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 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-35-16-00010-P	August 31, 2016	August 31, 2017

Department of Environmental Conservation

NOTICE OF ADOPTION

Solid Waste Management Regulations

I.D. No. ENV-11-16-00004-A
Filing No. 760
Filing Date: 2017-09-05
Effective Date: 60 days after filing

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

Action taken: Repeal of Parts 360, 362, 363, 364 and 369; addition of Parts 360, 361, 362, 363, 364, 365, 366 and 369; renumbering of Parts 361 to 377; and amendment of Parts 370, 371, 372, 373, 374 and 621 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 8-0113, titles 3, 5, 7, 8 of arts. 17, 19-0301, 19-0303, 19-0306, title 23 of art. 23, titles 1, 3, 5, 7, 9, 10, 13, 15, 18, 21, 23, 25, 26, 27, 29 of arts. 27, 27-1901, 27-1903, 27-1911, 54-0103, titles 5 and 7 of art. 54, title 1 of arts. 70, 71-2201, titles 27, 35, 40 and 44 of arts. 71 and 72-0502

Subject: Solid Waste Management Regulations.

Purpose: Amend the rules that implement the solid waste program in New York State to incorporate changes in law and technology.

Substance of final rule: This rulemaking is a comprehensive revision to the State's solid waste management regulations, 6 NYCRR Part 360. The overarching purpose of this rulemaking is to reorganize the existing solid waste regulations and group regulations for facilities that are similar in nature, such as facilities that recycle and recover materials. As a result of this reorganization, existing Part 360 is subdivided into Parts 360, 361, 362, 363, 365, and 366. The facilities covered by each part are described below. This rulemaking also includes many enhancements to the existing rules that reflect the Department's collective experience in regulating solid waste management facilities since the last major update to the regulations. In addition to reorganizing and enhancing Part 360, this rulemaking includes revisions to regulations governing waste transportation (Part 364) and state assistance grants to municipalities for solid waste management (Part 369). This rulemaking also incorporates minor amendments to Parts 621 and Parts 370-374.

Part 360 General Requirements

Existing Part 360 is repealed and a new Part 360 is adopted which includes the general requirements for all solid waste management facilities. This includes definitions, general exemptions, variance criteria, financial assurance criteria, general permit application and operation standards, and provisions to petition the Department for a beneficial use determination (BUD); a jurisdictional determination that a material is not solid waste. Part 360 also includes specific BUD criteria for navigational dredge material and the use of production brine. In addition, the regulations include a new section (360.13) to address the management of fill material, including criteria for the on-site use, off-site use, and disposal of the fill. Many of the definitions in Part 360 represent new terminology based on Department experience. The General Requirements also include transition criteria.

Part 361 Material Recovery Facilities

Existing Part 361 is renumbered as Part 377, and a new Part 361 is adopted which includes Subparts for: Recyclables Handling and Recovery Facilities; Land Application and Associated Storage Facilities; Composting and Other Organics Recycling Facilities; Mulch Processing Facilities; Construction and Demolition Debris Handling and Recovery Facilities; Waste Tire Handling and Recovery Facilities; Metal Processing and Vehicle Dismantling Facilities; Used Cooking Oil and Yellow Grease Processing Facilities; and Navigational Dredged Material Handling and Recovery Facilities.

For recycling and C&D debris processing facilities, the regulations include storage limits for material qualifying for a BUD as well as criteria for the processing and management of materials received. The regulations for Subpart 361-3 include criteria for technologies besides composting including anaerobic digestion and fermentation. Subpart 361-4 includes new criteria for facilities that produce mulch to control fire potential and other potential issues. The criteria include pile size restrictions, temperature monitoring, setbacks, etc. Subparts are also included for waste tire management, metal processing, used cooking oil processing, and dredged material handling and recovery.

Part 362 Combustion, Thermal Treatment, Transfer and Collection Facilities

Existing Part 362 is repealed and a new Part 362 is adopted which contains separate subparts for: Combustion Facilities and Thermal Treatment Facilities; Municipal Solid Waste (MSW) Processing Facilities; Transfer Facilities; and Household Hazardous Collection Facilities and Events.

The regulations restrict several source-separated waste streams from being managed in combustors or thermal treatment facilities that accept MSW. The regulations require combustors, thermal treatment facilities that process MSW, and transfer facilities that transport wastes out-of-state to install and utilize fixed radiation detectors to monitor incoming waste. To increase material recovery, the regulations will allow transfer facilities also authorized as recyclables handling and recovery facilities to accept particular source-separated waste streams for recycling. The regulations include storage, pile height and stacking requirements for unprocessed and processed waste. The current household hazardous waste regulations located in Subpart 373-4 are repealed and the rules are now included in this new Part.

Part 363 Landfills

Existing Part 363 is repealed and a new 6 NYCRR Part 363 addressing landfills is adopted. The regulations will require that horizontal gas collection systems be installed and require submission of a greenhouse gas reduction plan. Part 363 also includes language to clarify the responsibilities of landfills owners after closure. Under the regulations, post-closure care activities including leachate collection and treatment; landfill cover maintenance and repair; regular landfill gas, water quality monitoring; and regular inspection must be conducted until the owner or operator can demonstrate that the landfill's potential threat to public health or the environment has been reduced to a level where monitoring and maintenance can be reduced. The regulations require a facility manual for a landfill to include a custodial care plan. Throughout both the post-closure and custodial care periods, the owner or operator must maintain financial assurance to ensure post-closure and custodial care activities continue.

The regulations contain several clarifying changes, including the hydrogeologic investigation requirements, addition of a prohibition on the disposal of fluids from oil and gas production, and clarification of landfill reclamation rules. The regulations also include an additional exemption for management of waste from municipal and state highway projects. The regulations contain a limitation on tree disposal facilities to one acre in size in order for such facilities to be exempt from definition as a landfill. This exemption is not available in Nassau and Suffolk counties.

The regulations also include a limit on exempt disposal of materials such as uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil, and rock. The regulations limit the exemption to no more than 5,000 cubic yards. This exemption is not available in Nassau and Suffolk counties.

The technical criteria for landfill construction has been updated to incorporate technological changes and other frequently varianced conditions. The regulations require that landfill liner integrity testing be conducted on both geomembrane liners of a double-composite liner system. The regulations also require that the secondary leachate collection and removal system be designed to a minimum flowrate to ensure rapid detection of leaks.

Part 363 also requires landfills to submit a sustainability plan with new applications. The plan will address ways to conserve landfill airspace, encourage diversion of natural resources, reduce receipt of organic wastes, utilize alterative operating cover materials, enhance waste mass stabilization, and utilize other sustainable landfill management techniques.

Part 364 Waste Transporters

Existing Part 364 is repealed and a new Part 364 is adopted. The new Part 364 has been revised to operate in concert with new Parts 360-363 and 365 and include tracking of wastes such as C&D debris, historic fill (now defined as fill material), and non-exempt drilling and production waste, and to exclude the permitting of wastes with little potential harm when transported. Regulated medical waste will continue to require a tracking form. Exemptions have been clarified and new exemptions added for electronics destined for recovery, elemental mercury and dental amalgam from dental facilities destined for mercury recovery, and regulated medical waste (RMW) transported by emergency rescue vehicles. The requirements of Part 364 include enhanced tracking fill material leaving New York City, an exemption for waste incidentally transported by a public utility, enhancement of the registration requirements for transporters, and several clarifying changes to avoid overlap with Part 360.

Part 365 Regulated Medical Waste and Other Infectious Wastes

The Department has consolidated the requirements for treatment and management of regulated medical waste (RMW) in one location, and address wastes that present a biological hazard similar to RMW. Newly adopted Part 365 includes criteria for RMW generators, RMW management facilities, and the management of other infectious wastes similar to RMW. Part 365 includes substantial re-organization of the requirements for RMW, and separates the requirements for generators from the requirements for treatment, storage and disposal facilities.

Part 366 Local Solid Waste Management Planning

A new Part 366 is adopted to govern local solid waste management planning. Part 366 clarifies the public's role in LSWMP preparation and approval, as well as the requirements for LSWMP updates, modifications, and biennial compliance reports. The streamlining and reorganization of the LSWMP process is intended to make the preparation and implementation of LSWMPs less complicated for municipalities, yet at the same time assist them in reducing the amount of waste they are disposing and increase the percentages of recyclables removed from the waste stream. The regulations include default approval of plans if the Department does not meet review deadlines, reorganization of the approval process and several changes to the rules for biennial updates and withdrawal of an LSWMP.

Part 369 State Assistance Projects

Existing Part 369 is repealed and a new Part 369 is adopted to address state assistance projects. Various state assistance programs related to waste management have been consolidated into the new Part 369. The regulations create separate funding categories for capital waste reduction, recycling and household hazardous waste projects; waste reduction and recycling education and coordination projects; household hazardous waste collection and disposal; as well as establishment of an annual application process for education/coordination; and HHW collection programs to better control and direct available funding to municipalities in a timely manner. For the annually funded projects, should insufficient funds be available to provide 50% reimbursement, the department may either lower the percentage or set a dollar maximum on the funding level.

Due to changing technologies and evolving priorities, the department needs to have flexibility to help advance certain waste reduction and recycling activities and projects in the state. In order to accomplish this, the regulations establish a targeted priority area assistance program that the Department can use as needed in accordance with available funding and program needs and priorities.

In order to ensure that funded projects are well thought out and part of a reasonable and structured program consistent with state and local waste reduction and recycling efforts, awarding of state assistance grants will be limited to municipalities guided by approved LSWMPs or Comprehensive Recycling Analyses (CRAs) or those found to be making substantial progress toward completion of an LSWMP or CRA, unless unique circumstances prevent the municipality from completing an LSWMP or CRA in a timely fashion.

Final rule as compared with last published rule: Nonsubstantive changes were made in Parts 360, 361, 362, 363, 364, 365, 366 and 369.

Revised rule making(s) were previously published in the State Register on June 21, 2017.

Text of rule and any required statements and analyses may be obtained from: Melissa Treers, Department of Environmental Conservation, Division of Materials Management, 625 Broadway, Albany, NY 12233-7260, (518) 402-8678, email: melissa.treers@dec.ny.gov

Summary of Revised Regulatory Impact Statement

This rulemaking is a comprehensive revision to the Department's existing solid waste management regulations, found in 6 NYCRR Part 360. The existing regulations impact every aspect of the waste process, from initial collection to reuse, recycling, processing, storage, treatment and ultimately, disposal. The overarching purpose of this rulemaking is to reorganize and subdivide the solid waste management facility regulations into groups that are similar in nature, such as facilities that recycle and recover materials. As a result of this reorganization, the current Part 360 criteria will be found in Parts 360, 361, 362, 363, 365, and 366. This rulemaking also includes revisions to regulations governing waste transportation (Part 364) and state funding of municipal waste reduction and recycling projects (Part 369). In addition to reorganizing existing regulations, the rulemaking includes many enhancements to the existing rules which reflect the Department's collective experience in regulating solid waste management since the last major rewrite of the rules.

This rulemaking also incorporates minor amendments to Parts 621, 361, 362, 363, 370, 371, 372, 373 and 374. These changes include the repeal of Parts that are no longer supported by funding (existing Parts 362 and 363), removal of rules for used oil from existing Subpart 360-14 so that used oil is addressed in Subpart 374-2, and the relocation of rules that address household hazardous waste and hazardous waste from small quantity generators into the new Subpart 362-4.

The Department's statutory authority to promulgate amendments to Part 360 and adopt new regulations is found in Environmental Conservation Law Sections 1-0101, 3-0301, 8-0113, Titles 3, 5, 7 and 8 of Article 17, 19-0301,19-0303,19-0306, Title 23 of Article 23, Titles 1, 3, 5, 7, 9, 10, 13, 15, 18, 21, 23, 25, 26, 27, 29 of Article 27, 27-1901, 27-1903, 27-1911, 54-0103, Titles 5 and 7 of Article 54, Title 1 of Article 70, 71-2201, Titles 27, 35,40 and 44 of Article 71, and 72-0502.

NEEDS AND BENEFITS

The last comprehensive revisions to the regulations governing solid waste management in New York State occurred 20 years ago in 1993. Many changes in law and technology have occurred in that time period that dictate the need for an overhaul of the regulations. In the last two

decades the Department has gained expertise on the proper technical criteria for these facilities and this knowledge needs to be reflected in the regulations. Many new or expanded waste management facilities, particularly recycling facilities and landfills, have been constructed since the last comprehensive revision in 1993. Experience in regulating those facilities has demonstrated that many areas of the regulations would benefit from revision, clarification, or modification to allow for new, technically appropriate alternatives to the design and operation criteria for solid waste management facilities found in the existing regulations, and to streamline the regulatory process.

Although landfills may be the first solid waste facility that comes to mind when discussing solid waste management, there are many other facilities that also manage solid waste, from combustors to transfer facilities and commercial medical waste autoclaves. Some of these facility types did not even exist 20 years ago when the regulations were last revised or were much different than they are today. Therefore, new or revised regulations are needed at this time. Each type of facility has its own environmental characteristics and concerns that need to be reflected in the rules.

Reorganization of the entire set of rules provides distinct benefits to the regulated community and the Department. All definitions applicable for Parts 360-366 and 369 are located in Part 360, eliminating questions over how terms may be defined in different Parts, Subparts and Sections. By breaking Part 360 apart and creating distinct Parts and Subparts for similar facilities, and following a consistent format in each Part, the regulated community and the Department now has a more user-friendly set of rules.

The regulations include several enhancements to the existing rules, such as increased tracking requirements for construction and demolition (C&D) debris transport, a limitation on the amount of C&D debris that may be disposed without a permit, a more refined system for beneficial use determinations and a reorganized set of rules for regulated medical waste.

For landfills and other solid waste management facilities, updating the regulatory criteria does not mean more stringent criteria in all cases. If Department research and experience has found that a current regulatory requirement is too stringent or does not provide an environmental benefit, the rulemaking provides relief from that requirement. In that regard, the regulations benefit the regulated community and the general public by reflecting conditions that exist today. In all cases, the goal of the regulations is to ensure the citizens of New York State are protected by the most up to date and appropriate solid waste management regulations.

In December of 2010, the Department adopted a new State Solid Waste Management Plan, entitled Beyond Waste: A Sustainable Materials Management Strategy for New York State (http://www.dec.ny.gov/chemical/41831.html). This Plan sets forth multiple strategies to reduce the reliance on disposal facilities and increase waste reduction and recycling. The rulemaking addresses the issues outlined in the State Solid Waste Management Plan and includes measures to further the environmental objectives set out in that Plan.

COSTS

For a number of facilities, such as mulch processing facilities and landfills, the regulations will result in some additional costs for regulated parties, including local governments. For those rules which are being re-promulgated as a result of reorganization, no significant change from the current regulatory program costs is anticipated.

Cost to the Regulated Community:

The majority of the criteria in the rulemaking are derived from the current regulatory program in Part 360. For the majority of involved industries, the costs associated with complying will be similar or less than the costs currently incurred. However, the rulemaking includes many enhancements to the existing program, which will increase costs for some facilities. Increased costs on the regulatory community will result from requirements to:

-Install radiation detectors at MSW landfills, MSW combustion facilities, and composting and organics processing facilities ($7,000 to $20,000 per unit depending on model specifications, plus $2,000-$3,000 for maintenance);

-Obtain permits in case where rules lower permitting thresholds for existing registered facilities (recyclable handling facilities which process more than 250 tons, C&D facilities which process >500 tons per day), ($20,000 to $50,000 depending on complexity of proposal);

-test fill material ($900 to $1300 per sample);

-obtain a registration where rules lowered thresholds for currently exempt or permitted facilities ($3,000 to $5,000 in administrative costs);

-conduct landfill liner integrity testing ($2,000 to $3,000 per acre);

-install geosynthetic clay liner in the landfill's primary composite liner ($0.54 per foot);

-improve hydraulic capacity of secondary leachate collection system ($1.00 to $1.25 per square foot).

Costs to the Department and the State:

The cost to the State lies within the Department, for implementation and administration of the regulatory program. Since this is an existing regulatory program, it is not expected to be a significant increased cost to the Department.

Costs to Local Governments:

These regulations will not impose any direct costs on local governments in general. However, local governments who own and operate solid waste management facilities, such as landfills, may incur additional or reduced costs associated with the regulations as described above. With respect to solid waste management planning, no additional costs are anticipated and the regulations are expected to result in a reduction of municipal expenses and staff time necessary in the preparation of Local Solid Waste Management Plans (LSWMPs) and LSWMP updates.

LOCAL GOVERNMENT MANDATES

The regulations do not directly mandate the expenditure of funds by any sector of local government. The rulemaking primarily updates existing regulatory criteria applicable to solid waste management facilities. If a local government or small business owns and operates a solid waste management facility, the costs associated with revisions to criteria for that facility apply, as discussed above. The rulemaking is not expected to negatively affect local governments.

PAPERWORK

The rulemaking will impose additional paperwork requirements for the regulated community in some cases. Those impacted include waste transporters of C&D debris, fill material, non-exempt drilling and production waste, and commercial waste. These facilities will be required to register under Part 364 and comply with reporting requirements. In addition, some facilities will have an annual reporting requirement that is not required by the existing program. This includes facilities whose waste activities are covered under a beneficial use determination, waste transporters, and registered facilities. In addition, facilities who submit a registration application to the Department would also have to submit a site plan, which is not required under the existing rules. The regulations include criteria to reduce the burden of paperwork in some cases by reducing the quantity of information that must be submitted with permit applications and annual reports. Also, the regulations allow electronic submissions whenever possible to ease the transfer of data and information. The Department intends to develop new forms to simplify and standardize electronic reporting requirements to ease the paperwork requirements imposed by the regulations.

DUPLICATION

The regulations are not intended to duplicate any other federal or State regulations or statutes. There are federal and state regulated medical waste labeling and packaging requirements promulgated by the federal Department of Transportation and the NYS Department of Health. However, the rules are consistent with those requirements and are intended to complement those programs for facilities covered under Part 365. There is no federal regulatory program covering most of the facilities governed by Parts 360-366 or 369.

ALTERNATIVE APPROACHES

The Department examined the "no-action" alternative, which would be to continue the existing set of rules for solid waste management. This program consists of existing Parts 360, 364 and 369, Division guidance memoranda, program policies, and interpretation of Division memoranda on solid waste management issues and topics. Continuing this approach would provide the Department with a wide degree of administrative discretion and allow for rapid changes in management to account for recent advances in solid waste management. However, this approach may result in inconsistent application of the program across the State due to variations in the interpretation of Part 360 where other department guidance is not available. Additionally, the rulemaking is one of the key recommendations of the State Solid Waste Management Plan. For these reasons, the no-action alternative was rejected.

The rulemaking has been the subject of both extensive internal review and public review and discussion for several years. The result of this process is the subject rulemaking that the Department considers protective of environmental resources in a manner that limits the cost to the regulated community. In many cases, the cost to adhere to the regulatory criteria has been reduced without any reduction in environmental protection.

FEDERAL STANDARDS

As stated above, there are no federal regulations for most of the facilities contained in the rulemaking. The regulations for landfills and biosolids recycling exceed the federal regulatory framework found in 40 CFR Part 258 and 503, respectively.

COMPLIANCE SCHEDULE

For new facilities, compliance will be required upon adoption of the final rule. For existing facilities, transition provisions are specified in Section 360.4.

INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within 3 years as required by SAPA § 207.

Revised Regulatory Flexibility Analysis

This rulemaking modifies the Department of Environmental Conservation's (Department) existing regulations governing a broad array of solid waste management activities including the transportation of waste, local solid waste management planning, and funding of costs associated with solid waste management, as well as the design and operation of solid waste management facilities.

1. EFFECT OF RULE

The rulemaking is not expected to negatively affect small business and local governments. The rulemaking primarily updates existing regulatory criteria applicable to solid waste management facilities. If a local government or small business owns and operates a solid waste management facility, the costs associated with revisions to criteria for that facility apply.

2. COMPLIANCE REQUIREMENTS

The rulemaking will impose additional paperwork requirements for the regulated community in some specific cases. Those impacted include waste transporters of C&D debris, fill material, non-exempt drilling and production waste, and commercial waste. These facilities will be required to register under Part 364 and comply with reporting requirements. In addition, some facilities will have an annual reporting requirement that is not required by the existing program. This includes facilities whose waste activities are covered under a beneficial use determination, waste transporters, and registered facilities. In addition, facilities who submit a registration application to the Department will also have to submit a site plan, which is not required under the existing rules. The regulations include criteria to reduce the burden of paperwork in some cases by reducing the quantity of information that must be submitted with permit applications and annual reports. Also, the regulations allow electronic submissions whenever possible to ease the transfer of data and information.

This rulemaking will not directly impose any significant service, duty or responsibility upon any county, city, town, village, school district, fire district or small business. This rulemaking does not directly mandate the expenditure of funds by any sector of local government.

3. PROFESSIONAL SERVICES

The need for additional professional services for small businesses and local governments is not anticipated. If a local government or small business is currently operating a solid waste management facility, they may already employ professional services to facilitate the operation of that facility and compliance with the regulatory requirements. The regulations are not expected to increase the level of professional services needed by those entities.

4. COMPLIANCE COSTS

The rulemaking does not impose additional paperwork requirements for most small businesses and local governments who operate solid waste management facilities or waste transportation businesses except for commercial waste transportation in quantities greater than 2000 pounds, and construction and demolition debris in quantities greater than 10 cubic yards. These transporters will be required to register and comply with certain reporting requirements under Part 364. However, the regulations include criteria to reduce the burden of paperwork by reducing the quantity of information that must be submitted with permit applications and with annual reports. Also, the regulations allow electronic submissions whenever possible to ease the transfer of data and information. The Department intends to develop new forms to simplify and standardize electronic reporting to ease the paperwork requirements imposed by the regulations. Therefore, there will be no increase in cost for reporting.

These regulations will not impose any direct costs on small businesses or local governments. However, local governments and small businesses may own and operate solid waste management facilities or operate a waste transportation businesses. If a small business or local government owns and operates a solid waste management facility or waste transportation business, the costs associated with compliance with the rulemaking, including cost savings, are described below, organized by Part. As outlined below, in some cases the regulations will reduce cost associated with compliance. In others, the cost may increase.

Part 360 General Requirements:

-Clarification of criteria for beneficial use determinations, combined with the increased number of predetermined beneficial use determinations in the regulations, will help small businesses and local governments determine if their waste could be used in a beneficial manner, which could lead to cost savings through the reuse or sale of additional reused material.

-Specifying criteria for the use of dredged materials will help to facilitate the reuse of appropriate materials and reduce the significant cost associated with disposal.

Part 361 Material Recovery Facilities:

-An exemption for small scale food scrap composting will reduce the cost of management. An increasing the size threshold of a facility requiring registration related to food scraps will have a similar positive effect.

-New standards for the production of mulch may result in increased cost to a municipality or private firm due to the need for additional land for the quantity of material managed since pile size restrictions are included in the criteria. However, these criteria are not expected to affect most municipalities that have piles of mulch because they do not handle a significant amount of material.

-The registration criteria for used cooking oil and yellow grease will result in decreased costs to a small facility owner since they will not incur the cost of obtaining a permit.

Part 362 Combustion, Thermal Treatment, Transfer and Collection Facilities:

-Permitted transfer facilities from which waste is transported out-of-state and municipal solid waste processing facilities must install and operate a fixed radiation detection unit at a location appropriate for the monitoring of all incoming waste. The cost of purchasing this equipment ranges from $7,000 - $20,000 per unit depending on the level of capabilities that is desired. The cost of maintenance, including calibration is expected to be $2,000 - $3,000 annually.

-The registration for the combustion of limited amounts of waste tires, unadulterated wood, used cooking oil and yellow grease under prescribed conditions will result in decreased costs for a small facility owner since they will not incur the cost of obtaining a permit.

Part 363 Landfills:

-Elimination of the requirement to submit a site selection report for new landfill construction will result in cost savings of tens of thousands of dollars to landfill owners in preparation of this report.

-The requirement for adding electrical resistivity testing on the upper and lower liner system as part of a Construction Quality Assurance (CQA) Plan will add cost to the construction of new landfill cells. Costs associated with the requirement are expected to be between $2,000 - $3,000 per acre of geomembrane tested.

-The regulations require all landfills that receive municipal solid waste to install and operate a fixed radiation detection unit at a location appropriate for the monitoring of all incoming waste. The cost of purchasing this equipment ranges from $7,000 - $20,000 per unit depending on the level of capabilities that are desired. The cost of maintenance, including calibration is expected to be between $2,000 - $3,000 annually.

-The regulations require that landfills design and install an active gas collection system as part of the permit application and landfill construction. This will allow landfills to take advantage of available gas collection credit programs.

Part 364 Waste Transporters:

-There may be an increased cost for transporters that will be required to register and comply with recordkeeping and reporting requirements. There are no fees associated with registration, only minor costs associated with the completion of tracking forms and the completion and submission of an annual report similar to registered facilities.

-There will be a decrease in the cost of compliance for small transporters of regulated solid waste. The amount of material that can be transported without a permit will be increased from 500 to 2,000 pounds. Those transporters that mange between 500 and 2,000 pounds will save the cost of permitting under the waste transporter program while improving the economic efficiency of their business with the higher weight threshold.

Part 365 Regulated Medical Waste and Other Infectious Wastes:

-Most generators choosing to treat RMW or other infectious wastes on-site will incur no additional costs since many, especially those based in healthcare, academic or research institutions already have autoclaves in place for processing their waste. Facilities that choose to treat waste on-site (that currently do not) may incur an initial cost increase to purchase treatment devices, but over the long term, will experience considerable cost savings over transportation and off-site processing costs.

-The regulations add provisions for other infectious wastes. Although these represent new costs for compliance, the Department has been working for a number of years with entities that generate these wastes to obtain voluntary compliance with these standards.

Part 366 Local Solid Waste Management Planning:

-A reduction in staff time and costs related to the development and reporting requirements to a local government is expected as a result of the changes in the regulations. Small businesses are not subject to the provisions of this Part.

Part 369 State Assistance Projects:

-Small businesses are not subject to the provisions of Part 369. There will be no significant change in cost to a local government located in a rural area when compared to the existing regulations.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The rulemaking has been in development for many years and has been subject to significant public review and comment. The Department has focused on revising the regulations in a manner that is technically sound and economical. The regulations that apply to facilities that are currently subject to regulation are not expected to significantly alter the operation or costs associated with those operations. However, changes in law and technology required the addition of new facility requirements in the

regulations, such as vehicle dismantling facilities and facility types that are not currently addressed in the regulations. Addition of these facility requirements should not result in increased costs to these facilities. In some cases, the regulations include reduced regulatory oversight, through expanded exemptions, predetermined beneficial use determinations, and registration provisions, which will reduce the costs associated with some solid waste facilities and activities.

6. MINIMIZING ADVERSE IMPACTS

The rulemaking is not expected to have adverse impacts on local governments or small businesses in New York State. The updated regulatory criteria for solid waste facilities, such as landfills, are not expected to significantly change the cost of the operation of those facilities. Therefore, residents and businesses will not see an increase in the cost of solid waste management due to the rulemaking.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The rulemaking has been in development for many years. During that time period, the Department has published draft regulations, accepted and evaluated public comments, given public presentations on draft criteria in numerous venues, and met with potentially affected parties. Those solid waste facilities and other affected parties have been solicited for input on the proposed revisions. Both the regulated community and public were afforded two opportunities to review and comment on draft regulations, which resulted in significant helpful input on the regulations. The regulations have undergone significant changes based on the input received from the comments and additional stakeholder and outreach efforts undertaken with this rulemaking.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

Pursuant to SAPA 202-b(1-a)(a) and (b), the rulemaking includes transition provisions that provide adequate time for regulated parties to come into compliance with any new provisions. Otherwise there is no such cure period included in the rule because of the potential for adverse impacts on human health and the environment. Cure periods for the illegal management or disposal of solid waste are neither desirable nor recommended as compliance is required to ensure the general welfare of the public and the environment is protected.

9. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years as required by SAPA § 207.

Revised Rural Area Flexibility Analysis

The rulemaking modifies the Department of Environmental Conservation's (Department) existing regulations governing solid waste management activities including facilities, waste transporters, local solid waste management planning, and state assistance projects. Since the last revision in 1993, there have been technological, legal, and policy changes that need to be reflected in the regulations. Solid waste management covers a variety of activities, including regulated medical waste and medical waste treatment, in addition to landfills and other facilities that are commonly associated with waste management. The Department does not expect the rulemaking to have a negative economic impact on rural areas.

1. TYPES AND NUMBERS OF RURAL AREAS AFFECTED

All areas of the state, including rural areas, generate solid waste and will be affected directly or indirectly by the rulemaking.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

The rulemaking does not impose additional paperwork requirements for the majority of facilities affected by this rulemaking, including facilities located in rural areas. The existing regulations require annual reports from most solid waste management facilities, and these requirements continue under the newly adopted regulations. However, the regulations include criteria to reduce the burden of paperwork by reducing the quantity of information that must be submitted with permit applications and annual reports. Also, the regulations allow electronic submissions whenever possible to ease the transfer of data and information. The Department intends to develop new forms to simplify and standardize electronic reporting to ease the paperwork requirements imposed by the regulations.

The rulemaking will not directly impose any significant service, duty or responsibility upon any county, city, town, village, school district or fire district in a rural area. This rulemaking does not directly mandate the expenditure of funds by any sector of local government.

If a local government in a rural area chooses to own and operate a solid waste management facility in the State, the rulemaking may require the additional expenditure of funds to comply with the requirements of Parts 360, 361, 362, 363, and 364, which govern those solid waste facilities.

3. COSTS

These regulations will not impose any direct costs on rural areas. However, rural area governments may own and operate solid waste management facilities such as transfer facilities and landfills. If a local government owns a solid waste management facility, the costs associated with compliance with the revised rulemaking are addressed below, organized by Part:

Part 360 General Requirements:

-Clarification of criteria for beneficial use determinations will help local governments determine if their waste could be used in a beneficial manner, which could lead to cost savings. The regulations have added more predetermined beneficial use determinations which will allow for more solid waste materials to be more easily reused and will cease from being considered a solid waste when used in accordance with these provisions.

-Specifying criteria for the reuse of navigational dredged materials will facilitate the use of appropriate materials and reduce the significant cost associated with disposal.

Part 361 Material Recovery Facilities:

-An exemption for small-scale food scrap composting is included that will promote additional recycling and reduce the cost of management and disposal associated with this waste stream. An increase in the size threshold of a facility requiring registration related to food scraps will have a similar positive effect.

-New standards for the production of mulch may result in increased cost to a municipality or private firm due to the need for additional land for the quantity of material managed since pile size restrictions are included in the criteria. However, these criteria are not expected to affect most municipalities in rural areas that have piles of mulch if they do not handle a significant amount of material.

-The registration criteria for used cooking oil and yellow grease will result in decreased costs for a small facility owner since they will not incur the cost of obtaining a permit.

Part 362 Combustion, Thermal Treatment, Transfer and Collection Facilities:

-Permitted transfer facilities from which waste is transported out-of-state and municipal solid waste processing facilities must install and operate a fixed radiation detection unit at a location appropriate for the monitoring of all incoming waste. The cost of purchasing this equipment ranges from $7,000 - $20,000 per unit depending on the level of capabilities desired. The cost of maintenance, including calibration is expected to be $2,000 - $3,000 annually.

-The registration for the combustion of limited amounts of waste tires, unadulterated wood, used cooking oil and yellow grease under prescribed conditions will result in decreased costs for a small facility owner since they will not incur the cost of obtaining a permit.

Part 363 Landfills:

-Elimination of the requirement to submit of a site selection report for new landfill construction will result in cost savings of tens of thousands of dollars to landfill owners in preparation of this report.

-The requirement for adding electrical resistivity testing on the upper and lower liner system as part of a Construction Quality Assurance (CQA) Plan will add cost to the construction of new landfill cells. Costs associated with the requirement are expected to be $2,000 - $3,000 per acre of geomembrane tested. Based on the known improvement gained in construction quality and liner system performance, it makes sense to perform these evaluations routinely. The cost of performing the electrical resistivity testing on both upper and lower landfill liners will be borne by the landfill owner as part of the cost of constructing a landfill, but is a small fraction of the overall cost of constructing the entire landfill. Liner integrity testing will help pinpoint defects before construction continues. This will reduce defects overall and will reduce the cost of defect repairs. Furthermore, over 50% of the recent landfill construction projects statewide have been utilizing leak detection and location technology in constructing the upper liner system with good results.

-The regulations require all landfills that receive municipal solid waste to install and operate a fixed radiation detection unit at a location appropriate for the monitoring of all incoming waste. The cost of purchasing this equipment ranges from $7,000 - $20,000 per unit depending on the level of capabilities desired. The cost of maintenance, including calibration is expected to be $2,000 - $3,000 annually. Installation of radiation detectors at these facilities is the only means to ensure that radioactive waste will not be disposed of at landfills in the state.

Part 364 Waste Transporters:

-There may be an increased cost for transporters that will be required to register and comply with recordkeeping and reporting requirements. There are no fees associated with registration, only minor costs associated with the completion of tracking forms and the completion and submission of an annual report similar to those now prepared by registered facilities.

-There will be a decrease in the cost of compliance for small transporters of regulated solid waste. The amount of material that can be transported without a permit is increased from 500 to 2000 pounds. Those transporters that mange between 500 and 2000 pounds will save the cost of permitting under the waste transporter program and improve the economic efficiency of their businesses with the increased weight limits.

Part 365 Regulated Medical Waste and Other Infectious Wastes:

-Most generators choosing to treat RMW or other infectious waste on-site will incur no additional costs since many, especially those based in healthcare, academic or research institutions already have autoclaves in place for processing their waste. Facilities that choose to treat waste on-site (that currently do not) may incur an initial cost increase to purchase treatment devices, but over the long term, will experience considerable cost savings over transportation and off-site processing costs.

-The regulations add provisions for other infectious wastes. Although these represent new costs for compliance, the Department has been working for a number of years with entities that generate these wastes to obtain voluntary compliance with these standards.

Part 366 Local Solid Waste Management Planning:

-A reduction in staff time and costs related to the development and reporting requirements to a local government is expected as a result of the changes in the regulations.

Part 369 State Assistance Projects:

-The majority of the action is derived from the present regulatory program as presented in existing Parts 360, 364 and 369 as well as various Department policies and actions which set forth Department interpretation of its authority and responsibility under the ECL to regulate solid waste management facilities in an environmentally protective manner. In most cases, therefore, the ultimate costs associated with complying with the newly adopted Part 369 regulations will be similar to that of the existing regulatory program.

4. MINIMIZING ADVERSE IMPACTS

The rulemaking is not expected to have adverse impacts on rural areas of New York State. The updated regulatory criteria for solid waste facilities, such as landfills, that may be located in a rural area, are not expected to significantly change the cost of the operation of that facility. Therefore, the rural area residents will not see an increase in the cost of solid waste management due to the rulemaking.

5. RURAL AREA PARTICIPATION

The rulemaking has been in development for many years. During that time period, the Department has published draft regulations, accepted and evaluated public comments, given public presentations on draft criteria in numerous venues, and met with potentially affected parties. Those solid waste facilities and other affected parties in rural areas have been solicited for input on the proposed revisions.

6. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years as required by SAPA § 207.

Revised Job Impact Statement

The New York State Department of Environmental Conservation (Department) has adopted new 6 NYCRR Parts 360-366 and 369. The regulations will apply statewide. The Department does not expect the regulations to have a negative impact on jobs and employment opportunities in the state.

The regulations will update the existing regulations that relate to solid waste management facilities, waste transportation, local solid waste management planning, and state assistance. Many new or expanded solid waste management facilities, particularly recycling facilities and landfills, have been constructed since the last comprehensive revision in 1993, providing the Department with experience in applying those regulations. This experience has demonstrated that many areas of the regulations would benefit from revision, clarification, or modification to allow new, technically appropriate alternatives to the design and operation criteria for solid waste management facilities found in the existing regulations, and to streamline the regulatory process.

1. NATURE OF IMPACT

As mentioned above, the Department does not expect the regulations to have a negative impact on jobs and employment. The new adopted regulations amend regulations that have been in place for more than 20 years. For the majority of the criteria in the regulations, there will be little or no impact on economic activity. Numerous pre-determined BUDs have been added to the regulations eliminating regulatory oversight for many solid waste streams when reused in commerce. These regulatory provisions not only relieve burdens on the regulated community but also Department staff.

2. CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The regulations themselves will not negatively affect employment opportunities. Although it is difficult to predict the number of facilities and jobs that will be gained as a result of the rulemaking, a few hundred new jobs statewide are likely.

3. REGIONS OF ADVERSE IMPACT

There are no regions of the State expected to be negatively impacted from the rulemaking. The rulemaking was undertaken to reflect current industry practices and address new facility types that have begun operating since the last comprehensive revision in 1993. The rulemaking reduces regulatory burden on some food scrap composting facilities. The regulations will impose requirements for the testing of soil excavated from areas within New York City, either by the generator if they want to send these materials directly to other sites for reuse or by the processing facility that receives the fill material to ensure proper characterization and to ensure that these materials are properly handled. However, as a companion approach to these New York City requirements, the regulations will also open up more opportunities for eased reuse of the soils excavated in New York City to be reused in an environmentally sound manner. For larger projects, these changes will likely result in reduced costs for handling these materials and will reduce construction related costs for large development projects located in New York City from the availability of locally sourced fill materials. These changes will also improve the efficiency of fill material reuse within New York City that in turn will help to ensure that jobs will not be impacted.

4. MINIMIZING ADVERSE IMPACT

The regulations are not expected to have an adverse impact on jobs and employment. The Department already regulates the solid waste management activities covered by the regulations. For most facilities and activities, the regulations will have no direct impact on jobs and employment. The regulations have expanded the use of registrations in lieu of full permits for both solid waste management facilities and for solid waste transporters so as the ease regulatory burden on these industry sectors, while still properly engaging the Department.

5. SELF-EMPLOYMENT OPPORTUNITIES

The regulations are not expected to negatively impact self-employment opportunities.

6. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years as required by SAPA § 207.

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

On June 21, 2017, the Department of Environmental Conservation published notice of a revised rulemaking in the State Register and the Environmental Notice Bulletin related to the Department's ongoing efforts to amend the Department's existing solid waste management regulations. The revised rulemaking was issued to receive public comment on substantial revisions made to the proposed rules since the expiration of the last public comment on September 13, 2016. In response to the June 21, 2017 public comment period, the Department received ninety written comments from individuals, businesses, municipalities, associations and non-governmental organizations. The Department also received several form letters, which raised the same or similar concern. One public hearing was held on July 13, 2017 in Albany, and during the comment period Department staff met with members of the regulated community and the interested public to receive feedback on the revised rules.

Like the first Assessment of Public Comment issued by the Department for the revised rules, the Supplemental Assessment of Public Comment responds to the comments received during the most recent public comment period, organized by citation. Similar comments are grouped together and, when applicable, summarized to reflect that the same comment was raised by more than one commenter.

Although some comments were received on each of the proposed Parts included in the revised rules, most comments received during the last comment period were focused on Part 360. Specifically, public comment was focused on the pre-determined beneficial use determination (BUD) and fill material sections proposed at Section 360.12 & 360.13. Regarding the proposed fill material pre-determined BUD, many commenters objected to the proposed revised rules on the grounds that characterization of soils that would be reused off-site would be costly and that stockpiling of fill while testing occurs is impractical. According to public comment, this was particularly a concern in urban areas where lack of space, time and public safety concerns require the efficient movement of excess materials from construction sites. There was also significant confusion concerning who would be required to characterize fill in order to utilize the beneficial use determination available under Section 360.13. The Department made changes in the final rules to 360.13 to clarify that only fill material that travels from the excavation site directly to the end use site would be subject to the section. Presently, the majority of fill material currently generated in New York City is sent to processing facilities. Under the final regulations, fill material sent to processing facilities in New York City must be sampled by the processing facility, not the generator.

Many commenters also raised concerns about the proposed rules for landfills, contained in Part 363. Regarding landfills, several comments sought clarification on Subparts 363-6 and 363-7, with respect to operating requirements for landfills, leachate testing parameters and the radiation detector provisions. In addition to specific concerns about the

language or structure of the revised rules, many commenters also took issue with the amount of time available to comment and with the amount of time available to existing facilities to come into compliance with the final rules.

In response to public comment, the Department made several clarifying revisions. A full list of sections, subdivisions and paragraphs adjusted since the public comment period is attached as an Appendix to this Supplemental Assessment of Public Comment. In many cases, the changes made were to correct typographical errors, adjust cross-references to other citations and to re-order existing language to assist in readability. In other cases, the proposed rules were adjusted to clarify the Department's original intent, because members of the regulated community presented genuine and verifiable questions about the feasibility of achieving compliance with the revised rules. For instance, the Department clarified proposed 360.13 to make clear that fill material sent to a facility regulated pursuant to proposed Part 361 need not be tested to characterize the fill. The purpose of proposed 360.13 is to provide a mechanism to allow direct reuse of fill from the site of excavation to an end use location. To the extent that readers believed that revised 360.13 required municipalities, utilities and their contractors to test every load of fill taken off a construction site, the final rules have been clarified to remove that implication.

Commenters believed that since the volume threshold for testing of off-site material generated from within the boundaries of New York City was 10 cubic yards, this meant that every 10 cubic yards needed to be tested. This was not the case in the revised rules and is not the case in the final rules. Once the 10 cubic yard threshold is reached, representative samples can be taken of the entire volume of fill material proposed to be direct hauled to an end use location. The final rules also make clear that any fill material excavated outside the City of New York that shows no evidence of physical or chemical contamination, and otherwise does not fall into the categories of fill material in subdivision 360.13(d), is, in regulatory terms, presumptively clean soil and can be reused off site without restriction.

In response to comments received on the transition rules, the Department also provided some relief from the revised rules by extending the time for facilities subject to Subpart 361-5 to comply with new requirements. The final rules also allow those holding an existing BUD to submit a request for renewal within 180 days of the effective date of the rules. The renewal request would then continue the existing BUD in effect until the Department makes an individual decision on each BUD. This achieves the Department's regulatory goal of removing inactive or unused BUDs from the list of currently approved uses without creating an undue hardship caused by an automatic revocation on those persons who currently use BUD material.

There were also many instances where commenters suggested alternatives to the language provided in the revised rules. In many cases where a public comment requested stricter regulatory controls, the concerns were not accompanied by substantive evidence that the stricter regulations were required to address an actual environmental impact. For instance, several commenters called for an outright ban on waste coming from other states and requested bans from certain wastes from being used pursuant to a beneficial use determination. Objections were often made to waste produced from an entire industrial sector, namely the oil and gas production industry, and many commenters called for changes to the proposed radiation detector requirements in order to prevent alleged illegal disposal of oil and gas production wastes in New York landfills. Public comments also covered many topics that were either not relevant to the proposed rules, were outside the scope of the Part 360 series or were outside the jurisdiction of the Department altogether.

Conversely, many comments from the regulated community cited concerns that the revised rules were too onerous, and would unnecessarily increase the costs to, for example, prepare a solid waste management plan, obtain a permit or to reuse excavated fill material off site. Other comments from the regulated community raised concerns about financial assurance, and the limitations on the number of registered facilities that could be located at the same site. Each of the concerns raised is addressed in this supplemental response.

Comments were also solicited on the revised draft generic environmental impact statement (DGEIS). Only a few public comments on the revised DGEIS were received by the Department. One comment questioned whether the DGEIS sufficiently addressed the environmental concerns related to the beneficial use determination program, including impacts in sensitive areas such as watersheds from the use of fill material. Concerns over impacts on communities of disproportionate impact from the testing requirements associated with the fill material criteria were also raised by one commenter. Other commenters expressed concern that the BUD criteria would inhibit the recycling of asphalt millings, metal, paper, concrete, and other materials. Lastly, a concern was raised that the State Plan, that was referenced in the DEIS, does not address emerging contaminants such as perfluorooctanoic acid.

In response to concerns that the Department did not consider the potential environmental impacts from the proposed beneficial use determination rules, the record created during the rulemaking process speaks to the extensive efforts the Department made to prevent improper reuse of fill material. The final rules would require the tracking of construction and demolition debris under the waste transporter program and testing requirements for direct off-site beneficial use of fill material would be new additions the Department's regulatory program. In addition, a refinement of what fill material would be considered presumptively clean in proposed 360.12 replaces a clean soil pre-determined BUD that was difficult to implement because it left decisions about what constituted uncontaminated soil almost entirely up to the generator. Contrary to public comment, the proposed final rules also address emerging contaminants, in that the list of leachate testing parameters already included perfluorooctanoic acid. In all, the final rules appropriately respond to the concerns about improper reuse of fill regardless of where the end use is located. Throughout the rulemaking process the Department considered the potential for adverse environmental impacts as required by SEQRA.

The proposed action is the re-promulgation of the Department's existing solid waste management regulations reorganized and reformatted to provide the regulated community and the Department with a set of rules that are easier to implement. In addition to the reorganization of the existing program, the Department made several enhancements to the program that would reduce the potential for environmental impacts and thereby have a positive impact on the environment. Throughout the rulemaking process, the Department had two public comment periods, held multiple hearings and met individually with numerous stakeholders. Department staff listened to the concerns expressed and made revisions to the rules when it was possible to provide facilities with operational flexibility and, at the same time, retain an appropriate level of regulatory oversight.

The Department also listened to concerns from the regulated community that overly strict controls, such as low volume limits on the flow of material and limited re-use options, would actually lead to either more illegal disposal or would lead to more reusable materials being sent to landfills. In that regard, the final regulations have added language to clarify that fill material that is sent to regulated processing facilities is not subject to the testing requirements in proposed Section 360.13. The proposed regulations provide a means for fill material to be reused in a manner appropriate with the receiving environment and end use. Therefore, in the Department's view, the final rules would not lead to an increase in the landfilling of reusable fill material or improper disposal. The regulations for fill material therefore do not have the potential for a significant adverse environmental impact.

Overall, the final rules reflect a robust public process. While the Department did not agree with all the recommendations received during the two public comment periods and public hearings, the final rules as proposed were improved by the input from all the various stakeholders to the process. Moving forward, the Department looks forward to working with stakeholders in continuing efforts to improve the State's solid waste management regulations.

NOTICE OF ADOPTION

Regional Hunting Regulations

I.D. No. ENV-09-17-00001-A

Filing No. 757

Filing Date: 2017-09-05

Effective Date: 2017-09-20

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

Action taken: Repeal of Parts 69 and 101 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0321 and 11-2101

Subject: Regional Hunting Regulations.

Purpose: To repeal regional hunting regulations.

Text or summary was published in the March 1, 2017 issue of the Register, I.D. No. ENV-09-17-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Marcelo J. del Puerto, New York State Department of Environmental Conservation, 625 Broadway, 5th Floor, Albany, NY 12233-4750, (518) 402-8907, email: marcelo.delpuerto@dec.ny.gov

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Regulatory Flexibility Analysis
A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Rural Area Flexibility Analysis
A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Job Impact Statement
The rule repeals outdated sets of regional hunting regulations. For this reason, the department anticipates that the proposed rule making will have no adverse impact on jobs or employment opportunities in New York and that a job impact statement is not necessary.
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Protection of Diamondback Terrapin

I.D. No. ENV-17-17-00006-A
Filing No. 759
Filing Date: 2017-09-05
Effective Date: 2018-05-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Repeal of section 3.1; and amendment of section 3.2 of Title 6 NYCRR.
Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0311, 11-0903 and 11-0905
Subject: Protection of diamondback terrapin.
Purpose: To close the open season on diamondback terrapin.
Text or summary was published in the April 26, 2017 issue of the Register, I.D. No. ENV-17-17-00006-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Kathleen O'Brien, NYS Department of Environmental Conservation, Albany NY 12233, (518) 402-8864, email: kathleen.obrien@dec.ny.gov
Initial Review of Rule
As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2022, which is no later than the 5th year after the year in which this rule is being adopted.
Assessment of Public Comment
A total of 2360 emails were received.
4 support letters via USPS
1 petition w/34 signatures via USPS
Total Comments 2398
Positive: 2392
Negative: no comments were opposed to the proposal
Other Six comments were off topic or expressed neither support nor opposition
Within the positive comments two additional points were made
Comment: The closure of the terrapin season should take effect immediately instead of May 5, 2018.
Response: The comment has been noted. The reason for waiting for the closure to take effect on May 5, 2018 is that by the time the proposal is adopted, the 2017 harvest season will already be in progress. Closure before the end of that season on May 4, 2018 would mean licensees with legally harvested terrapins could be suddenly left in possession of terrapins that they could not then legally sell or retain in their possession. This would be a burden to the licensees and a pose difficulties for law enforcement to manage confiscated terrapins.
Comment: If the turtles rebound, there should be a provision to re-open the season.
Response: The comment has been noted. Regulations are used as tools to help maintain healthy populations of the flora and fauna of the State of New York for the health of the environment and the enjoyment of the people of New York. More common species may be able to absorb consumptive uses such as commercial or recreational harvest while rare species generally are not. As the status of species populations change, regulations can be adapted to sustain the balance between use and preservation.

Department of Financial Services

EMERGENCY RULE MAKING

Minimum Standards for Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure

I.D. No. DFS-25-17-00002-E
Filing No. 752
Filing Date: 2017-09-01
Effective Date: 2017-09-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Part 52 (Regulation 62) of Title 11 NYCRR.
Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 2606, 2607, 2608, 3201, 3221(h), 3231(a), 3232(g), (h), 3240(b), (d), 4303(ll), 4317(a), 4318(g), (h) and 4328(b)(1)
Finding of necessity for emergency rule: Preservation of public health and general welfare.
Specific reasons underlying the finding of necessity: There is movement underway in Congress to repeal and replace the federal Affordable Care Act ("ACA"), including the requirement that issuers cover essential health benefits ("EHB"), such as benefits for maternity and newborn care and mental health and substance use disorder services, and the prohibition against discrimination in the issuance and rating of accident and health insurance because of factors such as race, color, national origin, sex, age, and disability. This rule would require every individual and small group accident and health insurance policy or contract (other than a grandfathered health plan) delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York to provide coverage of at least the enumerated ten categories of EHB if the EHB provision in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 et seq. are no longer in effect or are modified as determined by the Superintendent of Financial Services. This will ensure that people covered under individual, small group, and student accident and health insurance policies and contracts will continue to have coverage for these important benefits.
In addition, the rule would, with regard to an individual or small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy or contract delivered or issued for delivery in New York State, reaffirm that an issuer is prohibited from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition and to clarify the scope of such prohibitions.
For the public health and general welfare, the Department is promulgating this rule on an emergency basis in the event that Congress repeals the ACA.
Subject: Minimum Standards for Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure.
Purpose: To ensure coverage for essential health benefits in all individual, small group, and student accident and health policies.
Text of emergency rule: A new subdivision 52.1(q) is added as follows:
(q)(1) The federal Patient Protection and Affordable Care Act ("ACA") requires all individual and small group accident and health insurance policies delivered or issued for delivery in this State that provide hospital, surgical, or medical expense coverage and are not grandfathered health plans, and all student accident and health insurance policies delivered or issued for delivery in this State to include coverage for ten categories of essential health benefits. The essential health benefits provide a set of minimum standards that ensure that all individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and are not grandfathered health plans, and all student accident and health insurance policies provide their insureds with comprehensive coverage for medically necessary care. Independent of the ACA, the Insurance Law and this Title include broad protections to ensure that all accident and health insurance coverage sold in this State is comprehensive and that insurers shall not discriminate against residents of this State based on race, color, creed, national origin, sex, age, marital status, disability, or preexisting condition.
(2) It is the policy of this State that all individual and small group accident and health insurance policies that provide hospital, surgical, or

medical expense coverage and are not grandfathered health plans, and all student accident and health insurance policies provide insureds with essential health benefits and that insurers shall not discriminate against residents of this State based on race, color, creed, national origin, sex, age, marital status, disability, or preexisting condition, whether in issuing policies or setting premiums. Accordingly, irrespective of any changes to the essential health benefit rules in the ACA, as set forth in section 52.71 of this Part, this State will continue to require that individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and are not grandfathered health plans, and student accident and health insurance policies cover the same essential health benefits and be subject to the same benchmark plan and model contract rules as currently apply. Similarly, irrespective of any changes to the anti-discrimination rules in the ACA, as set forth in section 52.72 of this Part, this State will continue to ensure that all New York insureds covered by individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and student accident and health insurance policies are not subject to discrimination based on race, color, creed, national origin, sex, age, marital status, disability, or preexisting condition.

A new section 52.71 is added as follows:

§ 52.71 Essential health benefits.

(a) Every individual and small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and is not a grandfathered health plan, and every student accident and health insurance policy shall provide coverage of at least the following essential health benefits:

(1) ambulatory patient services, such as office visits, ambulatory surgical services, dialysis, radiology services, chemotherapy, infertility treatment, abortion services, hospice care, and diabetic equipment, supplies and self-management education;

(2) emergency services, such as emergency room services, urgent care services, and ambulance services;

(3) hospitalization, such as preadmission testing, inpatient physician and surgical services, hospital care, skilled nursing facility care, and hospice care;

(4) maternity and newborn care, such as delivery, prenatal and postnatal care, and breastfeeding education and equipment;

(5) mental health and substance use disorder services, including behavioral health treatment, such as inpatient and outpatient services for the diagnosis and treatment of mental, nervous and emotional disorders including maternal depression, screening, diagnosis and treatment for autism spectrum disorder, and inpatient and outpatient services for the diagnosis and treatment of substance use disorder;

(6) prescription drugs, such as coverage for generic, brand name and specialty drugs, enteral formulas, contraceptive drugs and devices, abortifacient drugs, and orally administered anti-cancer medication;

(7) rehabilitative and habilitative services and devices, such as durable medical equipment, medical supplies, prosthetic devices, hearing aids, chiropractic care, physical therapy, occupational therapy, speech therapy, and home health care;

(8) laboratory services, such as diagnostic testing;

(9) preventive and wellness services and chronic disease management, such as well child visits, immunizations, mammography, gynecological exams including cervical cytology screening, bone density measurements or testing, and prostate cancer screening; and

(10) pediatric services, including oral and vision care, such as preventive and routine pediatric vision and dental care, and prescription lenses and frames.

(b) The scope of the minimum benefits covered as essential health benefits pursuant to subdivision (a) of this section shall be equal to the benefits provided by the benchmark plan selected by the superintendent as the New York Benchmark Plan in accordance with this section.

(c) Subject to subdivisions (d) and (e) of this section, the superintendent may select the New York Benchmark Plan in consultation with the commissioner of health from any of the following plans:

(1) Small group market health plan. The largest health plan by enrollment in any of the three largest small group insurance products by enrollment in the small group market in this state;

(2) State employee health benefit plan. Any of the largest three employee health benefit plan options by enrollment offered and generally available to state employees in this state;

(3) FEHBP plan. Any of the largest three national Federal Employees Health Benefits Program (FEHBP) plan options by aggregate enrollment that is offered to all health-benefits-eligible federal employees under 5 U.S.C. section 8903;

(4) HMO. The coverage plan with the largest insured commercial non-Medicaid enrollment offered by a health maintenance organization operating in this State; or

(5) Any other plan identified by the superintendent as a typical employer plan providing the coverage of essential health benefits required by this section.

(d)(1) In order to be eligible to be selected as the New York Benchmark Plan, a plan shall provide coverage of at least the categories of benefits identified in subdivision (a) of this section.

(2) Coverage in each benefit category. A plan not providing any coverage in one or more of the categories described in paragraph (1) of this subdivision may be selected as the New York Benchmark Plan if the plan is supplemented as follows:

(i) General supplementation methodology. A plan that does not include items or services within one or more of the categories described in subdivision (a) of this section shall be supplemented by the addition of the entire category of such benefits offered under any other benchmark plan option described in subdivision (c) of this section unless otherwise described in this subdivision.

(ii) Supplementing pediatric oral services. A plan lacking the category of pediatric oral services shall be supplemented by the addition of the entire category of pediatric oral benefits from one of the following:

(a) The Federal Employees Dental/Vision Program ("FEDVIP") dental plan with the largest national enrollment that is described in and offered to federal employees under 5 U.S.C. section 8952; or

(b) The benefits available under that State's separate Children's Health Insurance Program ("CHIP") plan, if a separate CHIP plan exists, to the eligibility group with the highest enrollment.

(iii) Supplementing pediatric vision services. A plan lacking the category of pediatric vision services shall be supplemented by the addition of the entire category of pediatric vision benefits from one of the following:

(a) The FEDVIP vision plan with the largest national enrollment that is offered to federal employees under 5 U.S.C. section 8982; or

(b) The benefits available under the State's separate CHIP plan, if a separate CHIP plan exists, to the eligibility group with the highest enrollment.

(e) The superintendent may issue model contract language identifying the coverage requirements for all individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage and all student accident and health insurance policies delivered or issued for delivery in this State.

(f) The model language issued by the superintendent summarizes the federal and state laws and rules that are applicable to health insurance policies delivered or issued for delivery in this State, including the requirement that the policies include coverage for essential health benefits required by the federal Patient Protection and Affordable Care Act. Every individual and small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy delivered or issued for delivery in this State shall comply with the federal and state laws and rules that are applicable to health insurance policies issued in New York State as set forth in the model language.

(g) Except for subdivisions (e) and (f) of this section, the provisions of this section shall not be applicable unless and until the essential health benefits provision in 42 U.S.C. section 18022 and 45 C.F.R. 156.100 et seq. are no longer in effect or are modified as determined by the superintendent.

A new section 52.72 is added as follows:

§ 52.72 Nondiscrimination on the basis of race, color, creed, national origin, sex, age, marital status, disability, or preexisting condition.

(a) With regard to an individual or small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy delivered or issued for delivery in this State, no insurer shall, because of race, color, creed, national origin, sex, age, marital status, disability, or preexisting condition:

(1) make any distinction or discrimination between persons as to the premiums or rates charged for the policy or in any other manner whatever;

(2) demand or require a greater premium from any person than it requires at that time from others in similar cases;

(3) make or require any rebate, discrimination or discount upon the amount to be paid or the service to be rendered on any policy;

(4) insert in the policy any condition, or make any stipulation, whereby the insured binds his or herself, or his or her heirs, executors, administrators or assigns, to accept any sum or service less than the full value or amount of such policy in case of a claim thereon except such conditions and stipulations as are imposed upon others in similar cases; and any such stipulation or condition so made or inserted shall be void;

(5) reject any application for a policy issued or sold by it;

(6) cancel or refuse to issue, renew or sell such policy after appropriate application therefor; or

(7) fix any lower rate or discriminate in the fees or commissions of insurance agents or insurance brokers for writing or renewing such a policy.

(b) For the purposes of this section, "disability" shall have the same meaning set forth in Executive Law section 292(21).

(c)(1) Discrimination because of national origin shall include discrimination based on an individual's, or his or her ancestor's, place of origin (such as country or world region) or an individual's manifestation of the physical, cultural, or linguistic characteristics of a national origin group.

(2) Discrimination because of sex shall include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.

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. DFS-25-17-00002-EP, Issue of June 21, 2017. The emergency rule will expire October 30, 2017.

Text of rule and any required statements and analyses may be obtained from: Nathaniel Dorfman, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-5538, email: Nathaniel.Dorfman@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301, 2606, 2607, 2608, 3201, 3217, 3221(h), 3231(a), 3232(g) and (h), 3240(b) and (d), 4303(ll), 4317(a), 4318(g) and (h), and 4328(b)(1).

Financial Services Law § 202 establishes the office of the Superintendent of Financial Services ("Superintendent"). Financial Services Law § 302 and Insurance Law § 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Financial Services Law, Insurance Law, or any other law, and to prescribe regulations interpreting the Insurance Law.

Insurance Law § 2606 prohibits discrimination because of race, color, creed, national origin, or disability, Insurance Law § 2607 prohibits discrimination because of sex or marital status, and Insurance Law § 2608 prohibits discrimination because of treatment for a mental disability.

Insurance Law § 3201 requires a policy form delivered or issued for delivery in New York to be filed with and approved by the Superintendent.

Insurance Law § 3217 requires the Superintendent to issue such regulations as the Superintendent deems necessary or desirable to establish minimum standards for the form, content and sale of accident and health insurance policies and subscriber contracts offered by a corporation authorized under Insurance Law Article 43 and entities licensed pursuant to Public Health Law article 43.

Insurance Law §§ 3221(h), 3240(d), 4303(ll), and 4328(b)(1) require an individual or small group health insurance policy or contract delivered or issued for delivery in New York, including a health maintenance organization ("HMO") contract (other than a grandfathered health plan), that provides hospital, medical or surgical expense coverage, and a student accident and health policy or contract delivered or issued for delivery in New York, to provide coverage for essential health benefits ("EHB") as defined in 42 U.S.C. § 18022(b).

Insurance Law §§ 3231(a) and 4317(a) require an individual and small group health insurance policy or contract, including an HMO contract, to be community rated.

Insurance Law §§ 3232(g) and (h), 3240(b), and 4318(g) and (h) prohibit an issuer from imposing any preexisting condition exclusion in any individual, group or blanket health insurance policy or contract, including an HMO contract, that provides hospital, medical or surgical expense coverage and is not an individual grandfathered health plan and any student accident and health insurance policy or contract.

2. Legislative objectives: Insurance Law §§ 3221(h), 3240(d), 4303(ll), and 4328(b)(1) require an individual or small group policy or contract delivered or issued for delivery in New York (other than a grandfathered health plan) that provides coverage for hospital, medical or surgical expense, and a student accident and health insurance policy or contract delivered or issued for delivery in New York, to provide coverage for EHB defined in 42 U.S.C. § 18022(b). In addition, Insurance Law §§ 3232(g) and (h), 3240(b), and 4318(g) and (h) prohibit an issuer from imposing any preexisting condition exclusion in any individual, group or blanket health insurance policy or contract that provides hospital, medical or surgical expense coverage and is not a grandfathered health plan and in any student accident and health insurance policy or contract. Insurance Law Article 26 prohibits discrimination because of race, color, creed, national origin, disability, sex, or marital status.

This rule accords with the public policy objectives that the Legislature sought to advance in Insurance Law §§ 3221(h), 3240(d), 4303(ll), 4328(b)(1) by requiring every individual and small group accident and health insurance policy or contract delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage (other than a grandfathered health plan), and every student accident and health insurance policy or contract delivered or issued for delivery in New York, to provide coverage of at least the enumerated ten categories of EHB if the EHB provision in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 et seq. are no longer in effect or are modified as determined by the Superintendent.

This rule also accords with the public policy objectives that the Legislature sought to advance in Insurance Law Article 26, which prohibits an issuer from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition with respect to an individual or small group accident and health insurance policy or contract that provides hospital, surgical, or medical expense coverage or a student accident and health insurance policy or contract.

3. Needs and benefits: There is movement underway in Congress to repeal and replace the federal Affordable Care Act ("ACA"), including the requirement that issuers cover EHB, such as benefits for maternity and newborn care and mental health and substance use disorder services, and the prohibition against discrimination in the issuance and rating of accident and health insurance because of factors such as race, color, national origin, sex, age, and disability. This rule would require every individual and small group accident and health insurance policy or contract (other than a grandfathered health plan) delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York to provide coverage of at least the enumerated ten categories of EHB if the EHB provisions in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 et seq. are no longer in effect or are modified as determined by the Superintendent. This will ensure that people covered under individual, small group, and student accident and health insurance policies and contracts will continue to have coverage for these important benefits.

In addition, the rule would, with regard to an individual or small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy or contract delivered or issued for delivery in New York State, reaffirm that an issuer is prohibited from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition and to clarify the scope of such prohibitions.

4. Costs: This rule will not impose compliance costs on issuers because it only continues the existing protections provided under the ACA.

The Department will not incur costs for the implementation and continuation of this rule.

This rule does not impose compliance costs on state or local governments.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule does not impose any reporting requirements, including forms and other paperwork.

7. Duplication: With regard to the section in the rule that pertains to EHB, it does not duplicate or conflict with any existing state or federal rules or other legal requirements because it only applies if Congress repeals the ACA. With regard to the section in the rule that pertains to nondiscrimination, there is some duplication and overlap with Insurance Law Article 26.

8. Alternatives: The Department considered not promulgating the rule. However, the Department is concerned about the negative impact on consumers if the protections under the ACA are repealed. As a result, the Department determined that it is necessary to promulgate this rule requiring coverage of EHB and continuing to prohibit discrimination for the individual and small group health insurance markets and for student accident and health insurance.

Another alternative considered by the Department was to implement the amendment immediately. However, if the ACA remains in effect in its current form, then there is no need to implement mandating the EHB benefits in the regulation.

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

10. Compliance schedule: The Department is promulgating this rule on an emergency basis in the event that Congress repeals the ACA.

Regulatory Flexibility Analysis

Small businesses: The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at insurers and health maintenance organizations ("HMOs"), which do not fall within the definition of a "small business" as defined by State Administrative Procedure Act § 102(8), because in general they are not independently owned and do not have fewer than 100 employees.

Local governments: The rule does not impose any impact, including

any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at insurers and HMOs.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and health maintenance organizations (“HMOs”) (collectively, “issuers”) affected by this rule operate in every county in this state, including rural areas as defined by State Administrative Procedure Act § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule does not impose additional reporting, recordkeeping, and other compliance requirements on issuers located in rural areas. An issuer in a rural area should not need to retain professional services to comply with this rule.

3. Costs: This rule will not impose compliance costs on issuers, including issuers in rural areas.

4. Minimizing adverse impact: This rule uniformly affects issuers that are located in both rural and non-rural areas of New York State. The rule should not have an adverse impact on rural areas.

5. Rural area participation: The Department of Financial Services (“Department”) is promulgating this rule on an emergency basis in the event that Congress repeals the ACA. Issuers in rural areas will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department’s website.

Job Impact Statement

This rule should not adversely impact jobs or employment opportunities in New York State. This rule would require every individual and small group accident and health insurance policy or contract (other than a grandfathered health plan) delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York to continue providing coverage of at least the enumerated ten categories of essential health benefits (“EHB”) if the EHB provisions in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 et seq. are no longer in effect or are modified as determined by the Superintendent of Financial Services. This will ensure that people covered under individual, small group, and student accident and health insurance policies and contracts will continue to have coverage for these important benefits.

In addition, the rule would, with regard to an individual or small group accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy or contract delivered or issued for delivery in New York State, reaffirm that an issuer is prohibited from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition and to clarify the scope of such prohibitions.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

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

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

Filing No. 751

Filing Date: 2017-09-01

Effective Date: 2017-09-01

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 and 216 (Regulations 41, 100, 64), Subparts 60-1, 60-2, 60-3, 65-1, 65-2, 65-3 (Regulations 35-A, 35-D, 35-E, 68-A, 68-C, 68-D) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 2105, 2118, 2305, 2307, 2334, 2335, 2601, 3420, 3455, 5102, 5105, 5106, arts. 23 and 51; Vehicle and Traffic Law, sections 311, 1693 and 1694; L. of 2017, ch. 59, part AAA

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

Specific reasons underlying the finding of necessity: Part AAA of Chapter 59 of the Laws of 2017 established a new Article 44-B of the Vehicle and Traffic Law (Article 44-B), which was signed into law on April 10, 2017 and will be effective as of June 29, 2017, regarding transportation network companies (TNC), and amended or added other laws to implement new Article 44-B. A TNC is a company that uses a digital network, such as an application on a phone, to connect people seeking rides with drivers who are interested in providing those rides. Although TNCs have several different models, the most typical model utilizes drivers that are not professional livery drivers and who use their own personal automobiles to provide those prearranged rides and it is that model that Chapter 59 recognizes. The new TNC laws necessitated a change to New York’s motor vehicle financial responsibility requirements, including regulations promulgated by the Superintendent of Financial Services. In addition, the law provides that the Superintendent will establish the provisions for policies satisfying the new financial responsibility requirements of Article 44-B.

In order to implement the new law, regulations are required to establish the minimum requirements for policies satisfying the financial responsibility requirements of Article 44-B, as well as to coordinate with existing regulations in order to ensure that minimum insurance requirements are in place at all times with appropriate protections in order to protect the drivers and owners of the vehicles, as well as the general public.

It is critical for the protection of the public that appropriate rules and regulations be in place in advance of the effective date of Chapter 59. Due to the short time frame before the new laws go into effect, it is necessary to promulgate the rules on an emergency basis for the furtherance of the general welfare.

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

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

Substance of emergency rule (Full text is posted at the following State website: http://www.dfs.ny.gov): 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.

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. DFS-25-17-00007-EP, Issue of June 21, 2017. The emergency rule will expire October 30, 2017.

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

Consolidated Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority to promulgate these amendments and the new Part derives from sections 202 and 302 of the Financial Services Law ("FSL"), sections 301, 2115, 2118, 2305, 2307, 2334, 2335, 2601, 3420, 3455, 5102, 5105, and 5406 and Articles 23 and 51 of the Insurance Law ("IL"), sections 1693, 1694 and 311 of the Vehicle and Traffic Law (VTL), and Part AAA of Chapter 59 of the Laws of 2017 (Part AAA).

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

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

Part AAA established a new Article 44-B of the VTL (Article 44-B), which was signed into law on April 10, 2017 and will be effective as of June 29, 2017, regarding transportation network companies and amended or added other laws to implement new Article 44-B.

IL §§ 2105 and 2118 govern excess line brokers and excess line placements.

IL Article 23 applies generally to property/casualty insurance rates and forms. Sections 2305 and 2307 apply to prior approval of certain rates and policy forms. Rates for insurance coverage afforded under VTL Article 44-B are subject to prior approval. IL §§ 2334 and 2335 govern merit rating plans for non-commercial private passenger automobile insurance and surcharges on motor vehicle liability insurance rates with respect to certain accidents and traffic infractions.

IL § 2601 prohibits unfair claim settlement practices in this State.

IL § 3420 establishes the minimum provisions for liability policies in this state and governs uninsured and supplementary uninsured/underinsured motorist coverage.

IL § 3455 governs policies providing coverage to a transportation network company (TNC) and its drivers.

IL Article 51 governs no-fault. Sections 5102, 5105, and 5106 implement provisions regarding no-fault as they apply to use of motor vehicles through a transportation network company.

VTL § 311 establishes minimum financial responsibility requirements for motor vehicles used or operated in this State. Pursuant to § 311, the Superintendent is authorized to promulgate a regulation that establishes the minimum provisions for an owner's policy of liability insurance (11 NYCRR 60-1 (Insurance Regulation 35-A)). VTL §§ 1693 and 1694 similarly establish minimum requirements when a motor vehicle is used as a TNC vehicle and authorizes the Superintendent to promulgate regulations governing the minimum provisions for policies satisfying such requirements.

2. Legislative objectives: A TNC is a company that uses a digital network, such as an application on a phone, to connect people seeking rides with drivers who are interested in providing those rides. Although TNCs have several different models, the most typical model utilizes drivers that are not professional livery drivers and who use their own personal automobiles to provide those prearranged rides.

Part AAA now authorizes the TNC model to operate in New York outside of New York City subject to certain conditions and requirements, effective June 29. 2017. As stated in Section 1 of Part AAA, the Legislature's purpose in enacting the law was "to ensure the safety, reliability and cost-effectiveness of transportation network company (TNC) services within the state of New York and to preserve and enhance access to these important transportation options for residents and visitors to the state." TNCs must register with the Department of Motor Vehicles and, among other things, have financial responsibility insurance in place. A TNC vehicle is not considered to be livery and a TNC driver is not deemed to be in the business of carrying or transporting passengers under VTL Article 8, if the individual does so solely as a TNC driver. A TNC vehicle may not, however, initiate rides in New York City or any city or county that has enacted a local law or ordinance.

3. Needs and benefits: Motor vehicle insurance in New York is one of the most heavily regulated kind or type of insurance and numerous laws and regulations govern these types of policies.

Since 1956, New York's motor vehicle financial responsibility requirements have been governed by VTL Article 6 (originally Article 6-A). For livery and other for-hire vehicles, Article 8 has additional requirements. The most common method used to satisfy the financial responsibility requirements is an owner's policy of liability insurance, which must be issued by a New York authorized insurer. Pursuant to what is now VTL § 311, the Superintendent of Insurance (now the Superintendent of Financial Services) promulgated Regulation 35 on July 25, 1956. Effective January 1, 1959, Regulation 35-A repealed and replaced Regulation 35. Regulation 35-A was codified as 11 NYCRR 60, and subsequently renumbered as 11 NYCRR 60-1. Insurance Regulation 35-A establishes the minimum requirements for an owner's policy of liability insurance for vehicles registered in New York. Starting in 1958, with the addition of uninsured motorist coverage to IL § 167, now § 3420, New York's minimum requirements for motor vehicle insurance have expanded, including no-fault coverage under IL Article 51, rental vehicle coverage under IL § 3440, and mandatory offers for under supplementary uninsured/underinsured motorists insurance and other requirements. These coverages together provide comprehensive protection to not only the owners and operators of New York registered motor vehicles when used anywhere in the United States and Canada, but also any innocent third-parties who may be hurt or whose property is damaged by the use or operation of such vehicles.

While the law and regulations have allowed limited exceptions, in general, the insured would be protected by the owner's policy of liability insurance for any proper use of a vehicle would have insurance in place. In addition, while motor vehicle physical damage insurance is not required statutorily, there are numerous laws and regulations applying to these types of policies.

In recognizing TNCs in New York, Part AAA has established a new paradigm for motor vehicle financial responsibility requirements. For the first time, the permissible use of a New York motor vehicle will be subject to not just one policy, but a minimum of two and potentially more policies. While an insured's Article 6 owner's policy of financial responsibility must always be in place for the vehicle, it may exclude coverage when used as a TNC. Article 44-B has different insurance requirements during the two periods when the TNC must demonstrate that insurance is in place. Period 1 is when the driver is logged onto a transportation network company's digital network but is not engaged in a transportation network company prearranged trip. Period 2 is when the driver is engaged in a prearranged trip, which begins when the TNC driver accepts a passenger's request for a trip through the TNC's digital network and continues while the TNC transports the passenger in a TNC vehicle and ends when the last requesting passenger departs from the TNC vehicle.

When the vehicle is used or operated as a TNC vehicle, the TNC must have one or more group insurance policies in place to provide the coverage either under a primary or excess basis. It is anticipated that most underlying Article 6 insurers will exclude coverage, as permitted under

the law. However, some insurers may choose to provide coverage under the driver's own Article 6 policy or as a separate policy.

The Superintendent was authorized by Article 44-B to promulgate regulations implementing the article's insurance requirements. Because of the complex layers of coverage now available, regulations are necessary to ensure that minimum insurance requirements are in place at all times with appropriate protections in order to protect the drivers and owners of the vehicles, as well as the general public. In addition, existing regulations must be modified to address the new Article 44-B coverage. To that end, a number of existing regulations were amended and a new regulation added to recognize that insurers may exclude coverage when the vehicle is used or operated as a TNC vehicle in Period 1 or 2; while also providing that coverage is afforded when required in such periods under a policy being used to satisfy Article 44-B requirements; and to coordinate such policies to prevent any gap in coverage. In addition, while only an authorized insurer may write an owner's policy of liability insurance under Articles 6 and 8, Article 44-B specifically recognizes that an unauthorized insurer may provide the coverage under the TNC group policy when the policy is placed through a New York licensed excess line broker and the coverage is unavailable from an authorized insurer. Accordingly, the regulations address the placement of coverage in the excess line market. While excess line insurers are excepted from certain of New York's laws, since they are providing financial responsibility insurance, the regulations make certain provisions applicable with respect to TNC group policies.

4. Costs: Costs to insurers will include the costs involved in filing new policy rates and forms. No insurer is required to submit new forms. While it is not expected that there will be many group insurance policy forms and rates filed, most insurers writing motor vehicle insurance may file exclusions to their policies for TNC use and some insurers may file endorsements expressly providing the coverage. In many cases, insurers may simply make the filings at the same as other rate and form filings, and thus minimize the costs of an additional filing.

The regulations require that certain notices be provided to insureds. Most notably, insurers writing motor vehicle insurance must provide notices to their insureds regarding whether the policies provide coverage when the vehicles are used as TNC vehicles and, if so, to what extent. In addition, the required notices under 11 NYCRR 60-3 (Insurance Regulation 35-E) are extended to policies providing coverage under new Vehicle and Traffic Law Article 44-B. Since these notices are to be provided when the policy is first issued and upon every renewal, it is not anticipated that these notices will add a significant cost to the insurers.

The regulations also implement the statutory requirements that they cooperate in sharing information with respect to accidents involving TNC vehicles. While there may be a cost to doing this, it should be minimal and would depend on how many times the insurer would be called on to share the information. In any event, the sharing requirement is imposed by the statute.

If an excess line broker is used to place the group policy, the broker is required to provide a written affirmation annually of the unavailability of coverage from an authorized insurer. This should present no significant additional costs to the broker since it should be communicating with the group policyholder anyway. The regulation also requires that the broker obtain certain commitments from the unauthorized insurer, but that too should not be a significant cost to the broker.

The main cost to the Department will be to review the new policy rates and forms that insurers may file to implement Part AAA of Chapter 59 of the Laws of 2017. While it is not expected that there will be many group insurance policy forms and rates filed, most insurers writing motor vehicle insurance may file exclusions to their policies for TNC use and some insurers may file endorsements expressly providing the coverage. The Department anticipates that existing personnel and line titles will handle all such filings.

These rules impose no compliance costs on any state or local governments.

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

6. Paperwork: As discussed under costs, the regulations require certain new notices to be provided to insureds. No new filings with or submissions to the Department are required.

7. Duplication: The amendments do not duplicate any existing laws or regulations.

8. Alternatives: No significant alternatives were considered.

9. Federal standards: There are no federal standards.

10. Compliance schedule: Part AAA of Chapter 59 of the Laws of 2017 took effect on June 29, 2017. In order to facilitate the orderly implementation of the new law, the Superintendent is promulgating these regulations on an emergency basis.

Consolidated Regulatory Flexibility Analysis

1. Effect of rule: These rules amend existing requirements applicable to motor vehicle insurance and adopt new rules governing policies providing coverage pursuant to Vehicle and Traffic Law ("VTL") Article 44-B and new Insurance Law ("IL") section 3455. These rules apply to insurers providing motor vehicle insurance in New York.

Industry has asserted in the past that certain insurers, in particular mutual insurers, subject to the rule fall within the definition of a "small business" as defined by State Administrative Procedure Act § 102(8) because in general they are independently owned and have fewer than 100 employees.

Certain provisions of the rules also apply to excess line brokers. There are approximately 1,238 business and 2,392 individuals licensed as excess line brokers. Many of these may be small businesses but we do not know how many may be.

Total – 3,630

2. Compliance requirements: No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with the rule because the rule does not apply to any local government.

For the most part, the regulations do not impose any new reporting or recordkeeping requirement. Authorized insurers that wish to write transportation network company ("TNC") policies will have to comply with the usual filing and approval requirements under the Insurance Law for such policies. Insurers will also have to comply with the requirements regarding sharing of information with respect to accidents involving TNC vehicles. The regulation does require that insurers writing motor vehicle insurance policies provide a notice upon issuance and renewal regarding whether and, if so, to what extent, the policies provide coverage when the vehicle is used or operated as a TNC vehicle.

If an excess line broker is used to place the group policy, the broker is required to provide a written affirmation annually of the unavailability of coverage from an authorized insurer. The regulation also requires that the broker obtain certain commitments from the unauthorized insurer, but that too should not be a significant cost to the broker.

3. Professional services: No local government will need professional services to comply with this rule because the rule does not apply to any local government. The Department does not anticipate that any insurer or excess line broker that is a small business affected by the rule, if any, should need to retain professional services, such as lawyers or auditors, to comply with this rule.

4. Compliance costs: While it is not expected that there will be many group insurance policy forms and rates filed, most insurers writing motor vehicle insurance may file exclusions to their policies for TNC use and some insurers may file endorsements expressly providing the coverage. In many cases, insurers may simply make the filings at the same as other rate and form filings, and thus minimize the costs of an additional filing.

Since these notices to the insureds are to be provided when the policy is first issued and upon every renewal, it is not anticipated that these notices will add a significant cost to the insurers.

While there may be a cost to the insurers having to share information, it should be minimal and would depend on how many times the insurer would be called on to share the information. In any event, the sharing requirement is imposed by the statute.

It is not anticipated that the additional notices and other requirements on excess line brokers would be a significant cost to the broker.

5. Economic and technological feasibility: This rule does not apply to any local government; therefore, no local government should experience any economic or technological impact as a result of the rule. No insurer that is a small business affected by this rule, if any, should experience any economic or technological impact as a result of the rule.

6. Minimizing adverse impact: There will not be an adverse impact on any local government because the rule does not apply to any local government. This rule should not have an adverse impact on an insurer that is a small business affected by the rule, if any, because the rule uniformly affects all insurers that are subject to the rule.

7. Small business and local government participation: In drafting the emergency regulations, the Department discussed the draft with interested parties, including those that represent small businesses. Small businesses and local governments will have a further opportunity to participate in the rule-making process when the proposed rule is published in the State Register and posted on the Department of Financial Services' website.

Rural Area Flexibility Analysis

The Department of Financial Services ("Department") finds that this rule does not impose any additional burdens on persons located in rural areas, and will not have any adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Rural area participation: Interested parties, including those located in rural areas, will have an opportunity to participate in the rule-making process when the proposed rule is published in the State Register and posted on the Department of Financial Services' website.

Job Impact Statement

The Department of Financial Services finds that these rules should have no negative impact on jobs and employment opportunities. The rules

implement Part AAA of Chapter 59 of the Laws of 2017, which recognize the operation of transportation network companies (TNC), to operate prearranged trips in New York and help ensure that the public will have appropriate insurance protection when utilizing a TNC vehicle. Part AAA should increase employment opportunities in New York as has been the case elsewhere in the country where TNCs operate.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Life Insurance and Annuity Non-Guaranteed Elements

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

Filing No. 755

Filing Date: 2017-09-05

Effective Date: 2018-03-19

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

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

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

Subject: Life Insurance and Annuity Non-Guaranteed Elements.

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

Substance of final rule: The full text of the regulation can be viewed at http://www.dfs.ny.gov.

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

Section 48.1 provides definitions applicable to the rule.

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

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

Section 48.4 requires insurers and fraternal benefit societies to maintain actuarial memoranda for certain life insurance policies and annuity contracts, and to file with the Superintendent documentation used in adverse readjustment of non-guaranteed elements for certain life insurance policies, and to maintain records documenting compliance with the rule.

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 48.0(b)(1), 48.1(h), (l), (o), (p), 48.4(b)(1) and (c).

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: William B. Carmello, New York State Department of Financial Services, One Commerce Plaza, 19th floor, Albany, NY 12257, (518) 474-7929, email: William.Carmello@dfs.ny.gov

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

Changes made to the last published proposed new 11 NYCRR 48 (Insurance Regulation 210) have no bearing on the last published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement. Therefore, no changes have been made to the RIS, RFA, RAFA and 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

The Department of Financial Services ("Department") received comments on revised proposed rule 11 NYCRR 48 from four parties, summarized as follows:

One commenter requested the effective date of the regulation to be extended from 180 days to 240 days after publication in the State Register, noting the need to revise board criteria. The Department believes that insurers should establish proper board criteria and procedures for setting and revising non-guaranteed elements as soon as practicable to ensure that consumers are treated fairly, and that 180 days after publication will provide sufficient time to comply.

Two commenters recommended excluding annuities from the scope of the regulation. One commenter suggested that if annuities are included they should be included only during the surrender charge period. The Department believes that annual reporting of adverse changes in non-guaranteed elements, and a 60-day notice to policyholders of adverse changes in non-guaranteed elements, are necessary to protect annuitants' interests. Two commenters recommended that the regulation only apply to annuities issued after the effective date of the regulation. The Department believes that the regulation should apply to existing business to ensure that consumers who already bought annuities are treated fairly and without undue discrimination.

Two commenters recommended amending the definition of adverse change in order to exclude more types of changes, such as lapse rates or other forms of policyholder behavior. Currently the regulation only excludes changes in crediting rates or indexed account parameters based entirely on changes to expected investment income or hedging costs. The Department believes that changes to non-guaranteed elements based on factors other than changes in the general level of interest rates or hedging costs should be subject to review by the Department to ensure that the changes are justified, whereas changes due to, for example, changes in interest rates should be straightforward and need not be reviewed.

One commenter recommended adding wording to permit smoothing and rounding in the resetting of credited interest rates or index account parameters, without such change being considered adverse. The Department believes that unbiased smoothing and rounding would not be treated as an adverse change per section 48.2(g)(3) of the regulation and thus no change is necessary.

Two commenters recommended that the regulation exempt certain types of group business, such as business not subject to individual rules. The Department believes that the recommended exemption is overly broad and would result in exempting groups of contracts, which could lead to unfair treatment of participants.

One commenter recommended that the definition of applicable group certificate should be revised by replacing "derived substantially from funds contributed by the person covered" with "derived wholly from funds contributed by the person covered" to replicate language used in other contexts, such as the group mail order exception in Insurance Law § 1101(b)(2)(B). The Department intentionally used the term "substantially" rather than "wholly" in this context to prevent insurers from circumventing the regulation through the use of nominal contributions in order to claim that the contributions were not "wholly" contributed by the person covered.

One commenter contended that applying the regulation to group certificates that were issued to New York residents from outside New York would be administratively burdensome. The Department has consistently held that the Insurance Law and regulations apply to certificates issued in the individual insurance market in this state regardless of the situs of delivery of the group policy or contract. The Department believes that the extension of New York protections to New York certificate holders in this context substantially outweighs the commenter's contention regarding potential administrative burdens.

Two commenters recommended clarifying the definition of class of policies. The Department believes that the definition is appropriate because a policy might be in one class with respect to one assumption (for example, the mortality assumption) and a different class with respect to another assumption (for example, the expense assumption) since generally there would be more policyholders with similar expectations as to expense costs compared with the number of policyholders with similar expectations as to mortality.

One commenter recommended that dividend provisions should not be exempt from the regulation because they can be based on considerations of future financial performance. The Department believes that dividend provisions should not be subject to the regulation since the regulation is intended to address non-guaranteed elements that are required to be based on expectations of future performance, whereas as dividends are legally based on accumulated surplus from past financial performance.

One commenter recommended expanding the list of exempt policy provisions in the definition of exempt policy in section 48.1(g). The Department believes that expanding the list is not necessary because the definition already provides sufficient examples.

One commenter recommended exempting fixed accounts in variable annuities from the regulation. The Department believes that the protections provided by the regulation are needed for such accounts.

Two commenters recommended clarifying changes to the definition of experience factor. The Department believes that the definition does not

need to be changed because the definition is based on applicable sections of the Insurance Law.

One commenter recommended changing the definition of experience factor to indicate that the list of factors is not exhaustive. No revision was made because the Department does not want to include factors that are not included in the applicable laws.

Two commenters suggested clarifying that current annuitization rates in annuity contracts are not considered non-guaranteed elements. The Department made the suggested change.

Three commenters recommended clarifying changes to the definition of pricing cell because the definition could result in too many required calculations. No revision was made to the definition. The Department believes that the regulation's definition of pricing cell, in conjunction with the regulation's definition of class of policies, supports the fair treatment of policyholders within a given pricing cell.

One commenter recommended that profit margin be defined. The Department added the definition.

One commenter recommended that the regulation should not have rules applicable to the setting of initial non-guaranteed elements, but should instead focus exclusively on revisions of non-guaranteed elements. The Department believes that it is important for the initial scale of non-guaranteed elements to be reasonable and equitable.

One commenter suggested that the regulation require the initial scale of non-guaranteed elements to be self-supporting. The Department believes that the change is unnecessary because the Insurance Law contains self-support requirements and the regulation must be read consistently with those requirements.

One commenter recommended that section 48.2(b) of the regulation, regarding the method of calculating changes to non-guaranteed elements, should not apply to changes in interest crediting rates or index account parameters. The Department believes that the method of calculation should be applied to such changes and the related calculations should be straightforward.

One commenter recommended that the regulation should clarify that insurers are not required to make changes because such requirement would exceed the Department's statutory authority. However, certain sections of the law require non-guaranteed elements to be based on reasonable assumptions. If an assumption is no longer reasonable it needs to be changed, which may mean that one or more non-guaranteed elements would change. The regulation establishes thresholds for making changes but those thresholds must be applied fairly to both increases and decreases in non-guaranteed elements. Accordingly, this revision was not made.

Three commenters recommended that instead of requiring the profit margin at a given policy year to be fixed, the regulation should require only the present value of profits from the time of a change in non-guaranteed elements to be fixed. The Department's concern about this approach is that if profit margins are increased at certain durations and reduced at other durations, some policyholders could be harmed.

One commenter recommended that the regulation permit the Superintendent to allow increases in profit margins for any reason, rather than due to the financial condition of the insurer. The Department does not anticipate any other legitimate reason for permitting such increases.

One commenter recommended deleting the requirement in section 48.2(b)(6) that experience from the time of the most recent change in non-guaranteed elements should be assumed to equal the anticipated experience factors. The Department believes that this requirement is necessary to ensure that the impact of past experience is not passed on to policies in force.

Three commenters recommended a clarification to section 48.2(d) regarding the impact of reinsurance. The Department believes that a clarification is not necessary because the language is clear and unambiguous.

One commenter recommended that the Department should delete the requirement that reinsurance and other third party agreements should be ignored when revising non-guaranteed elements. The Department believes that basing changes to non-guaranteed elements on actions by a third party is not acceptable if the actions, such as premium increases, are not consistent with the experience, e.g., mortality, anticipated by the direct insurer.

Three commenters expressed concern about the requirement that the acquiring insurer's procedures for changing non-guaranteed elements should not be less favorable than the original insurer's procedures. The Department believes that using a less favorable procedure would be unfair to policyholders and annuitants, except where necessary due to the financial condition of the original insurer, if approved by the Superintendent.

One commenter recommended clarifying the requirement that the anticipated experience factors for existing business should be reviewed at least every five years to indicate when the five-year period begins for policies already in force at the time of adoption of the regulation. Clarifying language was added.

One commenter recommended eliminating the rule requiring a limit on passing high unit costs on to policyholders due to low sales volume. The Department believes that passing on the impact of low sales volume is unfair and inconsistent with the requirements in the law that changes must be based on expectations of future experience rather than the impact of past experience.

One commenter recommended that insurers should not be required to disclose current non-guaranteed elements to policyholders. The Department believes that policyholders and annuitants should know the non-guaranteed elements that are expected to apply to their policies so that actual credits and charges may be tracked over time and can be compared to what was originally expected.

One commenter recommended replacing the word "special" with "other" in section 48.3(a), thereby allowing the initial scale of non-guaranteed elements to be disclosed in any disclosure document. The Department believes that if the disclosure is not made in the policy, application or illustration, it should be made in a noticeable separate document and not in an obscure place in a larger document containing various types of information.

Two commenters recommended changing the advanced notification of adverse changes to policyholders from 60 days to 15 days. The Department believes that 15 days' notice is insufficient and 60 days is more appropriate.

One commenter contended that the advanced notification of adverse changes to policyholders in section 48.3(b) should not be required if the change does not impact a given policyholder. The Department believes that the regulation does not require advanced notification in such case because there is no adverse change for that policyholder.

One commenter contended that the advanced notification of adverse changes to policyholders should not be required if the policyholder has an option to not accept the change by, for example, switching to another type of account option or surrendering a rider. The Department does not agree with the recommendation.

One commenter suggested that section 48.4(a)(2), which requires a new actuarial memorandum when non-guaranteed elements have been changed for only new issues, should not apply to changes in interest crediting rates. The change was not made because the Department believes that changing of interest crediting rates for only new issues might imply the creation of a new pricing class.

Three commenters remarked that the information required for the actuarial memorandum is too detailed. The Department believes that the level of detail required by the regulation is necessary and appropriate for the Superintendent to evaluate the information. However, section 48.4(b)(1) was revised to clarify that the Department needs sufficient detail of the pricing assumptions.

One commenter questioned the need to include in the annual notice of adverse changes in non-guaranteed elements any adverse changes that were previously filed with the Department. The Department believes that such changes should be included in the listing to ensure that the list is complete.

Department of Health

EMERGENCY RULE MAKING

Hospital Indigent Care Pool Payment Methodology

I.D. No. HLT-25-17-00009-E

Filing No. 753

Filing Date: 2017-09-01

Effective Date: 2017-09-01

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

Action taken: Amendment of section 86-1.47 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-k(5-d)

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

Specific reasons underlying the finding of necessity: The proposed amendment extends a distribution methodology for indigent care pool payments to general hospitals for another three year period, from January 1, 2016 through December 31, 2018.

Public Health Law Section 2807-k(5-d)(b) provides the Commissioner

of Health with the authority to revise the regulation on an emergency basis. Emergency adoption of the proposed regulation with an effective date of January 1, 2016 is necessary to satisfy the statutory timeframe prescribed by Section 1 of Part E of Chapter 57 of the Laws of 2015 and to secure federal approval of the associated Medicaid State Plan Amendment. The State has unofficial approval of the Indigent Care Pool Extender State Plan Amendment.

The State has been making SFY 2016 hospital indigent care pool payments using the extender distribution methodology pursuant to statute while it seeks approval of both the proposed amendment and the associated Medicaid State Plan Amendment.

Subject: Hospital Indigent Care Pool Payment Methodology.

Purpose: To extend the methodology for indigent care pool payments to general hospitals for another 3 year period - 1/1/16 - 12/31/18.

Text of emergency rule: Subdivision (f) of section 86-1.47 is renumbered as subdivision (i) and amended to read as follows:

(i)(1) Funds reserved in the Financial Assistance Compliance Pool ("FACP") pursuant to § 2807-k(5-d)(b)(iv) of the Public Health Law for the calendar years 2014 [and 2015] *through 2018* shall be distributed to hospitals which demonstrate substantial compliance, as determined by the Commissioner, with the provisions of § 2807-k(9-a) of the Public Health Law (the "financial assistance law" or "FAL").

(2) Hospitals which are determined to be in substantial FAL compliance by the end of the 2013 calendar year shall receive their 2014 FACP payments as soon as practical in 2014 in accordance with subdivision (b) of this section. Hospitals which are determined to be in substantial FAL compliance by the end of the 2014 calendar year shall receive their 2015 FACP funds as soon as practical in 2015 in accordance with subdivision (b) of this section[,]. *Hospitals which are determined to be in substantial FAL compliance by the end of the 2015 calendar year shall receive their 2016 FACP payments as soon as practical in 2016 in accordance with subdivision (b) of this section. Hospitals which are determined to be in substantial FAL compliance by the end of the 2016 calendar year shall receive their 2017 FACP payments as soon as practical in 2017 in accordance with subdivision (b) of this section. Hospitals which are determined to be in substantial FAL compliance by the end of the 2017 calendar year shall receive their 2018 FACP payments as soon as practical in 2018 in accordance with subdivision (b) of this section* provided, however, that those hospitals which were determined to be not in such substantial compliance by the end of [2013] *2015 and 2016*, but which are determined to be in such substantial compliance by the end of [2014] *2017*, shall receive [both] their [2014] *2015, 2016* and [2015] *2017* FACP payments as soon as practical in [2015] *2018*.

Section 86-1.47 is amended by adding subdivisions (f), (g), and (h) to read as follows:

(f) For the 2016 calendar year, payments shall be made as follows:

(1) One hundred thirty nine million four hundred thousand dollars ($139,400,000) shall be distributed as Medicaid disproportionate share hospital ("DSH") payments to major public general hospitals, including the hospitals operated by public benefit corporations, on the basis of each hospital's uncompensated care nominal need, as determined in accordance with the provisions of subdivision (b) of this section, as a share of the aggregate uncompensated care nominal need for all major public general hospitals, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than ten percent less than the average distributions such hospitals received pursuant to § 2807-k of the Public Health Law for the three year period January 1, 2010, through December 31, 2012.

(2) Nine hundred ninety four million nine hundred thousand dollars ($994,900,000) shall be distributed as Medicaid DSH payments to eligible general hospitals, other than major public general hospitals, on the basis of each hospital's uncompensated care need share, as determined in accordance with the provisions of subdivision (b) of this section, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than ten percent less than the average distributions such hospitals received pursuant to § 2807-k and § 2807-w of the Public Health Law, excluding academic medical center grants received pursuant to § 2807-k(5-b)(b)(v) of the Public Health Law, and after any reductions made pursuant to § 2807-k(17) of the Public Health Law, for the three year period January 1, 2010, through December 31, 2012.

(3) Payments made pursuant to paragraphs (1) and (2) of this subdivision shall be further adjusted such that such payments made to hospitals that experience increases in payments, as compared to the average of such payments made pursuant to this section for the three year period January 1, 2010 through December 31, 2012, shall be further adjusted on a percentage basis, as determined by the Commissioner, sufficient to ensure, in conjunction with such other funding as may be made available, the full funding of the transition adjustments described in paragraphs (1) and (2) of this subdivision.

(g) For the 2017 calendar year, payments shall be made as follows:

(1) One hundred thirty nine million four hundred thousand dollars ($139,400,000) shall be distributed as Medicaid disproportionate share hospital ("DSH") payments to major public general hospitals, including the hospitals operated by public benefit corporations, on the basis of each hospital's uncompensated care nominal need, as determined in accordance with the provisions of subdivision (b) of this section, as a share of the aggregate uncompensated care nominal need for all major public general hospitals, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than twelve and a half percent less than the average distributions such hospitals received pursuant to § 2807-k of the Public Health Law for the three year period January 1, 2010, through December 31, 2012.

(2) Nine hundred ninety four million nine hundred thousand dollars ($994,900,000) shall be distributed as Medicaid DSH payments to eligible general hospitals, other than major public general hospitals, on the basis of each hospital's uncompensated care need share, as determined in accordance with the provisions of subdivision (b) of this section, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than twelve and a half percent less than the average distributions such hospitals received pursuant to § 2807-k and § 2807-w of the Public Health Law, excluding academic medical center grants received pursuant to § 2807-k(5-b)(b)(v) of the Public Health Law, and after any reductions made pursuant to § 2807-k(17) of the Public Health Law, for the three year period January 1, 2010, through December 31, 2012.

(3) Payments made pursuant to paragraphs (1) and (2) of this subdivision shall be further adjusted such that such payments made to hospitals that experience increases in payments, as compared to the average of such payments made pursuant to this section for the three year period January 1, 2010 through December 31, 2012, shall be further adjusted on a percentage basis, as determined by the Commissioner, sufficient to ensure, in conjunction with such other funding as may be made available, the full funding of the transition adjustments described in paragraphs (1) and (2) of this subdivision.

(h) For the 2018 calendar year, payments shall be made as follows:

(1) One hundred thirty nine million four hundred thousand dollars ($139,400,000) shall be distributed as Medicaid disproportionate share hospital ("DSH") payments to major public general hospitals, including the hospitals operated by public benefit corporations, on the basis of each hospital's uncompensated care nominal need, as determined in accordance with the provisions of subdivision (b) of this section, as a share of the aggregate uncompensated care nominal need for all major public general hospitals, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than fifteen percent less than the average distributions such hospitals received pursuant to § 2807-k of the Public Health Law for the three year period January 1, 2010, through December 31, 2012.

(2) Nine hundred ninety four million nine hundred thousand dollars ($994,900,000) shall be distributed as Medicaid DSH payments to eligible general hospitals, other than major public general hospitals, on the basis of each hospital's uncompensated care need share, as determined in accordance with the provisions of subdivision (b) of this section, further adjusted by a transition factor that shall be calculated such that no hospital shall experience a reduction in payments pursuant to this section that is greater than fifteen percent less than the average distributions such hospitals received pursuant to § 2807-k and § 2807-w of the Public Health Law, excluding academic medical center grants received pursuant to § 2807-k(5-b)(b)(v) of the Public Health Law, and after any reductions made pursuant to § 2807-k(17) of the Public Health Law, for the three year period January 1, 2010, through December 31, 2012.

(3) Payments made pursuant to paragraphs (1) and (2) of this subdivision shall be further adjusted such that such payments made to hospitals that experience increases in payments, as compared to the average of such payments made pursuant to this section for the three year period January 1, 2010 through December 31, 2012, shall be further adjusted on a percentage basis, as determined by the Commissioner, sufficient to ensure, in conjunction with such other funding as may be made available, the full funding of the transition adjustments described in paragraphs (1) and (2) of this subdivision.

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. HLT-25-17-00009-P, Issue of June 21, 2017. The emergency rule will expire October 30, 2017.

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

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2807-k (5-d) of the Public Health Law (PHL), as amended by Section 1 of Part E of Chapter 57 of the Laws of 2015, which requires the Commissioner to promulgate regulations, including emergency regulations, with regard to the extension of a distribution methodology to make annual indigent care pool payments to general hospitals for the three-year period January 1, 2016 through December 31, 2018.

Legislative Objectives:

The legislation requires the Department of Health to develop an indigent care distribution methodology, for calendar years through 2018, which conforms to federal DSH ("Disproportionate Share Hospital") reform guidelines by targeting payments to hospitals which provide a disproportionate share of uncompensated care to the uninsured and Medicaid inpatient population and to also strengthen hospital compliance with the Financial Aid Law contained in Section 2807-k(9-a) of the Public Health Law.

The current regulation contains, for calendar years 2013-2015, the detailed calculations required to determine a hospital's relative uncompensated care need, incorporating both uninsured and Medicaid inpatient volume, which forms the basis for allocation of a proportional share of the total available pool funds. The proposed amendment would extend this methodology to calendar years 2016-2018, in conformance with amendments to PHL Section 2807-k(5-d).

The current regulation also provides, for calendar years 2013-2015, for a transition payment to ensure that no hospital experiences severe financial instability resulting from the redistribution of funding among the hospitals as a result of the indigent care distribution methodology. This transition payment establishes a minimum payment as a set percentage of the average indigent care pool payments received by the hospital in the years 2010-2012. Hospitals which experience gains have their distributions similarly capped by a set percentage of the average indigent care pool payments received in the years 2010-2012. The proposed amendment would extend the transition payments to calendar years 2016-2018, in conformance with amendments to PHL Section 2807-k(5-d).

The current regulation also requires, for calendar years 2013-2015, the Commissioner to withhold one percent of the total indigent care pool funds available to distribute to hospitals who demonstrate substantial compliance with the Financial Aid Law PHL Section 2807-k(9-a). The proposed amendment would extend the one-percent withholding and distribution to hospitals to calendar years 2016-2018, in conformance with amendments to PHL Section 2807-k(5-d).

Needs and Benefits:

The proposed amendment would extend, through calendar year 2018, the current indigent care distribution methodology, which replaced an outdated and complex distribution methodology that expired December 31, 2012. Public Health Law Section 2807-k(5-d) requires the Department to have such a methodology in place through 2018.

Benefits of the current methodology include a simpler, more transparent methodology which relates indigent care pool payments directly to care of the poor and provides incentives for hospitals to comply with the provisions of the Financial Aid Law. Further, federal DSH matching funds are optimized by the State's conformance with federal guidelines.

Costs:

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The Department utilizes audited information contained in hospitals' Institutional Cost Reports, which the hospitals are already required to submit to the Department on an annual basis.

Costs to State Government:

There is no increase in Medicaid expenditures anticipated as a result of this proposed amendment.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed amendment.

Costs to the Department of Health:

There will be no additional administrative costs to the Department of Health as a result of this proposed amendment.

Local Government Mandates:

The proposed amendment does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There are no new reporting requirements, forms or additional paperwork as a result of this proposed amendment.

Duplication:

This proposed amendment does not duplicate any existing federal, state or local regulations.

Alternatives:

No significant alternatives are available. The Department developed the distribution methodology with extensive input from the industry associations representing the hospitals subject to the proposed amendment. The regulation is mandated by PHL Section 2807-k(5-d).

Federal Standards:

The proposed amendment does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The proposed amendment grants the Commissioner of Health the authority to withhold one percent of the total indigent care pool funds available for years 2016, 2017 and 2018. Hospitals must demonstrate compliance with the provisions of the Financial Aid Law contained in Section 2807-k(9-a) of the Public Health Law to receive their share of the one percent withheld funds for years 2016, 2017 and 2018. There are no additional compliance efforts required by the hospitals.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, five hospitals were identified as employing fewer than 100 employees.

Some hospitals subject to this regulation may see a decrease in their indigent care payments as a result of this regulation.

This rule will have no direct effect on local governments.

Compliance Requirements:

The proposed amendment requires the Commissioner of Health to withhold one percent of the total indigent care pool funds available for years 2016, 2017 and 2018. All hospitals must demonstrate compliance with the provisions of the Financial Aid Law as set forth in Section 2807-k(9-a) of the Public Health Law to receive their share of the funds held in this pool for years 2016, 2017 and 2018. No other compliance efforts are required.

A small business regulation guide will not be prepared.

The rule will have no direct effect on local governments.

Professional Services:

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

Compliance Costs:

No additional compliance costs are anticipated as a result of this proposed amendment.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this proposed amendment because there are no technological requirements other than the use of existing technology, and the overall economic aspect of complying with the requirements is expected to be minimal.

Minimizing Adverse Impact:

A transition payment will be provided, in each of the three years, to ensure that no hospital experiences severe financial instability resulting from the methodology. This transition payment will establish a minimum payment as a set percentage of the average indigent care pool payments received by the hospital in the three years 2010-2012.

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register on March 25, 2015, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include hospitals with 100 or fewer FTEs.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following eleven counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Monroe	Orange
Broome	Niagara	Saratoga
Dutchess	Oneida	Suffolk
Erie	Onondaga	

Compliance Requirements:

The proposed amendment requires the Commissioner of Health to withhold one percent of the total indigent care pool funds available for years 2016, 2017 and 2018. All hospitals must demonstrate compliance with the provisions of the Financial Aid Law as set forth in Section 2807-k(9-a) of the Public Health Law to receive their share of the funds held in this pool for years 2016, 2017 and 2018. No other compliance efforts are required.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendment.

Compliance Costs:

No additional compliance costs are anticipated as a result of this proposed amendment.

Minimizing Adverse Impact:

A transition payment will be provided, in each of the three years, to ensure that no hospital experiences severe financial instability resulting from the methodology. This transition payment will establish a minimum payment as a set percentage of the average indigent care pool payments received by the hospital in the three years 2010-2012.

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Rural Area Participation:

The State filed a Federal Public Notice, published in the State Register on March 25, 2015, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including rural area members and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include members from rural areas.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. The proposed amendment extends the hospital indigent care pool payment methodology for the three-year period January 1, 2016 through December 31, 2018. It is apparent, from the nature and purpose of the proposed amendment, that it will not have a substantial adverse impact on jobs or employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Trauma Centers

I.D. No. HLT-38-17-00001-P

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

Proposed Action: Amendment of Parts 405 and 708 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2800, 2803, 3063, 3064, 3066, 3074 and 3075

Subject: Trauma Centers.

Purpose: Requires hospitals to be verified by the American College of Surgeons Committee to be designated trauma centers by the Department.

Substance of proposed rule (Full text is posted at the following State website:www.health.ny.gov/Laws&Regulations/Proposed Rulemaking): These regulations establish a new regulatory framework for the operation of trauma centers at hospitals in New York State, by adding a new 10 NYCRR section 405.45. Subdivision (a) defines terms relating to trauma centers, including but not limited to trauma patient, trauma care, Levels I-IV trauma centers, pediatric trauma center, and Regional Trauma Center. Subdivision (a) also defines the transfer agreements that must exist between hospitals, and the trauma affiliation agreement that each hospital must have with the Regional Trauma Center.

Subdivision (b) establishes certain general provisions relating to trauma care. More specifically, the regulation states that the Department has authority to determine whether a hospital meets the legal requirements for designation by the Department as a trauma center. Only trauma centers designated by the Department may admit and provide care to trauma patients, except in certain emergency situations. Any hospital not designated as a trauma center must transfer a trauma patient to the most appropriate trauma center pursuant to a transfer agreement. A hospital may not state that it has trauma center status unless it is designated by the Department.

Subdivision (c) establishes the process for obtaining trauma center designation. A hospital seeking designation as a trauma center must receive verification by the American College of Surgeons, Committee on Trauma (ACS-COT), or other entity determined by the Department. To receive verification, the hospital must undergo a consultation site visit and verification site visit. The regulation provides details on what must occur during consultation and verification site visits.

Subdivision (d) establishes certain requirements for operating a trauma center, including but not limited to complying with ACS-COT's publication entitled Resources for Optimal Care of the Injured Patient (2014), maintaining appropriate equipment, maintaining transfer agreements, participating in a performance improvement process, submitting notices of noncompliance to the Department, and notifying the Department immediately of any inability to meet trauma care capabilities.

Subdivision (e) sets forth the conditions under which the Department may withdraw trauma center designation. Subdivision (f) requires trauma centers to submit information to the New York State Trauma Registry. Subdivision (g) requires trauma centers to participate with the coordinating Regional Trauma Center and other hospitals and healthcare facilities, EMS agencies and governmental disaster preparedness programs in regional trauma performance improvement activities. The regulation provides additional details concerning the trauma performance improvement program.

Two provisions in existing regulation relating to trauma centers are repealed as no longer needed, in light of the proposed regulations.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in Public Health Law (PHL) Sections 2800, 2803(2), 3063, 3064, 3066, 3074 and 3075. Section 2800 provides that "the Department of Health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services." PHL § 2803(2) authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and pro-

visions of PHL Article 28 and to establish minimum standards governing the operation of health care facilities.

PHL §§ 3063 and 3064 establish the State Emergency Medical Advisory Committee (SEMAC) and the State Trauma Advisory Committee (STAC), respectively, to advise the Commissioner and the Department on emergency medical care and trauma care within the state. PHL § 3066 authorizes the Department to develop standards for trauma care and to categorize hospitals as trauma centers appropriate for providing trauma care. PHL § 3074 establishes the State Emergency Medical Services for Children Advisory Committee to advise the Commissioner and the Department on all aspects of emergency medical services for children, including trauma care. PHL § 3075 authorizes the Department to develop and maintain, with the advice of the State Emergency Medical Services for Children Advisory Committee, the State Emergency Medical Advisory Committee and the State Trauma Advisory Committee, a statewide system for recognition of facilities able to provide pediatric trauma care.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost. The legislative objective of PHL Articles 30-B and 30-C includes the protection of public health and safety through the development of systems for adult and pediatric trauma care.

Needs and Benefits:

After a traumatic event, the complexity of injuries sustained, the health of the patient at the time of the event, and the trauma care available to that patient will determine the risk of death, loss of limb, disability and/or other permanent harm. Because hospitals vary in the scope of resources they can provide to treat trauma patients, the state's network of healthcare providers works to ensure that trauma patients receive high quality care at those hospitals that have the resources to maximize chances for good outcomes. Since 1984, several research studies, including more than 15 published articles, have concluded that a patient's chances of survival following significant trauma improve when he or she is cared for in a specialized trauma center.

These proposed regulations repeal certain provisions of Part 708 that define trauma care and trauma centers. These provisions were originally promulgated in 1990 and were modeled after the national trauma care standards at that time. The proposed regulations update and modernize these standards.

The State Trauma Advisory Committee (STAC), as established by PHL Article 30-B, advises the Department and Commissioner regarding trauma and disaster care. In collaboration with STAC, the Department determined that, to strengthen the provision of trauma care in New York State, and to improve access to trauma care and improve patient care, the Department should require hospitals seeking trauma center designation to comply with the current national trauma care standards published by the American College of Surgeons Committee on Trauma (ACS-COT) in Resources for Optimal Care of the Injured Patient (2014).

Consistent with STAC's recommendation, the Department advised the 40 hospitals designated as trauma centers that the Department intended to make compliance with ACS-COT standards a requirement of designation, and the Department advised those hospitals to contact the ACS-COT to schedule a consultation site visit. To date, twenty-nine (29) hospitals have received verification from the American College of Surgeons, and the remaining hospitals are in the process of scheduling their verification survey visits. While completing the ACS-COT verification site visit process, all currently designated trauma centers retain their designation and continue to receive trauma patients.

In March 2013, the Department advised that those hospitals seeking trauma center designation for the first time should contact the ACS-COT by May 2015 to schedule a consultation site visit, and that within two years of a final consultation site visit, request a verification site visit. This initial timeline was established to facilitate advance compliance with the regulations now being proposed. The Department advised those facilities seeking trauma care designation for the first time that, prior to their consultation site visit, the facility must have in place: a trauma service, a trauma medical director, a trauma program manager, a hospital-based trauma registry, 9-12 months of trauma data, and a performance improvement process of some kind. To date, four (4) hospitals have been provisionally designated in anticipation of receiving verification. One of the provisional hospitals completed the verification survey and has been verified as a Level III trauma center and has received its designation from the Commissioner. Trauma care requires significant resources and highly trained staff with expertise in caring for severely injured patients. The ACS-COT has set the standard for caring for trauma patients since 1922 when the ACS-COT was created. The ACS-COT standards are national standards which are updated regularly to reflect current trends and evidence-based practice. The current ACS-COT publication entitled Resources for the Optimal Care of the Injured Patient was published in 2014 and is the edition which is being incorporated by reference in these regulations. The ACS-COT conducts surveillance of trauma centers in three-year cycles to verify that a facility is still capable of providing its verified level of trauma care.

The Department's current regulations allow for only two levels of trauma center: Regional and Area trauma centers. In keeping with the ACS-COT standards, the proposed regulations would allow the Department to designate four levels of trauma centers. The addition of two more levels of trauma centers will strengthen the state's trauma system and include facilities in underserved area of the state.

These regulations will not preclude non-designated hospitals from caring for patients with minor trauma. It is expected, however, that those hospitals will transfer all seriously injured trauma patients – those patients at high risk of death or disability from multiple and severe injuries – to designated trauma centers. Emergency Medical Services (EMS) protocols already dictate that trauma patients be transported to the highest level of care within a region's trauma system.

Costs:

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Costs incurred by those hospitals voluntarily seeking trauma center designation would include the cost of a consultation site visit and verification site visit. The cost for a consultation site visit is approximately $15,000, while the cost for a verification site visit, including a nurse reviewer, is approximately $16,000. Verification must be completed every three years. Hospitals may also incur costs associated with the hiring of additional trauma surgeons, trauma registrars and an injury prevention coordinator. The average salary of a board-certified trauma surgeon is approximately $304,500. The average salary of a nurse manager is $62,840. The average salary for an injury prevention coordinator (or "health educator") is $47,812.

The total costs per institution will vary depending on the resources already at hand. For current trauma hospitals, review and update of a hospital's trauma policies and procedures could be accomplished with existing staff, imposing little or no additional cost. Those hospitals seeking trauma designation for the first time may need to create a full-time position for a trauma program manager. For those facilities seeking a new Level II designation, this new trauma program manager may also coordinate injury prevention activities. This position may be filled by someone currently employed by the hospital, or the hospital could choose to hire a new employee. Level I facilities must also have an injury prevention coordinator.

Designated trauma centers are already required to maintain a hospital-based trauma registry which captures information pertaining to the patient's injury, pre-hospital care, Emergency Department care, hospital care and outcome information so that the hospital can submit information to the New York State Trauma Registry. ACS-COT standards require trauma data submission to the National Trauma Data Bank (NTDB) (a minimum of 80% of cases entered within 60 days of discharge) and the periodic monitoring of data validity. The New York State Trauma Registry "data dictionary" already incorporates the ACS-COT National Trauma Data Bank (NTDB) data elements along with 22 data elements specific to New York. At the state level, each record receives a unique identifier to protect patient confidentiality. Registry information is stored on a protected server with highly limited access.

The ACS-COT currently recommends one registrar for every 750-1,000 patients entered into the registry. Currently designated trauma centers, which already maintain a hospital-based trauma registry, may need to hire an additional registrar to meet these registry standards. The "average" salary for a "registrar" is $37,828. According to one of the vendors currently supporting the New York State Trauma Registry, for those facilities pursuing designation as a trauma center for the first time, the average cost of purchasing the software necessary to begin a hospital-based trauma registry is approximately $5,000 - 10,000, and the annual cost for maintaining such registry is approximately $2,000 - 3,000.

The goal of the New York State Trauma Registry is to capture all data for trauma patients cared for in the state. For those non-designated hospitals that occasionally receive trauma patients, there will be a mechanism for capturing an abbreviated set of data elements. The mechanism for submitting an abbreviated subset of trauma data is expected to be offered free of charge. For the small numbers of trauma patients expected at these facilities, entry of trauma data can be accomplished by existing staff and should not require additional hiring.

Those hospitals that will be caring for pediatric trauma patients must also ensure that their equipment is age and size appropriate.

Cost to State and Local Government:

There are no additional costs to State and local governments to implement this regulation. Existing staff will be utilized to conduct surveillance of the regulated parties and monitor compliance with these provisions.

Cost to the Department of Health:

There are no additional costs to the Department of Health to implement this regulation. Existing staff will be utilized to conduct surveillance of the regulated parties and monitor compliance with these provisions.

Local Government Mandates:

There are no additional programs, services, duties or responsibilities imposed by this rule upon any county, city, town, village, school district, fire district or any other special district.

Paperwork:

Hospitals may need to develop or revise written trauma policies and procedures, including trauma activation criteria and procedures, a massive transfusion protocol, a difficult airway management policy, trauma diversion policy, performance improvement processes and activities, transfer agreements and trauma data analysis. Hospitals seeking trauma center designation will need to complete an application for their consultation and verification site visits, along with a pre-review questionnaire.

Duplication:

This regulation will not duplicate any state or federal rules.

Alternatives:

ACS-COT sets the national standard of care for trauma patients. Adopting any other standards would be contrary to good medical practice. Moreover, leaving the regulations unchanged would subject trauma centers, and their patients, to outdated standards that would also be contrary to good medical practice. These regulatory changes ensure that trauma centers are subject to the most up-to-date standards.

Federal Requirements:

This regulation will not conflict with any federal rules.

Compliance Schedule:

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

This regulation will apply to the 228 general hospitals in New York State that either have or would seek trauma center designation. Currently, there are 40 designated trauma centers in New York State, four of which are operated by local government.

Compliance Requirements:

There are no additional programs, services, duties or responsibilities imposed by this rule upon any county, city, town, village, school district, fire district or any other special district. Hospitals would only need to comply with these regulations if they choose to become trauma centers.

Professional Services:

Most currently designated trauma centers already employ an adequate number of trauma surgeons, a trauma program manager and a registrar, and several hospitals already employ an injury prevention coordinator. Some currently designated trauma centers may need to hire additional trauma registrars to comply with the ACS-COT standards regarding data submission. Some facilities may need to hire additional surgeons. Newly designated trauma centers will likely need to hire a trauma program manager and trauma registrar.

Compliance Costs:

Costs incurred by those hospitals voluntarily seeking trauma center designation would include the cost of a consultation site visit and verification site visit. The cost for a consultation site visit is approximately $15,000, while the cost for a verification site visit, including a nurse reviewer, is approximately $16,000. Verification must be completed every three years. Hospitals may also incur costs associated with the hiring of additional trauma surgeons, trauma registrars and an injury prevention coordinator.

The total costs per institution will vary depending on the resources already at hand. For current trauma hospitals, review and update of a hospital's trauma policies and procedures could be accomplished with existing staff, imposing little or no additional cost. Those hospitals seeking trauma designation for the first time may need to create a full-time position for a trauma program manager. For those facilities seeking a new Level II designation, this new trauma program manager may also coordinate injury prevention activities. This position may be filled by someone currently employed by the hospital, or the hospital could choose to hire a new employee. Level I facilities must also have an injury prevention coordinator.

Designated trauma centers are already required to maintain a hospital-based trauma registry which captures information pertaining to the patient's injury, pre-hospital care, Emergency Department care, hospital care and outcome information so that the hospital can submit information to the New York State Trauma Registry. ACS-COT standards require trauma data submission to the National Trauma Data Bank (NTDB) (a minimum of 80% of cases entered within 60 days of discharge) and the periodic monitoring of data validity. The New York State Trauma Registry "data dictionary" already incorporates the ACS-COT National Trauma Data Bank (NTDB) data elements along with 22 data elements specific to New York. At the state level, each record receives a unique identifier to protect patient confidentiality. Registry information is stored on a protected server with highly limited access.

The ACS-COT currently recommends one registrar for every 750-1,000 patients entered into the registry. Currently designated trauma centers, which already maintain a hospital-based trauma registry, may need to hire an additional registrar to meet these registry standards. According to one of the vendors currently supporting the New York State Trauma Registry, for those facilities pursuing designation as a trauma center for the first time, the average cost of purchasing the software necessary to begin a hospital-based trauma registry is approximately $5,000 - 10,000, and the annual cost for maintaining such registry is approximately $2,000 - 3,000.

The goal of the New York State Trauma Registry is to capture all data for trauma patients cared for in the state. For those non-designated hospitals that occasionally receive trauma patients, there will be a mechanism for capturing an abbreviated set of data elements. The mechanism for submitting an abbreviated subset of trauma data is expected to be offered free of charge. For the small numbers of trauma patients expected at these facilities, entry of trauma data can be accomplished by existing staff and should not require additional hiring.

Those hospitals that will be caring for pediatric trauma patients must also ensure that their equipment is age and size appropriate.

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

Trauma center designation is voluntary. Those hospitals that do not wish to care for trauma patients will not need to comply with this regulation.

In May 2012, the Department advised currently designated trauma centers that it intended to make compliance with ACS-COT standards a requirement of designation and advised those hospitals to contact the ACS-COT to schedule a consultation site visit by May 2013. Following receipt of their final consultation site visit report, those centers have two years in which to schedule a verification site visit. In March 2013, the Department advised those hospitals seeking trauma center designation for the first time that they should contact the ACS-COT by May 2015 to schedule a consultation site visit and within two years following receipt of their final consultation site visit report to request a verification site visit. The Department has also advised these hospitals that, prior to having a consultation site visit, they should have in place: a trauma service, a trauma medical director, a trauma program manager, a hospital-based trauma registry, 9-12 months of trauma data and a performance improvement process of some kind. In this way, the Department has sought to facilitate compliance with these regulations in advance of their proposal.

Small Business and Local Government Participation:

The Department has conducted outreach to the affected parties. The State Trauma Advisory Committee (STAC) has discussed and reviewed this proposal during open, webcast meetings, and the Department has shared this proposal with the Greater New York Hospital Association (GNYHA) and the Healthcare Association of New York State (HANYS). Organizations that represent the affected parties are also given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the Public Health and Health Planning Council (PHHPC). This agenda and the proposal will be posted on the Department's website. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Cure Period:

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

Rural Area Flexibility Analysis

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

Job Impact Statement

These provisions will not have a significant impact on jobs. Currently designated trauma centers have been required to have a trauma program director, trauma program manager, trauma registrar and an injury prevention coordinator. Many may be required to hire an additional trauma registrar to maintain ACS-COT standards regarding data abstraction and submission, and some will need to hire additional trauma surgeons to manage their current trauma census and performance improvement responsibilities.

Office of Temporary and Disability Assistance

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP)

I.D. No. TDA-38-17-00002-EP

Filing No. 758

Filing Date: 2017-09-05

Effective Date: 2017-10-01

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

Proposed Action: Amendment of section 387.12(f)(3)(v)(*a*)-(*c*) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 17(a)-(b), (j), 20(3)(d), 95; 7 United States Code, section 2014(e)(6)(C); 7 Code of Federal Regulations, section 273.9(d)(6)(iii)

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

Specific reasons underlying the finding of necessity: It is of great importance that the federally-mandated and most currently approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) are applied to SNAP benefit calculations effective October 1, 2017, and thereafter until new amounts eventually are approved by the United States Department of Agriculture (USDA). It is equally important that the new federally-approved standard utility allowance amounts be implemented by the October 1, 2017 deadline. If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP benefits, thousands of SNAP households qualifying for the higher-level utility-based standard utility allowances would receive SNAP underpayments each month, while households qualifying for the telephone standard utility allowance would receive SNAP overpayments. Households receiving overpayments would be subject to SNAP recoupments to recover the overpayments of SNAP benefits. Thousands of SNAP households throughout New York State could thus be adversely affected by both the underpayments and the overpayments, which would constitute hardships to these households and impact their ability to purchase needed food. In addition, the use of standard utility allowances that are not authorized by the USDA could also result in severe fiscal sanctions by the federal government against the State. These emergency amendments protect the public health and general welfare by setting forth the federally-mandated and approved standard utility allowances effective as of October 1, 2017, and by helping to prevent such hardships.

As stated above, there is no federal authority to use past standard utility allowances after the October 1, 2017 effective date of the new federally approved allowance amounts. For New York to continue the State option to use the standard utility allowance in lieu of the actual utility cost portion of SNAP household shelter expenses, new allowances must be in place. Otherwise, the State may be forced to use the actual utility cost portion of the shelter expenses of each SNAP household. This policy would result in all 58 social services districts in New York State having to require up to 1.6 million SNAP households to provide verification of the actual utility cost portions of their shelter expenses. This policy would create a tremendous burden on both social services districts as well as recipient households. In addition, as actual utility costs are generally significantly less than the standard utility allowances, SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.6 million SNAP households would result in significant harm to the health and welfare of these households.

It is noted that the regulatory amendments are being promulgated pursuant to a combined Notice of Emergency Adoption and Proposed Rule Making, instead of a Notice of Proposed Rule Making, due to time constraints. On August 3, 2017, the USDA approved the Office of Temporary and Disability Assistance's (OTDA's) standard utility allowance calculation methodology and the resulting federal fiscal year 2017 adjustments to the standard utility allowances for heating/air conditioning, for basic utilities, and for telephone effective October 1, 2017. This did not provide sufficient time for OTDA to publish a Notice of Proposed Rule Making and for the new standard utility allowances to become effective on October 1, 2017. An emergency adoption is necessary to have the new standard utility allowances be effective on October 1, 2017. Although these regulations are being promulgated on an emergency basis to protect the public health and general welfare, OTDA will receive public comments on its combined Notice of Emergency Adoption and Proposed Rule Making until 45 days after publication of this notice.

Subject: Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP).

Purpose: These regulatory amendments set forth the federally-mandated and approved SUAs as of 10/1/17.

Text of emergency/proposed rule: Clauses (a)–(c) of subparagraph (v) of paragraph (3) of subdivision (f) of § 387.12 of Title 18 NYCRR are amended to read as follows:

(a) The standard allowance for heating/cooling consists of the costs for heating and/or cooling the residence, electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. The standard allowance for heating/cooling is available to households which incur heating and/or cooling costs separate and apart from rent and are billed separately from rent or mortgage on a regular basis for heating and/or cooling their residence, or to households entitled to a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment. A household living in public housing or other rental housing which has central utility meters and which charges the household for excess heating or cooling costs only is not entitled to the standard allowance for heating/cooling unless they are entitled to a HEAP or LIHEAA payment. Such a household may claim actual costs which are paid separately. Households which do not qualify for the standard allowance for heating/cooling may be allowed to use the standard allowance for utilities or the standard allowance for telephone. As of October 1, [2016] *2017*, but subject to subsequent adjustments as required by the United States Department of Agriculture ("USDA"), the standard allowance for heating/cooling for SNAP applicant and recipient households residing in New York City is [$758] *$791*; for households residing in either Suffolk or Nassau Counties, it is [$706] *$736*; and for households residing in any other county of New York State, it is [$627] *$654*.

(b) The standard allowance for utilities consists of the costs for electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. It is available to households billed separately from rent or mortgage for one or more of these utilities other than telephone. The standard allowance for utilities is available to households which do not qualify for the standard allowance for heating/cooling. Households which do not qualify for the standard allowance for utilities may be allowed to use the standard allowance for telephone. As of October 1, [2016] *2017*, but subject to subsequent adjustments as required by the USDA, the standard allowance for utilities for SNAP applicant and recipient households residing in New York City is [$300] *$313*; for households residing in either Suffolk or Nassau Counties, it is [$277] *$289*; and for households residing in any other county of New York State, it is [$254] *$265*.

(c) The standard allowance for telephone consists of the cost for basic service for one telephone. The standard allowance for telephone is available to households which do not qualify for the standard allowance for heating/cooling or the standard allowance for utilities. As of [April 1, 2011] *October 1,2017*, but subject to subsequent adjustments as required by the USDA, the standard allowance for telephone for all SNAP applicant and recipient households residing in New York State is [$33] *$30*.

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 December 3, 2017.

Text of rule and any required statements and analyses may be obtained from: Richard P. Rhodes, Jr., New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16-C, Albany, NY 12243-0001, (518) 486-7503, email: richard.rhodesjr@otda.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority:

The United States Code (U.S.C.), at 7 U.S.C. § 2014(e)(6)(C), provides that in computing shelter expenses for budgeting under the federal Supplemental Nutrition Assistance Program (SNAP), a State agency may use a standard utility allowance as provided in federal regulations.

The Code of Federal Regulations (C.F.R.), at 7 C.F.R. § 273.9(d)(6)(iii), provides for standard utility allowances in accordance with SNAP. Clause

(A) of this subparagraph states that with federal approval from the Food and Nutrition Services (FNS) of the United States Department of Agriculture (USDA), a State agency may develop standard utility allowances to be used in place of actual costs in calculating a household's excess shelter deduction. Federal regulations allow for the following types of standard utility allowances: a standard utility allowance for all utilities that includes heating or cooling costs; a limited utility allowance that includes electricity and fuel for purposes other than heating or cooling, water, sewerage, well and septic tank installation and maintenance, telephone, and garbage or trash collection; and an individual standard for each type of utility expense. Clause (B) of the subparagraph provides that a State agency must review the standard utility allowances annually and adjust them to reflect changes in costs. State agencies also must provide the amounts of the standard utility allowances to the FNS when the standard utility allowances are changed and submit the methodologies used in developing and updating the standard utility allowances to the FNS for approval whenever the methodologies are developed or changed.

Social Services Law (SSL) § 17(a)-(b) and (j) provide, in part, that the Commissioner of the Office of Temporary and Disability Assistance (OTDA) shall "exercise such other powers and perform such other duties as may be imposed by law."

SSL § 20(3)(d) authorizes OTDA to promulgate regulations to carry out its powers and duties.

SSL § 95 authorizes OTDA to administer SNAP in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

2. Legislative objectives:

It was the intent of the Legislature to implement the federal SNAP Act in New York State in order to provide SNAP benefits to eligible New York State residents.

3. Needs and benefits:

The regulatory amendments set forth the standard utility allowances within New York State as of October 1, 2017. OTDA is amending its standard utility allowances in 18 NYCRR § 387.12(f)(3)(v)(a)-(c) to reflect an increase in fuel and utility costs, which is indicated in the Consumer Price Index (CPI) fuel and utilities values (which includes components for water, sewage and trash collection).

The following chart sets forth the standard utility allowance categories; the past standard utility allowances ("Past SUA") that were in effect for federal fiscal year (FFY) 2017, from October 1, 2016 through September 31, 2017; and the new standard utility allowances ("New SUA") that are in effect for FFY 2018, effective October 1, 2017:

	New York City		Nassau / Suffolk Counties		Rest of State	
	Past SUA	New SUA	Past SUA	New SUA	Past SUA	New SUA
Heating/Air Conditioning SUA	$758	$791	$706	$736	$627	$654
Basic Utility SUA	$300	$313	$277	$289	$254	$265
Phone SUA	Past SUA: $33 (for all Counties) New SUA: $30 (for all Counties)					

To determine the new standard utility allowance values for FFY 2018, the CPI Fuel and Utility value for June 2017 was compared to the same CPI value for June 2016, the CPI value that was used to determine the adjustment for the FFY 2017 standard utility allowance values. The percentage change between June 2016 and June 2017 was then applied to the FFY 2017 standard utility allowance figures. The June 2017 CPI Fuel and Utility value was 4.311% higher than the June 2016 value.

To determine the Telephone standard utility allowance value for FFY 2018, the CPI Telephone Services value for June 2017 was compared to the same CPI Telephone Services value for June 2016, the CPI value that was used to determine the 2017 standard utility allowance value. The percentage change between June 2016 and June 2017 was then applied to the FFY 2017 telephone standard utility allowance. The June 2017 CPI Telephone Services value is 9.030% lower than the June 2016 value.

The June CPI values were used because they were the most recent month for which CPI values were available at the time when programming the new SUA values into the Welfare Management System (WMS) had to be done in order to comply with the October 1, 2017 effective date.

OTDA has all required approvals from the FNS pertaining to these changes and is required to apply the standard utility allowances for FFY 2018 in its SNAP budgeting effective October 1, 2017. As of October 1, 2017, OTDA does not have federal approval or authority to apply past standard utility allowances in its prospective SNAP budgeting.

It is of great importance that the federally-mandated and most currently approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) are applied to SNAP benefit calculations effective October 1, 2017, and thereafter until new amounts eventually are approved by the USDA. It is equally important that the new federally-approved standard utility allowance amounts be implemented by the October 1, 2017 deadline. If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP benefits, thousands of SNAP households qualifying for the higher-level utility-based standard utility allowances would receive SNAP underpayments each month, while households qualifying for the telephone standard utility allowance would receive SNAP overpayments. Households receiving overpayments would be subject to SNAP recoupments to recover the overpayments of SNAP benefits. Thousands of SNAP households throughout New York State could thus be adversely affected by both the underpayments and the overpayments, which would constitute hardships to these households and impact their ability to purchase needed food. In addition, the use of standard utility allowances that are not authorized by the USDA could also result in severe fiscal sanctions by the federal government against the State. These emergency amendments protect the public health and general welfare by setting forth the federally-mandated and approved standard utility allowances effective as of October 1, 2017, and by helping to prevent such hardships.

As stated above, there is no federal authority to use past standard utility allowances after the October 1, 2017 effective date of the new federally approved allowance amounts. For New York to continue the State option to use the standard utility allowance in lieu of the actual utility cost portion of SNAP household shelter expenses, new allowances must be in place. Otherwise, the State may be forced to use the actual utility cost portion of the shelter expenses of each SNAP household. This policy would result in all 58 social services districts in New York State having to require up to 1.6 million SNAP households to provide verification of the actual utility cost portions of their shelter expenses. This policy would create a tremendous burden on both social services districts as well as recipient households. In addition, as actual utility costs are generally significantly less than the standard utility allowances, SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.6 million SNAP households would result in significant harm to the health and welfare of these households.

4. Costs:

The regulatory amendments will not result in any impact to the State financial plan, they will not impose costs upon the social services districts because SNAP benefits are 100 percent federally-funded, and they comply with federal statute and regulation to implement federally-approved standard utility allowances.

5. Local government mandates:

The regulatory amendments do not impose any mandates upon social services districts since the amendments simply set forth the federally approved standard utility allowances, effective October 1, 2017. Additionally, the calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA's WMS. To the extent that these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

6. Paperwork:

The regulatory amendments do not impose any new forms, new reporting requirements or other paperwork upon the State or the social services districts.

7. Duplication:

The regulatory amendments do not duplicate, overlap or conflict with any existing State or federal statutes or regulations.

8. Alternatives:

An alternative to the regulatory amendments would be to refrain from implementing the revised standard utility allowances. However, this alternative is not a viable option because if New York State were to opt not to implement the new standard utility allowances or were otherwise judicially precluded from doing so, then New York State would be out of compliance with federal statutory and regulatory requirements.

9. Federal standards:

The regulatory amendments do not conflict with or exceed minimum standards of the federal government.

10. Compliance schedule:

Since the regulatory amendments set forth the federally-approved standard utility allowances effective October 1, 2017, the State and all social services districts will be in compliance with the regulatory amendments upon the adoption date of the regulatory amendments.

Regulatory Flexibility Analysis

1. Effect of Rule:

The regulatory amendments will have no effect on small businesses. The regulatory amendments do not impose any mandates upon social ser-

vices districts since the amendments simply set forth the federally approved standard utility allowance amounts, effective October 1, 2017. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's (OTDA's) Welfare Management System, and to the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

2. Compliance Requirements:

The regulatory amendments do not impose any reporting, recordkeeping or other compliance requirements on social services districts.

3. Professional Services:

The regulatory amendments do not require social services districts to hire additional professional services to comply with the new regulations.

4. Compliance Costs:

The regulatory amendments do not impose initial costs or any annual costs upon social services districts because SNAP benefits are 100 percent federally funded, and these regulatory amendments also comply with federal statute and regulation to implement federally-approved standard utility allowances.

5. Economic and Technological Feasibility:

All social services districts have the economic and technological abilities to comply with the regulatory amendments.

6. Minimizing Adverse Impact:

The regulatory amendments will not have an adverse impact on social services districts.

7. Small Business and Local Government Participation:

OTDA plans to provide a General Information System (GIS) release to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2017. In past years, social services districts have not raised any concerns or objections related to the implementation of the new standard utility allowances. After OTDA releases its GIS reflecting the standard utility allowances effective October 1, 2017, social services districts will have an opportunity to contact OTDA with any concerns, questions, or other issues. The GIS will be posted to OTDA's internet website.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulatory amendments will have no effect on small businesses in rural areas. The regulatory amendments do not impose any mandates upon the 44 social services districts in rural areas of the State. Rather, the regulatory amendments simply set forth the federally-approved standard utility allowance amounts, effective October 1, 2017. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's (OTDA's) Welfare Management System. To the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

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

The regulatory amendments do not impose any reporting, recordkeeping or other compliance requirements on the social services districts in rural areas. Social services districts in rural areas do not need to hire additional professional services to comply with the regulations.

3. Costs:

The regulatory amendments do not impose initial capital costs or any annual costs upon the social services districts in rural areas because SNAP benefits are 100 percent federally-funded, and these regulatory amendments comply with federal statute and regulation to implement federally-approved standard utility allowances.

4. Minimizing adverse impact:

The regulatory amendments will not have an adverse impact on the social services districts in rural areas.

5. Rural area participation:

OTDA plans to provide a General Information System (GIS) release to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2017. In past years, social services districts have not raised any concerns or objections related to the implementation of the new standard utility allowances. After OTDA releases its GIS reflecting the standard utility allowances effective October 1, 2017, social services districts will have an opportunity to contact OTDA with any concerns, questions or other issues. The GIS will be posted to OTDA's internet website.

Job Impact Statement

A Job Impact Statement is not required for the regulatory amendments. It is apparent from the nature and the purpose of the regulatory amendments that they will not have a substantial adverse impact on jobs and employment opportunities in either the public or the private sectors in New York State. The regulatory amendments will have no effect on small businesses. The regulatory amendments will not affect, in any significant way, the jobs of the workers in the social services districts or the State. These regulatory amendments set forth the federally-approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) as of October 1, 2017. The calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's Welfare Management System. To the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets. Thus, the regulatory amendments will not have any adverse impact on jobs and employment opportunities in either the public or private sectors of New York State.