. 51

Subject: Charges for Professional Health Services.

Purpose: Limit reimbursement of no-fault health care services provided outside NYS to highest fees in fee schedule for services in NYS.

Text of final rule: Section 68.6 is amended to read as follows:

Section 68.6. Health services performed outside New York State.

*(a)(1)*If a professional health service reimbursable under [section 5102(a)(1) of the] Insurance Law *section 5102(a)(1)* is performed outside [New York] *this* State, the [permissible charge] *amount that the insurer shall reimburse* for [such] *the* service shall be *the lower of the amount charged by the provider and* the prevailing fee in the geographic location of the provider *with respect to services:*

(i) that constitute emergency care;

(ii) provided to an eligible injured person that is not a resident of this State; or

(iii) provided to an eligible injured person that is a resident of this State who, at the time of treatment, is residing in the jurisdiction where the treatment is being rendered for reasons unrelated to the treatment.

(2) For purposes of this subdivision, emergency care means all medically necessary treatment initiated within 48 hours of a motor vehicle accident for a traumatic injury or a medical condition resulting from the accident, which injury or condition manifests itself by acute symptoms of sufficient severity such that absence of immediate attention could reasonably be expected to result in: death; serious impairment to bodily functions; or serious dysfunction of a bodily organ or part. Medically necessary treatment shall include immediate pre-hospitalization care, transportation to a hospital or trauma center, emergency room care, surgery, critical and acute care. Emergency care extends during the period of initial hospitalization until the patient is discharged from the hospital.

(b) Except as provided in subdivision (a) of this section, if a professional health service reimbursable under Insurance Law section 5102(a)(1) is performed outside this State with respect to an eligible injured person that is a resident of this State, the amount that the insurer shall reimburse for the service shall be the lowest of:

(1) the amount of the fee set forth in the region of this State that has the highest applicable amount in the fee schedule for that service;

(2) the amount charged by the provider; and

(3) the prevailing fee in the geographic location of the provider.

(c) If the jurisdiction in which the treatment is being rendered has established a fee schedule for reimbursing health services rendered in connection with claims for motor vehicle-related injuries and the fee schedule applies to the service being provided, the prevailing fee amount specified in subdivisions (a) and (b) of this section shall be the amount prescribed in that jurisdiction's fee schedule for the respective service.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 68.6(c).

Text of rule and any required statements and analyses may be obtained from: Hoda Nairooz, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5595, email: hoda.nairooz@dfs.ny.gov

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

A revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement are not required for the adoption of the Thirty-third Amendment to 11 NYCRR 68 (Insurance Regulation 83) because the non-substantive revision to Section 68.6(c) does not require a change to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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 Department of Financial Services ("Department") received four comments from various property/casualty insurers and trade associations comprised of New York State automobile insurers in response to its publication of the proposed rule in the New York *State Register*.

All of the commenters applauded the Department for its proposed amendments to Insurance Regulation 83, which addresses the ongoing exploitation of New York's no-fault system by out-of-state providers who, taking advantage of current provisions in the regulation, submit grossly inflated bills for services rendered, thus quickly depleting the $50,000 no-fault coverage limit available to an eligible injured party ("EIP"). Commenters asserted that this abuse results in numerous fee disputes in arbitration and the courts, and drives up insurance costs.

Summaries of the comments received on the proposed amendment and the Department's responses thereto are as follows:

Proposed 11 NYCRR Section 68.6(c) (definition of "prevailing fee")

Comments

Two commenters asserted that clarification is needed with respect to the manner in which proposed section 68.6 (c) relates to the definition of "prevailing fee," referenced in subdivisions (a) and (b). The concern is that subdivision (c) could be interpreted as a replacement for subdivisions (a) and (b), rather than merely defining "prevailing fee" in subdivisions (a) and (b). One commenter proposed that the wording should be amended as follows: "… the DEFINITION OF prevailing fee IN SECTIONS (A) AND (B) shall be the amount prescribed in that jurisdiction's fee schedule for the respective service". [Emphasis in original.]

Department's Response

The Department has amended subdivision (c) to clearly define the amount that an insurer is obligated to reimburse an out-of-state provider, and has clarified the meaning of "prevailing fee."

Proposed 11 NYCRR Section 68.6(a)(1)(ii) and (iii) (services for which the proposed reimbursement is eligible)

Comments

One commenter suggested that the word "or" be substituted for the word "and" in the following passage: "(a)(1) If a professional health service reimbursable under [section 5102(a)(1) of the] Insurance Law section 5102(a)(1) is performed outside [New York] this State, the [permissible charge] amount that the insurer shall reimburse for [such] the service shall be the lower of the amount charged by the provider (and) or the prevailing fee in the geographic location of the provider with respect to services." The commenter suggested that the change in wording would avoid confusion.

Department's Response

The Department believes that the wording as written is clear in its meaning and intent, so that when a professional health service is performed outside of New York, the insurer's reimbursement rate will be either one of two distinct charges between the lower of the amount charged by the provider and the prevailing fee in the geographic location of the provider, whichever is lower.

Proposed 11 NYCRR Section 68.6(a)(2) (definition of "emergency care")

Comments

One commenter, which represents hospitals in No-Fault disputes, argued that the inclusion of a 48-hour time frame after a motor vehicle accident until the time of hospital admission for the performance of emergency medical services, in order to be considered as "emergency care" for purposes of billing for out-of-state health services rendered, undermines the definition of emergency medical services for the purpose of insurance reimbursement to hospitals in New York. The commenter therefore argued that there should not be any time limitation established.

Department's Response

The Department disagrees that there will be an adverse impact upon New York hospitals because of this out-of-state limitation. The amendment makes explicit that the 48-hour time frame will only address very limited circumstances, in which emergency services are provided a few days after an accident occurs. In many instances, a New York resident injured in, for example, New Jersey would have returned to New York and would not then visit a New Jersey hospital for emergency treatment, but would instead visit a local New York hospital for emergency services. In fact, the services provided after 48 hours will still be billed and paid for as emergency services, based upon the applicable rate. The amendment should have no impact upon treatment provided to injured persons.

The submitting agency electronically uploaded ID# DFS-39-16-00007-A on September 22, 2017. The Notice fulfilled all SAPA requirements. Due to a technical, non-substantive issue in the electronic submission, the Notice of Adoption documents were not processed for publication in the October 11, 2017 edition of the *State Register*. Due to these specific circumstances, the Department of State has accepted DFS's September 22, 2017 submission for filing.

NOTICE OF ADOPTION

Transportation Network Companies, Minimum Requirements for Financial Responsibility Policies and Other Requirements

I.D. No. DFS-25-17-00007-A

Filing No. 837

Filing Date: 2017-10-10

Effective Date: 2017-10-25

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

Action taken: Amendment of Parts 27, 169, 216, Subparts 60-1, 60-2, 65-1, 65-3, 65-4; addition of Part 60-3 to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 30; Insurance Law, sections 301, 2105, 2118, 2305, 2307, 2334, 2335, 2601, 3420, 3455, 5102, 5105, 5106, arts. 23, 51; Vehicle and Traffic Law, sections 1693, 1694, 311; L. 2017, ch. 59, part AAA

Subject: Transportation network companies, minimum requirements for financial responsibility policies and other requirements.

Purpose: To implement part AAA of chapter 59 of the Laws of 2017, providing for the operation of transportation network companies in NY.

Substance of final rule: The following sections are amended or added:

Section 27.5(d) is amended to address the excess line affidavit requirement in the context of a transportation network company (TNC) group insurance policy.

Section 27.10(a) is amended to prohibit legal expense coverage within limits or claims-made policies with respect to a TNC group insurance policy placed in the excess line market.

A new subdivision (i) is added to § 60-1.2 to permit a new exclusion in an owner's policy of liability insurance issued in satisfaction of the financial responsibility requirements of Vehicle & Traffic Law Article 6, when the vehicle is used as a TNC vehicle.

A new § 60-1.5(e)(6) to clarify that, for purposes of the rental vehicle coverage required under Insurance Law (IL) § 3440, the use of the vehicle as a TNC vehicle will not be deemed to be the business of carrying or transporting passengers.

The definitions in the rental vehicle endorsement specified in § 60-1.5(h) are amended to clarify that use of the vehicle as a TNC vehicle is not using the vehicle as a public or livery conveyance.

A new § 60-1.5(j) adds a new exclusion to the rental vehicle endorsement to make clear that coverage for the endorsement follows the liability coverage under the policy.

A new § 60-1.7 is added to permit higher limits in an owner's policy of liability insurance issued in satisfaction of the financial responsibility requirements of VTL Article 6 when the vehicle is used to satisfy the financial responsibility requirements of VTL Article 44-B.

A new § 60-1.8 is added to make clear that, when an owner's policy of liability insurance issued in satisfaction of the financial responsibility requirements of VTL Article 6 also provides coverage for use or operation of the vehicle as a TNC vehicle, no-fault and other required coverages will be provided for such use.

Section 60-2.0(a) is amended and a new subdivision (e) is added to add definitions and to include a reference to TNC coverage.

A new section 60-2.1(f) is added to address the mandatory inclusion of supplementary uninsured/underinsured motorists (SUM) coverage in a policy that provides liability coverage while the TNC driver is engaged in a TNC prearranged trip and the mandatory offer of SUM coverage in a policy that provides liability coverage while the driver is logged onto the TNC's digital network but is not engaged in a TNC prearranged trip.

Section 60-2.2(a) is amended to provide for the appropriate notices regarding SUM coverage.

Section 60-2.3(f), which contains the required SUM endorsement, is amended to address the use of the vehicle as a TNC vehicle.

A new Subpart 60-3 is added addressing policies covering the use or operation of a TNC vehicle. The new sections are:

Section 60-3 (purpose);

Section 60-3.1 (definitions);

Section 60-3.2 (general requirements for TNC policies);

Section 60-3.3 (mandatory provisions for TNC policies);

Section 60-3.4 (permissible exclusions for TNC policies;

Section 60-3.5 (discretionary provisions for TNC policies);

Section 60-3.6 (rules for payment to the insured when involved in an accident with an uninsured motor vehicle);

Section 60-3.7 (requirements that apply to a TNC group policy issued pursuant to IL § 3455);

Section 60-3.8 (the requirements when a TNC group policy is placed in the excess line market); and

Section 60-3.9, (minimum notice that must be provided by an insurer writing motor vehicle liability insurance in satisfaction of the financial requirements of Vehicle and Traffic Law article 6 or motor vehicle physical damage insurance).

Section 65-1.1(a) makes the no-fault regulations applicable to TNC policies issued in satisfaction of the VTL article 44-B requirements.

Section 65-1.1(d) amends the mandatory personal injury protection endorsement with respect to TNC policies issued in satisfaction of the VTL article 44-B requirements.

Section 65-1.3(c) amends the additional personal injury protection endorsement with respect to TNC policies issued in satisfaction of the VTL article 44-B requirements.

A new section 65-3.12(f) is added to make clear which insurer is the "insurer of such motor vehicle" as used therein.

New section 65-3.13(a)(6) and (c) are added to address disputes among

insurers as to which insurer is liable for the payment of additional personal injury protection benefits when both have the same priority of payment.

Section 65-4.5(b)(1) and (2) are amended to address special expedited no-fault arbitrations.

Section 65-4.11(a)(1) and (2) are amended to address certain mandatory arbitrations of controversies between insurers with respect to no-fault.

Section 169.1(d)(1) is amended to prevent an insurer from surcharging the insured for an accident that occurs while the vehicle is being used or operated as a TNC vehicle and the insured is not convicted of a moving traffic violation, unless the policy provides coverage for such operation of the vehicle.

A new section 216.2(e) is added to make an unauthorized insurer that issues a group policy pursuant to IL § 3455 subject to unfair claims regulations.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 60-2, 60-3, 65-4.5 and 216.2(e).

Text of rule and any required statements and analyses may be obtained from: Nathaniel Dorfman, New York State Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 473-4824, email: nathaniel.dorfman@dfs.ny.gov

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement ("RIS") is not required for the adoption of this consolidated rulemaking because the non-substantive revisions made to Parts 60-2 and 60-3 and Sections 65-4.5 and 216.2(e) of 11 NYCRR do not require a change to the previously published RIS.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments ("RFA") is not required for the adoption of this consolidated rulemaking because the non-substantive revisions made to Parts 60-2 and 60-3 and Sections 65-4.5 and 216.2(e) of 11 NYCRR do not require a change to the previously published RFA.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis ("RAFA") is not required for the adoption of this consolidated rulemaking because the non-substantive revisions made to Parts 60-2 and 60-3 and Sections 65-4.5 and 216.2(e) of 11 NYCRR do not require a change to the previously published RAFA.

Revised Job Impact Statement

A revised Job Impact Statement ("JIS") is not required for the adoption of this consolidated rulemaking because the non-substantive revisions made to Parts 60-2 and 60-3 and Sections 65-4.5 and 216.2(e) of 11 NYCRR do not require a change to the previously published JIS.

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

In response to the publication of the proposed rule in the New York State Register, the New York State Department of Financial Services ("Department") received comments from a trade association representing property/casualty mutual insurers, two national trade associations representing property/casualty insurers, state trade association representing property/casualty insurers, and the New York excess line stamping office.

Interested parties commented that the: legislative intent of the transportation network company ("TNC") law is that non-commercial motor vehicle insurance policies need not cover any claims arising from TNC activity and that exclusions in existing policies should apply to such activity; annual notice requirement set forth in 11 NYCRR § 60-3.9 represents an increased administrative burden on insurers that will add system costs while providing limited benefits to consumers; Department should clarify the phrase "reasonable belief" in Insurance Law ("IL") § 5106(d); Department should require a TNC driver to provide a notice to the TNC in all cases where the driver files for no-fault insurance benefits; Department should include penalties for non-disclosure under Vehicle and Traffic Law ("VTL") § 1695(6); Department should include more restrictive language for the driver background and driving history check requirements set forth in VTL § 1696(1); Department should require production of the entire group policy so coverage, exclusions, and restrictions may be reviewed; insurer that issued the owner's policy of liability insurance should be specifically included in the list of persons eligible to receive information from the Commissioner of Motor Vehicles under VTL § 1695(8); Department should delete the amendment to 11 NYCRR § 27.10(a), which applies Insurance Regulations 107 and 121 to TNC excess line transactions, and add a new 11 NYCRR § 60-2.8(c); Department should delete the language that applies Insurance Regulation 64, regarding unfair claims practices, to an excess line TNC group policy; federal Nonadmitted and Reinsurance Reform Act of 2010 and IL § 2118(b)(3)(F) authorize an exempt commercial purchaser exemption and that a regulation may not supersede a law; TNC group insurance is not currently on the export list and the express mooting of the provision is therefore unnecessary and sets a bad precedent; and amendments contain several new requirements that place significant burdens on excess line brokers.

The Department amended the rule to fix typographical errors but otherwise did not make any other changes to the proposed amendments. The Department has posted on its website a complete assessment of the public comments that the Department received regarding the proposed rule.

Department of Health

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Use of Marihuana

I.D. No. HLT-43-17-00001-EP
Filing No. 833
Filing Date: 2017-10-05
Effective Date: 2017-10-05

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

Proposed Action: Amendment of sections 1004.3, 1004.4, 1004.22 and 1004.23 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3369-a

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

Specific reasons underlying the finding of necessity: Currently, over 31,000 patients have been certified to use medical marihuana in New York State. Many of these certified patients are admitted into hospitals or reside in residential health care facilities, adult care facilities, community mental health residences, mental hygiene facilities, residential facilities for the care and treatment of persons with developmental disabilities, and residential treatment facilities for children and youth. In addition, there are certified patients who attend private or public schools. These severely ill, and often disabled, certified patients are currently being denied access to medical marihuana because of concerns from facilities over the handling of the medication. Denying certified patients access to medical marihuana, or forcing them to abruptly discontinue using medical marihuana, poses an immediate risk to the health and safety of these patients, some of whom are terminally ill.

The proposed regulations are necessary to immediately allow these facilities the option of becoming designated caregivers for certified patients. Once registered with the Department, designated caregivers are authorized by Public Health Law Section 3362 to possess, acquire, deliver, transfer, transport and/or administer medical marihuana on behalf of their certified patient(s). By allowing a facility to become a designated caregiver, these regulations will authorize the facility to lawfully possess, acquire, deliver, transfer, transport and/or administer medical marihuana to certified patients residing in, or attending, that facility. In doing so, these regulations will help prevent patients from experiencing adverse events associated with abrupt discontinuation of this treatment alternative.

Subject: Medical Use of Marihuana.

Purpose: To allow certain defined facilities to become a designated caregiver for a certified patient in NYS's Medical Marihuana Program.

Text of emergency/proposed rule: Subdivision (k) of section 1004.3 is amended to read as follows:

(k) A certified patient may designate up to two designated caregivers either on the application for issuance or renewal of a registry identification card or in another manner determined by the department. *A designated caregiver may be either a natural person or a facility. For purposes of this section, a "facility" shall mean: a general hospital or residential health care facility operating pursuant to Article 28 of the Public Health Law; an adult care facility operating pursuant to Title 2 of Article 7 of the Social Services Law; a community mental health residence established pursuant to section 41.44 of the Mental Hygiene Law; a hospital operating pursuant to section 7.17 of the Mental Hygiene Law; a mental hygiene facility operating pursuant to Article 31 of the Mental Hygiene Law; an inpatient*

or residential treatment program certified pursuant to Article 32 of the Mental Hygiene Law; a residential facility for the care and treatment of persons with developmental disabilities operating pursuant to Article 16 of the Mental Hygiene Law; a residential treatment facility for children and youth operating pursuant to Article 31 of the Mental Hygiene Law; or a private or public school. Further, within each of the facilities listed above, each division, department, component, floor or other unit of such facility shall be entitled to be considered to be a "facility" for purposes of this section. The application *for issuance or renewal of a registry identification card* shall include the following information:

* * *

(3) date of birth of the proposed designated caregiver(s)*, unless the proposed designated caregiver is not a natural person*;

* * *

Subdivision (b) of section 1004.4 is amended to read as follows:

(b) A *facility or natural* person selected by a certified patient as a designated caregiver [shall] *may* apply to the department for a registry identification card or renewal of such card on a form or in a manner determined by the department. The proposed designated caregiver shall submit an application to the department which shall contain the following information and documentation:

(1) *For a proposed designated caregiver that is a natural person, the individual shall submit:*

(i) the applicant's full name, address, date of birth, telephone number, email address if available, and signature;

([2]*ii*) if the applicant has a registry identification card, the registry identification number;

([3]*iii*) a nonrefundable application fee of fifty ($50) dollars, provided, however that the department may waive or reduce the fee in cases of financial hardship as determined by the department;

([4]*iv*) a statement that the applicant is not the certified patient's practitioner;

([5]*v*) a statement that the applicant agrees to secure and ensure proper handling of all approved medical marihuana products;

([6]*vi*) acknowledgement that a false statement in the application is punishable under section 210.45 of the penal law;

([7]*vii*) proof that the applicant is a New York State resident, consisting of a copy of either:

([i]*a*) a New York State issued driver's license; or

([ii]*b*) a New York State *non-driver* identification card;

([8]*viii*) If the documentation submitted by the applicant in accordance with paragraph ([7]*vii*) of this subdivision does not contain a photograph of the applicant or the photograph on the documentation is not a true likeness of the applicant, the applicant shall provide one recent passport-style color photograph of the applicant's face taken against a white background or backdrop. The photograph shall be a true likeness of the applicant's appearance on the date the photograph was taken and shall not be altered to change any aspect of the applicant's physical appearance. The photograph shall have been taken not more than thirty (30) days prior to the date of the application. The photograph shall be submitted in a form and manner as directed by the department, including as a digital file (.jpeg).

([9]*ix*) Identification of all certified patients for which the applicant serves, has served or has an application pending to serve as a designated caregiver and a statement that the applicant is not currently a designated caregiver for five current certified patients, and that he/she the applicant has not submitted an application which is pending and, if approved, would cause the applicant to be a designated caregiver for a total of five current certified patients;

* * *

(2) For a proposed designated caregiver that is an entire facility that is licensed or operated pursuant to an authority set forth in subdivision (k) of section 1004.3 of this Part, the designated caregiver shall submit:

(i) the facility's full name, address, operating certificate or license number where appropriate, email address, and printed name, title, and signature of an authorized facility representative;

(ii) if the facility has a registry identification card, the registry identification number;

(iii) a statement that the facility agrees to secure and ensure proper handling of all approved medical marihuana products; and

(iv) an acknowledgement that a false statement in the application is punishable under section 210.45 of the penal law;

(3) For a proposed designated caregiver that is a division, department, component, floor or other unit pursuant to subdivision (k) of section 1004.3 of this Part, the designated caregiver shall submit:

(i) the parent facility's full name, address, operating certificate or license number where appropriate, email address, and printed name, title and signature of an authorized representative of the parent facility and of an authorized representative of the division, department, component, floor or other unit;

(ii) if the parent facility, division, department, component, floor or other unit has a registry identification card, the registry identification number;

(iii) a statement that the parent facility, and the division, department, component, floor or other unit, agree to secure and ensure proper handling of all approved medical marihuana products; and

(iv) an acknowledgement that a false statement in the application is punishable under section 210.45 of the penal law.

Subdivision (e) of section 1004.22 is amended to read as follows:

(e) A practitioner shall not be a designated caregiver for any patients that he or she has certified under section 1004.2 of this Part. *However, this shall not prohibit a facility, or a division, department, component, floor or other unit from being a designated caregiver pursuant to section 1004.4 of this Part.*

Section 1004.23 is amended as follows:

§ 1004.23 Designated Caregiver Prohibitions *and Protections*

* * *

(b) A designated caregiver may only obtain payment from the certified patient to be used for the cost of the approved medical marihuana product purchased for the certified patient in the actual amount charged by the registered organization; provided, however, that a designated caregiver may charge the certified patient for reasonable costs incurred in the transportation*,* [and] delivery*, storage and administration* of *approved* medical marihuana [product to the certified patient] *products*.

(c) Designated caregivers, including employees of facilities registered as designated caregivers and acting within their scope of employment, shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for an action or conduct in accordance with this Part.

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 January 2, 2018.

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner is authorized pursuant to Section 3369-a of the Public Health Law (PHL) to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of Article 33 of the Public Health Law.

Legislative Objectives:

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

Needs and Benefits:

The proposed regulations are necessary to allow certain defined facilities to seek Department of Health approval to become a designated caregiver for a certified patient in New York State's Medical Marihuana Program. A certified patient must have one of the severe debilitating or life-threatening conditions listed in Section 1004.2(8) of Title 10 Part 1004 in order to receive a certification and subsequently register with the Medical Marihuana Program. Patients with one of these conditions might not be able to visit the dispensing facilities operated by registered organizations to pick up their medical marihuana, or might not be able to administer medical marihuana to themselves properly, and therefore need to rely on designated caregivers. Previously, the regulations only allowed for designated caregivers to be natural persons. However, recognizing that certified patients may be located in certain facilities, the proposed regulations would allow those certain facilities to be designated caregivers. Facilities designated as caregivers by certified patients would have the ability to register with the Department. Further, each division, department, component, floor or other unit of a parent facility may be designated as a

"facility" for purposes of being designated a caregiver. After registering, a designated caregiver facility would be authorized to possess, acquire, deliver, transfer, transport, and administer medical marihuana on behalf of a certified patient. This would help to prevent patients from experiencing adverse events associated with abrupt discontinuation of a treatment alternative that may be providing relief for the severe debilitating or life-threatening condition.

Costs:

Costs to the Regulated Entity:

Facilities seeking to register as designated caregivers would incur nominal administrative costs in registering. Pursuant to PHL Section 3363(f), there is a $50 application fee for designated caregivers to register with the department. However, the department is currently waiving the $50 application fee for all designated caregivers, including facilities registering as designated caregivers.

Costs to Local Government:

The proposed rule does not require the local government to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

Costs to the Department of Health:

The Department anticipates an increased administrative cost to support facilities seeking to register as designated caregivers, however such increase would be minimal.

Local Government Mandates:

The proposed amendments do not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

No paperwork will be required to be maintained, as the registration process for designated caregivers is all done electronically. A registry identification card will be provided to the facility. The facility will be responsible for maintaining the registry identification card at all times when medical marihuana is present at the facility for the certified patient. The facility may have its own paperwork related to internal policies and procedures for possession of the registry identification card by staff members.

Duplication:

The proposed regulations do not duplicate any existing State or federal requirements.

Alternatives:

The Department could have chosen to keep the status quo and not allow patients to designate facilities as designated caregivers. The Department could have also allowed certified patients to designate an individual within the facility to be a caregiver. However, these options are not viable since patients in facilities may be cared for by multiple staff members in the course of a day. Certified patients have severe debilitating or life-threatening conditions and the regulatory amendments would help to prevent adverse events associated with abrupt discontinuation of a treatment alternative that may be providing relief for certified patients in these facilities.

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

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

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement under the proposed regulation. The regulatory amendment authorizing the patients to designate facilities as designated caregivers does not mandate that a facility register with the medical marihuana program. Hence, no cure period is necessary.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent from the nature of the proposed regulation that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

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

Department of Labor

EMERGENCY RULE MAKING

Home Care Aide Hours Worked

I.D. No. LAB-43-17-00002-E
Filing No. 836
Filing Date: 2017-10-06
Effective Date: 2017-10-06

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

Action taken: Amendment of sections 142-2.1(b), 142-3.1(b) and 142-3.7 of Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11) and 659

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

Specific reasons underlying the finding of necessity: This emergency regulation is needed to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions that treat meal periods and sleep time by home care aides who work shifts of 24 hours or more as hours worked for purposes of state (but not federal) minimum wage. As a result of those decisions, home care agencies may cease to provide home care aides thereby threatening the continued operation of this industry that employs and serves thousands of New Yorkers by providing vital, lifesaving services and averting the institutionalization of those who could otherwise be cared for at home. Because those decisions relied upon the Commissioner's regulation, and rejected the Department's opinion letters as inconsistent with that regulation, this emergency adoption amends the relevant regulations to codify the Commissioner's longstanding and consistent interpretations that such meal periods and sleep times do not constitute hours worked for purposes of minimum wage and overtime requirements.

Subject: Home Care Aide Hours Worked.

Purpose: To clarify that hours worked may exclude meal periods and sleep times for home care aides who work shifts of 24 hours or more.

Text of emergency rule: Sections 142-2.1, 142-3.1 and 143.7 of 12 NYCRR are amended to read as follows:

§ 142-2.1 Basic minimum hourly wage rate and allowances.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) New York City for

(i) Large employers of eleven or more employees
$11.00 per hour on and after December 31, 2016;
$13.00 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018;

(ii) Small employers of ten or fewer employees
$10.50 per hour on and after December 31, 2016;
$12.00 per hour on and after December 31, 2017;
$13.50 per hour on and after December 31, 2018;
$15.00 per hour on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)
$10.00 per hour on and after December 31, 2016;
$11.00 per hour on and after December 31, 2017;
$12.00 per hour on and after December 31, 2018;
$13.00 per hour on and after December 31, 2019;
$14.00 per hour on and after December 31, 2020;
$15.00 per hour on and after December 31, 2021,

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties)
$9.70 per hour on and after December 31, 2016;
$10.40 per hour on and after December 31, 2017;
$11.10 per hour on and after December 31, 2018;
$11.80 per hour on and after December 31, 2019;
$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors, such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

§ 142-3.1 Basic minimum hourly wage rate.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) New York City for

(i) Large employers of eleven or more employees

$11.00 per hour on and after December 31, 2016;
$13.00 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018;

(ii) Small employers of ten or fewer employees

$10.50 per hour on and after December 31, 2016;
$12.00 per hour on and after December 31, 2017;
$13.50 per hour on and after December 31, 2018;
$15.00 per hour on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)

$10.00 per hour on and after December 31, 2016;
$11.00 per hour on and after December 31, 2017;
$12.00 per hour on and after December 31, 2018;
$13.00 per hour on and after December 31, 2019;
$14.00 per hour on and after December 31, 2020;
$15.00 per hour on and after December 31, 2021,

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties)

$9.70 per hour on and after December 31, 2016;
$10.40 per hour on and after December 31, 2017;
$11.10 per hour on and after December 31, 2018;
$11.80 per hour on and after December 31, 2019;
$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors. Such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work:

(1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or

(2) at any other time when he or she is free to leave the place of employment.

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

§ 143.7 An hour.

The term an hour shall include each hour an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee–one who lives on the premises of the employer–shall not be deemed to be permitted to work or required to be available for work:

(a) during such employee's normal sleeping hours solely because he or she is required to be on call during such hours;

(b) at any other time when he or she is free to leave the place of employment.

Notwithstanding the above, the term an hour shall not be construed to include meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 3, 2018.

Text of rule and any required statements and analyses may be obtained from: Michael Paglialonga, NYS Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: regulations@labor.ny.gov

Regulatory Impact Statement

Statutory Authority: State Administrative Procedure Act (SAPA) § 202(6) and Labor Law §§ 21(11) and 659.

Legislative Objectives: In enacting the Minimum Wage Law (Labor Law Article 19) in 1960 the Legislature mandated that the minimum wage be paid "for each hour worked" (Labor Law § 652(1)), without defining that phrase (Labor Law § 651), and delegated authority to the Commissioner of Labor ("Commissioner") to promulgate regulations as she "deems necessary or appropriate to carry out the purposes of this article and to safeguard the minimum wage" (L. 1960, Ch. 619, § 2, at Labor Law § 652(2) & (4)), to order "such modifications of or additions to any regulations as he may deem appropriate to effectuate the purposes of this article" (Labor Law § 659(2)), and to investigate hours worked (Labor Law §§ 660(b)(1) & 661). While Labor Law § 659(2) provides for rulemaking after a hearing, emergency adoption of this rulemaking is authorized "[n]otwithstanding any other law" by SAPA § 202(6).

The regulations to be amended. In 1960, based on the Legislature's delegation of authority, the Commissioner promulgated a new Minimum Wage Order for Miscellaneous Industries and Occupations (currently codified at 12 NYCRR Parts 142 and 143) ("the Wage Order"). The Wage Order contains regulations that defined the term "An hour" and provided that the requirement to pay minimum wages expressly covers time "an employee is permitted to work, or required to be available for work at a place prescribed by the employer." The Wage Order's regulations explicitly recognized that such time shall not be deemed to include sleeping time of a residential employee "solely because he or she is required to be on call during such hours" (see 12 NYCRR §§ 142-2.1(b), 142-3.1(b) & 143.7, originally promulgated as Minimum Wage Order 11 (1960), at II.A.1 (Hourly rate) and III.A.1 (Hourly rate), and Regulations (for exempt nonprofits) at IV.7 (A hour), and published at NYCRR, Supplement 15 (1963) at 344-64).

Legislative expansions to cover workers in the home. Over the years, the Legislature expanded the scope of the Minimum Wage Law as applied to domestic service and home companions. The original 1960 enactment expressly excluded any individual "employed or permitted to work (a) in domestic service in the home of the employer" (L. 1960, Ch. 691, § 2). In 1972, the Legislature removed that exclusion and replaced it with an exclusion for "service as a part time baby sitter in the home of the employer; or someone who lives in the home of the employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" (L. 1971, Ch. 1165, § 1). Finally, in 2010, the Legislature removed the exclusion for in-home companions as part of the Domestic Workers Bill of Rights (L. 2010, Ch. 481 § 8).

Administrative interpretations accompany statutory expansions. The above-referenced legislative expansions in 1972 and 2010 were each preceded by Commissioner's interpretations in the late 1960s and early 1980s that construed the statutory exclusions of domestic service and companions "in the home of the employer" to be inapplicable to domestic service and companions who were employed by agencies and placed in the home of a client. Such interpretations were affirmed by the Board of Standards and Appeals and its successor the Industrial Board of Appeals, and eventually by the Courts (see e.g., Settlement Home Care v. Industrial Board of Appeals, 151 A.D. 580 (2d Dept. 1989)). As the scope of minimum wage coverage expanded through administrative interpretations and legislative enactments, the Commissioner continued to interpret the statutory requirement to pay minimum wages for "each hour worked" to exclude sleep and meal periods of various categories of newly covered workers who were employed by agencies to work in the home of a client for extended periods of time. Those interpretations were set forth in investigators' manuals, formal guidelines, legal opinions, and Commissioner's determinations starting in the early 1970s, and were relied upon by the New York State Department of Health and by private agencies that employed home care aides. While the Commissioner did not amend the Wage Order's regulations to expressly codify those interpretations, she did amend it in 1986 to provide for overtime to be calculated "in the manner and methods provided for in and subject to the exemptions of" the federal Fair Labor Standards Act (FLSA) (12 NYCRR §§ 142-2.2 & 142-3.2) and, in so doing, grew to increasingly look to, and rely upon, federal FLSA regulations interpreting hours worked (29 CFR Part 785) to address meal periods (29 CFR §§ 785.18-19) and sleeping time (29 CFR §§ 785.20-23) so that hours worked were calculated consistently at the state and federal level for overtime (and other) purposes.

Needs and Benefits: This emergency regulation is necessary to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage. Tokhtaman v. Human Care, LLC, Docket No. 3671 151268/16, 2017 NY

Slip Op 02759 (1st Dept. Apr. 11, 2017), motion to reargue and for leave to appeal denied, 2017 NY Slip Op 82713(U) (1st Dept. Aug. 15, 2017); Andryeyeva v. New York Health Care, Inc., 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017); and Moreno v Future Care Health Servs., Inc., 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017). Absent a conflict between the First and Second Departments, and a final judgement in any of these cases that would make them ripe to be heard by the Court of Appeals, the Commissioner must take action now to avert an impending crisis. Emergency adoption of this regulation is necessary for the preservation of the public health, safety, and general welfare to ensure that home care aides will be available to provide care for, and avoid the institutionalization of, those who rely on home care.

The purpose and intent of this rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of home care aides who work shifts of 24 hours or more. While the Commissioner's interpretations regarding meal periods and sleep time have not been limited to home care aides, the current emergency is, and thus the necessarily limited nature of this emergency rulemaking should not be taken as evidence that the Commissioner interprets hours worked to include meal periods and sleep time for all others who work shifts of 24 hours or more. Rather, the Commissioner anticipates that regulations to codify the full scope of her interpretations regarding meal periods and sleep time can be appropriately pursued through the ordinary rulemaking process, after a public hearing and a full notice and comment period.

Costs: As this rule codifies existing Federal regulations and the Commissioner's interpretations, the Department estimates that there will be no costs to the regulated community, to the Department of Labor, or to state and local governments to implement this rulemaking.

Local Government Mandate: None. Federal, state and municipal governments and political subdivisions thereof are excluded from coverage under Part 142 by Labor Law §§ 651(5)(n) and 651(5)(last paragraph).

Paperwork: This rulemaking does not impact any reporting requirements currently required in either statute or regulation.

Duplication: This rulemaking does not duplicate, overlap, or conflict with any other state or federal requirements.

Alternatives: There were no significant alternatives considered.

Federal Standards: This rule keeps New York State in conformity with existing Federal standards involving working time contained in Federal Regulations 29 C.F.R. Part 785, as applied to meal periods and sleep time for home care aides who work shifts of 24 hours or more. There are no other federal standards relating to this rule.

Compliance Schedule: This emergency rulemaking shall become effective upon filing with the Department of State.

Regulatory Flexibility Analysis

Effect of Rule: The purpose and intent of this emergency rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation of Article 19 of the Labor Law and to make clear that the amended regulations shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The Department anticipates this will have a positive impact on small businesses as it will eliminate any instability introduced by decisions recently issued by the State Appellate Divisions. See Tokhtaman v. Human Care, LLC, Docket No. 3671 151268/16, 2017 NY Slip Op 02759 (1st Dept. Apr. 11, 2017), motion to reargue and for leave to appeal denied, 2017 NY Slip Op 82713(U) (1st Dept. Aug. 15, 2017); Andryeyeva v. New York Health Care, Inc., 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017); and Moreno v Future Care Health Servs., Inc., 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017).

Compliance Requirements: Small businesses and local governments will not have to undertake any new reporting, recordkeeping, or other affirmative act in order to comply with this regulation.

Professional Services: No professional services would be required to effectuate the purposes of this regulation.

Compliance Costs: As this regulation codifies existing administrative interpretations relied upon by regulators and employers, the Department estimates that there will be no costs to the small businesses or local governments to implement this regulation.

Economic and Technological Feasibility: The regulation does not require any use of technology to comply.

Minimizing Adverse Impact: The Department does not anticipate that this regulation will adversely impact small businesses or local governments. Since no adverse impact to small businesses or local governments will be realized, it was unnecessary for the Department to consider approaches for minimizing adverse economic impacts as suggested in State Administrative Procedure Act § 202-b(1).

Small Business and Local Government Participation: The Department does not anticipate that this rule will have an adverse economic impact upon small businesses or local governments, nor will it impose new reporting, recordkeeping, or other compliance requirements upon them. Nevertheless, the Department will ensure that small businesses and local governments have an opportunity to participate in the rulemaking process. In connection with a final revision to the regulation, the Department will elicit input from small businesses and local governments during the public comment period, and through a publicly scheduled hearing in accordance with Labor Law §§ 659 and 656.

Initial review of the rule pursuant to SAPA § 207: Initial review of this regulation shall occur no later than the third calendar year in which it is adopted.

Rural Area Flexibility Analysis

Types and estimated numbers of rural areas: The Department anticipates that this regulation will have a positive or neutral impact upon all areas of the state; there is no adverse impact anticipated upon any rural area of the state resulting from adoption of this regulation.

Reporting, recordkeeping and other compliance requirements: This regulation will not impact reporting, recordkeeping or other compliance requirements.

Professional services: No professional services will be required to comply with this regulation.

Costs: As this regulation codifies the Commissioner's longstanding interpretation of Article 19 of the Labor Law, consistent with federal law and regulations, the Department estimates that there will be no new or additional costs to rural areas to implement this regulation.

Minimizing adverse impact: The Department does not anticipate that this regulation will have an adverse impact upon any region of the state. As such, different requirements for rural areas were not necessary.

Rural area participation: The Department does not anticipate that the regulation will have an adverse economic impact upon rural areas nor will it impose new reporting, recordkeeping, or other compliance requirements. Nevertheless, the Department will ensure that rural areas in the state have an opportunity to participate in the rulemaking process. In connection with a final revision to the regulation, the Department will elicit input from rural areas of the state during the public comment period, and through a publicly scheduled hearing in accordance with Labor Law §§ 659 and 656.

Job Impact Statement

Nature of Impact: The Department of Labor (hereinafter "Department") projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this emergency rulemaking. Rather, this regulation will help to limit or eliminate any negative impact on jobs from recent court decisions affecting the home care industry. This regulation amends existing regulations to codify the Commissioner's longstanding and consistent interpretation of Article 19 of the Labor Law and clarify that the amended regulations shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The nature and purpose of this regulation is such that it will not have an adverse impact on jobs or employment opportunities.

Categories and numbers affected: The Department does not anticipate that this regulation will have an adverse impact on jobs or employment opportunities in any category of employment. This regulation will help to ensure the stability of the jobs of home care workers who work shifts of 24 hours or more in New York State. According to the Department's Division of Research and Statistics, there are an estimated 330,650 home care aides employed across the state.

Regions of adverse impact: The Department does not anticipate that this regulation will have an adverse impact upon jobs or employment opportunities statewide or in any particular region of the state.

Minimizing adverse impact: Since the Department does not anticipate any adverse impact upon jobs or employment opportunities resulting from this regulation, no measures to minimize any unnecessary adverse impact on existing jobs or to promote the development of new employment opportunities are required.

Self-employment opportunities: The Department does not foresee a measureable impact upon opportunities for self-employment resulting from adoption of this regulation.

Initial review of the rule pursuant to SAPA § 207: Initial review of this regulation shall occur no later than the third calendar year in which it is adopted.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Notice of Intent to Submeter Electricity and Waiver Request

I.D. No. PSC-43-17-00003-P

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

Proposed Action: The Commission is considering the notice of intent of Midtown Tower LLC, to submeter electricity at 280 East Broad Street, Rochester, New York and request for a waiver of the 16 NYCRR section 96.5(k)(3).

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

Subject: Notice of intent to submeter electricity and waiver request.

Purpose: To consider the notice of intent to submeter electricity and waiver request.

Substance of proposed rule: The Commission is considering the notice of intent of Midtown Tower LLC, (Owner) filed on July 20, 2017, to submeter electricity at 280 East Broad Street, Rochester, New York, located in the service territory of Rochester Gas and Electric Corporation. By stating its intent to submeter electricity, Midtown Tower LLC has requested authorization to take electric service from Rochester Gas and Electric Corporation and then distribute and meter that electricity to tenants. Submetering of electricity to residential tenants is allowed so long as it complies with the protections and requirements of the Commission's regulations at 16 NYCRR Part 96. The Commission is also considering the Owner's request for a waiver of 16 NYCRR § 96.5(k)(3), which requires proof that an energy audit has been conducted when 20 percent or more of the residents receive income-based housing assistance. The full text of the notice of intent and waiver request 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 requested 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-E-0431SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

ReEnergy Lyonsdale, LLC's 22 MW Biomass Facility Located in Lewis County, New York

I.D. No. PSC-43-17-00004-P

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

Proposed Action: The Commission is considering the petition filed by ReEnergy Lyonsdale, LLC on October 2, 2017 to provide financial support for its 22 MW biomass facility under the Tier 2 ''Maintenance Tier'' Program in the Renewable Energy Standard.

Statutory authority: Public Service Law, sections 4(1), 5(1), (2), 66(2); Energy Law, section 6-104(5)(b)

Subject: ReEnergy Lyonsdale, LLC's 22 MW biomass facility located in Lewis County, New York.

Purpose: To promote and maintain renewable electric energy resources.

Substance of proposed rule: The Public Service Commission is considering the petition filed on October 2, 2017 by ReEnergy Lyonsdale, LLC. The petition seeks an order authorizing a Tier 2 Maintenance Tier contract offered through the Renewable Energy Standard (RES) program which extends ReEnergy Lyonsdale's current Maintenance Tier contract at the existing REC price for six months (through June 30, 2018) while the Commission completes its review of the revised Maintenance Tier program in the CES proceeding. Further, ReEnergy requests the Commission authorize an additional 30-month extension of its Maintenance Tier contract from July 1, 2018 through December 31, 2020. ReEnergy will submit updated financial projections to support its request for the additional 30-month REC contract. ReEnergy states that the contract extension will permit the facility to continue operating while ReEnergy proceeds with its emergent plan for adaptive re-use of the facility, which includes the construction of a renewable fuel oil (RFO) and 33 MW (DC) solar project. 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 petition 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-E-0603SP3)

Susquehanna River Basin Commission

INFORMATION NOTICE

Susquehanna River Basin Commission

General Policies

SUMMARY: This document contains proposed rules that would codify in the regulations and strengthen the Susquehanna River Basin Commission's (Commission) Access to Records Policy providing rules and procedures for the public to request and receive the Commission's public records.

DATES: Comments on the proposed rulemaking may be submitted to the Commission on or before November 13, 2017. The Commission has scheduled a public hearing on the proposed rulemaking on November 2, 2017, 2:30 p.m. to 5 p.m. or at the conclusion of public testimony, whichever is sooner.

ADDRESSES: Comments may be mailed to: Jason E. Oyler, Esq., General Counsel, Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788, or by e-mail to regcomments@srbc.net. The public hearing is located in Harrisburg, Pennsylvania, State Capitol (East Wing, Room 8E-B), Commonwealth Avenue, Harrisburg, PA 17120.

Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

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. This document is scheduled to be published in the Federal Register on 10/12/2017 and available online at https://federalregister.gov/d/2017-21975, and on FDsys.gov. Also, for further information on the proposed rulemaking, visit the Commission's website at http://www.srbc.net.

SUPPLEMENTARY INFORMATION: The Commission has long made its records available to the public but it has never formalized its open records policy in regulation. The Commission first promulgated its "Freedom of Information Policy" on January 11, 1979. As an interstate compact agency, no single member jurisdiction may subject the

Commission to its open records law. See C.T. Hellmuth & Associates v. Washington Metropolitan Area Transit Authority, 414 F. Supp. 408 (D. Md. 1976) (holding that Maryland could not unilaterally subject transit authority to the provision of the Maryland Public Information Act). In recognition of this limitation, the Commission developed its policy "in line with Freedom of Information legislation enacted by all four signatory jurisdictions." See Minutes of Commission Meeting (Jan. 11, 1979). As noted in the January 11, 1979, meeting minutes of the Commission, the Policy "merely formalized the current Commission practice of making its records available to the furthest extent possible."

The Commission updated its open records policy on September 10, 2009, by adopting its "Access to Records Policy," Policy No. 2009-02 on September 10, 2009. This policy replaced the 1979 Freedom of Information Policy. The updated policy reflected the practice of the Commission's member jurisdictions, recognized records in electronic format as being subject to public access and added a formal procedure for the protection of confidential information submitted by project sponsors and a procedure for the public to challenge the designation of this information as confidential. This revised policy also provided that the Commission "will endeavor to make as much information as possible available on its website…, in an effort to eliminate the need for many records requests." For example, the Commission provides all of its approved dockets on its website, as well as information summaries for each docket or project application pending before the Commission, policies, reports, publications and data from its water quality monitoring programs.

The Commission believes the results of this policy have been successful. From 2012 through 2016, the Commission provided records to 152 distinct records requests in writing for documents data or information, as well as innumerable informal requests. The Commission website has been a well-used public resource and repository for records. In the past 12 months, the Commission website has received 121,213 visits from 26,522 unique visitors. The Commission Water Application and Approval Viewer, where the public can view Commission dockets and pending application information, was recently upgraded to increase its functionality and ease of use and received 16,593 unique page views over the past 12 months. Similarly, the Commission water quality network data landing page received 9,904 unique page views over this same time period.

The Commission wishes to continue this long tradition of transparency by further formalizing the key elements of its Access to Records Policy in duly promulgated regulations. The Commission is not looking to replace the policy, but rather to memorialize the key tenets of the policy in regulation. Through this action, the Commission will be codifying its commitment to public access to records in a way that imbues them with the status of law that can be enforceable against the Commission.

The Commission's 2009 Access to Records Policy can be found at: http://www.srbc.net/pubinfo/docs/2009-02_Access_to_Records_Policy_20140115.pdf.

The Commission's current records processing fee schedule can be found at: http://www.srbc.net/pubinfo/docs/RecordsProcessingFeeScheduleUpdatedAddress.pdf.

List of Subjects in 18 CFR Part 801

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR part 801 as follows:

PART 801—GENERAL POLICIES

1. The authority citation for part 801 is revised to read as follows:

Authority: Secs. 3.1, 3.4, 3.5(1), 15.1 and 15.2, Pub. L. 91-575 (84 Stat. 1509 et seq.)

2. Add § 801.14 to read as follows:

§ 801.14 Public access to records.

(a) Purpose. The Commission, as an independent compact agency, is not subject to any of its member jurisdictions' laws regarding public access to records. Nevertheless, the Commission wishes to assure, to the maximum extent practicable, the availability of Commission records consistent with the Susquehanna River Basin Compact. The Commission shall maintain an "Access to Records Policy" that outlines the details and procedures related to public access to the Commission's records. Any revisions to this policy shall be consistent with this section and undertaken in accordance with appropriate public notice and comment consistent with requirements of 18 CFR 808.1.

(b) Scope. This section shall apply to all recorded information, regardless of whether the information exists in written or electronic format. There is a strong presumption that records shall be public, except where considerations of privacy, confidentiality, and security must be considered and require thoughtful balancing. The Commission shall identify types of records that are not subject to public access, including but not limited to:

(1) Personnel or employment records;

(2) Trade secrets, copyrighted material, or any other confidential business information;

(3) Records exempted from disclosure by statute, regulation, court order, or recognized privilege;

(4) Records reflecting internal pre-decisional deliberations;

(5) Records reflecting employee medical information, evaluations, tests or other identifiable health information;

(6) Records reflecting employee personal information, such as social security number, driver's license number, personal financial information, home addresses, home or personal cellular numbers, confidential personal information, spouse names, marital status or dependent information;

(7) Investigatory or enforcement records that would interfere with active enforcement proceedings or individual due process rights, disclose the identity of public complainants or confidential sources or investigative techniques or endanger the life or safety of Commission personnel; or

(8) Records related to emergency procedures, facilities or critical infrastructure.

(c) Procedures. The Access to Records Policy will detail the necessary procedures for requesting records and processing records requests:

(1) Requests shall be in writing and shall be reasonably specific;

(2) The Commission shall identify an Access to Records Officer to handle requests;

(3) The Commission shall respond to a records request within a reasonable time and in consideration of available resources and the nature of the request;

(4) The Commission shall not be required to create a record that does not already exist, or to compile, maintain, format or organize a public record in a manner in which the Commission does not currently do so;

(5) A procedure shall be identified for electronic transfer, copying or otherwise providing records in a manner that maintains the integrity of the Commission's files;

(6) A procedure shall be identified for handling review of requests that seek access to information that has been identified as confidential and for notifying the person(s) who submitted the confidential information that it is subject to a records request.

(d) Fees. The Commission shall adopt and maintain a "Records Processing Fee Schedule." The fees shall be calculated to reflect the actual costs to the Commission for processing records requests and may include the costs of reproducing records and the cost to search, prepare and/or redact records for extraordinary requests.

(e) Appeals. Any person aggrieved by a Commission action on a records request shall have 30 days to appeal a decision in accordance with 18 CFR 808.2.

Dated: October 5, 2017.

Stephanie L. Richardson

Secretary to the Commission.