

# 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.

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## Office of Alcoholism and Substance Abuse Services

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

#### Rates of Reimbursement -- Alcoholism Facilities

**I.D. No.** ASA-33-18-00001-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 840 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.02 and 32.07(a)

**Subject:** Rates of Reimbursement -- Alcoholism Facilities.

**Purpose:** Repeal obsolete regulations.

**Text of proposed rule:** 14 NYCRR 840 is repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Associate Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2312, email: Sara.Osborne@oasas.ny.gov

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

**Public comment will be received until:** 60 days after publication of this notice.

#### Consensus Rule Making Determination

Chapter 223 of the Laws of 1992 consolidated the Mental Hygiene Department Divisions of Alcohol and Alcohol Abuse (DAAA) and Substance Abuse Services (DSAS) into one Office of Alcoholism and Substance Abuse Services. Regulations for the new Office were compiled

in Chapter XXI of Title 14 (Department of Mental Hygiene). Parts 839 and 840 were adopted in June 1994, both relating to reimbursement (Medicaid and Rates) for services delivered by Office certified programs.

In August 2002 the provisions of both of these Parts were consolidated into a new Part 841 making Parts 839 and 840 obsolete; however, neither was repealed at that time. The Summary provided for the 2002 Rulemaking for Part 841 includes the following language indicating the intent that Parts 839 and 840 would become obsolete:

“The regulations will place all Medicaid financial and data reporting requirements, utilization review requirements and rate setting requirements in one regulation. Providers of chemical dependence services which receive Medicaid will only have to meet one set of requirements regardless of the number of different services they provide. In addition the regulation simplifies and provides greater flexibility by adhering to the minimum requirements of the federal Medicaid rules wherever possible. The Medicaid rate setting methodology is carried over from existing regulations and includes the following...”

This rule making is filed as a Consensus Rulemaking because its purpose is to repeal obsolete regulations to which no person is likely to object. The Behavioral Health Services Advisory Council approved advancement of this proposal on July 26, 2018.

#### Job Impact Statement

A Job Impact Statement is not being submitted with this notice because the subsequent repeal of regulations made obsolete by their previous inclusion in a more recent adopted regulation does not create any impact on jobs and employment opportunities. The finding is based on the fact that the existing Part 841, which incorporated Part 840 in 2002, does not require any action outside of the agency that is not already required.

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

#### Standards for Alcoholism Facilities to Participate in the Medicaid Program

**I.D. No.** ASA-33-18-00002-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 839 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.02 and 32.07(a)

**Subject:** Standards for Alcoholism Facilities to Participate in the Medicaid Program.

**Purpose:** Repeal obsolete regulations.

**Text of proposed rule:** 14 NYCRR 839 is repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Associate Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2312, email: Sara.Osborne@oasas.ny.gov

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

**Public comment will be received until:** 60 days after publication of this notice.

#### Consensus Rule Making Determination

Chapter 223 of the Laws of 1992 consolidated the Mental Hygiene Department Divisions of Alcohol and Alcohol Abuse (DAAA) and Substance Abuse Services (DSAS) into one Office of Alcoholism and Substance Abuse Services. Regulations for the new Office were compiled in Chapter XXI of Title 14 (Department of Mental Hygiene). Parts 839 and 840 were adopted in June 1994, both relating to reimbursement (Medicaid and Rates) for services delivered by Office certified programs.

In August 2002 the provisions of both of these Parts were consolidated into a new Part 841 making Parts 839 and 840 obsolete; however, neither was repealed at that time. The Summary provided for the 2002 Rulemaking for Part 841 includes the following language indicating the intent that Parts 839 and 840 would become obsolete:

“The regulations will place all Medicaid financial and data reporting requirements, utilization review requirements and rate setting requirements in one regulation. Providers of chemical dependence services which receive Medicaid will only have to meet one set of requirements regardless of the number of different services they provide. In addition the regulation simplifies and provides greater flexibility by adhering to the minimum requirements of the federal Medicaid rules wherever possible. The Medicaid rate setting methodology is carried over from existing regulations and includes the following...”

This rule making is filed as a Consensus Rulemaking because its purpose is to repeal obsolete regulations to which no person is likely to object. The Behavioral Health Services Advisory Council approved advancement of this proposal on July 26, 2018.

#### **Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because the subsequent repeal of regulations made obsolete by their previous inclusion in a more recent adopted regulation does not create any impact on jobs and employment opportunities. The finding is based on the fact that the existing Part 841, which incorporated Part 839 in 2002, does not require any action outside of the agency that is not already required.

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## Department of Civil Service

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00005-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading “New York State Board of Elections,” by increasing the number of positions of Special Assistant from 4 to 7 and by adding thereto the positions of Assistant Public Information Officer (2), Chief Information Officer and Manager Information Services.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00006-P

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

**Proposed Action:** Amendment of Appendix 3 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the labor class.

**Text of proposed rule:** Amend Appendix 3 of the Rules for the Classified Service, listing positions in the labor class, under the heading All State Departments and Agencies, by adding thereto the positions of Facility Operations Assistant 1 (Grounds).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00007-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading “Office of Mental Health,” by increasing the number of positions of Associate Commissioner for Mental Health from 6 to 7.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov  
**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00008-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Power Authority under the subheading "New York State Canal Corporation," by adding thereto the positions of Visitor Services Assistant 2 (3).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00009-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of Parks, Recreation and Historic Preservation," by deleting therefrom the positions of øDeputy General Manager (1), øDeputy Park Director 2 (1), øDirector, Parks and Recreation, Western District (1), øPark Operations Manager (1), øRegional Manager for Parks and Recreation (7), øRegional Manager, Parks and Recreation, New York City (1) and by increasing the number of positions of øPark Director 1 from 1 to 2 and by adding thereto the positions of øPark Director 5 (1), øRegional Director Parks and Recreation 1 (7), øRegional Director Parks and Recreation 2 (2) and øRegional Director Parks and Recreation 3 (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00010-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Justice Center for the Protection of People with Special Needs," by increasing the number of positions of

øInternal Investigator 1 (Justice Center) from 111 to 118, øInternal Investigator 2 (Justice Center) from 60 to 73 and øSupervising Investigator (Justice Center) from 16 to 31.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00011-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Environmental Conservation, by increasing the number of positions of Public Information Specialist 1 (Digital Content) from 1 to 3.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00012-P

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

**Proposed Action:** Amendment of Appendices 1 and 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position in the exempt class and to classify a position from the non-competitive class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of General Services," by deleting therefrom the position of Deputy Director Procurement; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by adding thereto the position of øDeputy Chief Procurement Officer (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-33-18-00013-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a subheading and a position in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified

Service, listing positions in the non-competitive class, in the Executive Department by adding thereto the subheading "Division of Veterans' Affairs," and the position of Coordinator, Cultural and Language Access Services (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00014-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading "State Insurance Fund," by increasing the number of positions of Special Assistant from 5 to 6.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00015-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Corrections and Community Supervision, by deleting therefrom the positions of Deputy Superintendent of Correctional Health Care Facility (6) and by adding thereto the positions of Deputy Superintendent of Correctional Health Care Facility.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-18-00016-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified

Service, listing positions in the exempt class, in the Department of State, by increasing the number of positions of Special Assistant from 24 to 26.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov  
**Public comment will be received until:** 60 days after publication of this notice.

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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## Department of Environmental Conservation

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### EMERGENCY RULE MAKING

#### Sanitary Condition of Shellfish Lands

**I.D. No.** ENV-21-18-00028-E

**Filing No.** 691

**Filing Date:** 2018-07-30

**Effective Date:** 2018-07-30

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

**Action taken:** Amendment of Part 41 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0307 and 13-0319

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

**Specific reasons underlying the finding of necessity:** Shellfish are filter feeders that consume plankton, other minute organisms and particulate matter found in the water column. They are capable of accumulating pathogenic bacteria, viruses and toxic substances within their bodies. Consequently, shellfish harvested from areas that do not meet the bacteriological standards for certification have an increased potential to cause illness in shellfish consumers. Closures of shellfish lands that do not meet the water quality standards provide essential protection of public health. Some shellfish growing areas will require reclassification as uncertified year-round and/or seasonally uncertified. Recent evaluations of current water quality data indicate that the bacteriological standards for certified shellfish lands are not being met in the affected areas and an increased risk of illness exists for shellfish consumers.

Some shellfish growing areas will require reclassification as certified year-round and seasonally uncertified. Recent evaluations of current water quality data also indicate that the bacteriological standards for other shellfish growing areas are being met and those areas can be reclassified as certified year-round or seasonally uncertified for the harvest of shellfish. Technical changes are also needed to clarify descriptions for enforcement

purposes, to correct inconsistent spellings of similar names and to remove unnecessary ordinal indicators in the description of closure dates.

The promulgation of this regulation on an emergency basis is necessary to protect public health. If the department does not adopt this rule making on an emergency basis, areas that do not meet bacteriological standards will remain open for the harvest and consumption of potentially harmful shellfish.

**Subject:** Sanitary Condition of Shellfish Lands.

**Purpose:** To reclassify underwater shellfish lands to protect public health.

**Text of emergency rule:** 6 NYCRR Part 41 is amended to read as follows:

Clause 41.2(b)(1)(ii)(e) is amended to read as follows:

(e) [All] *During the period of November 1 through April 30, both dates inclusive, all that area of East Bay and all other bays, creeks, canals and tributaries lying [east and within the boundaries north of a line extending southerly from the westernmost point of land at Big Crow Island at Neds Creek to the southwestern corner of the Fundy Channel Bridge of the Meadowbrook Parkway on West Crow Island, and] north of a line extending easterly from the southwestern corner of the Fundy Channel Bridge of the Meadowbrook Parkway on West Crow Island to the northwestern tip of the Sloop Channel Bridge of the Wantagh State Parkway connecting Green Island with Jones Beach State Park, and west of a line extending northerly along the western shoreline of Green Island to the southwestern tip of the Goose Creek Bascule Bridge of the Wantagh State Parkway, connecting Green Island with Great (Low) Island, [and south of a line extending westerly to the westernmost point of land of Big Crow Island on Neds Creek.] then continuing northerly along the shoreline to the westernmost point of Great (Low) Island, and continuing northwesterly to the southernmost point of land at Whaleneck Point, and lying south and east of a line extending southwesterly to the northernmost tip of Big Crow Island at Neds Creek, continuing along the western shore of Big Crow Island, to the southwestern corner of the Fundy Channel Bridge of the Meadowbrook Parkway on West Crow Island.*

Clause 41.2(b)(3)(ii)(c) is amended to read as follows:

(c) All that area of West Pond and *that portion of Hempstead Harbor lying [southerly and easterly of a line extending northerly from the westernmost end of the rock jetty, located southerly of the mouth of West Pond, to the westernmost end of the rock jetty with adjacent wooden walkway, located on Dosoris Island, northerly of the mouth of West Pond (local names, local landmarks).] between lines extending 500 feet northwesterly from the seaward ends of the rock jetties on each side of the entrance to West Pond (local names, local landmarks).*

Clause 41.2(b)(4)(ii)(c) is amended to read as follows:

(c) All that area of West Pond and *that portion of Hempstead Harbor lying [southerly and easterly of a line extending northerly from the westernmost end of the rock jetty, located southerly of the mouth of West Pond, to the westernmost end of the rock jetty with adjacent wooden walkway, located on Dosoris Island, northerly of the mouth of West Pond (local names, local landmarks).] between lines extending 500 feet northwesterly from the seaward ends of the rock jetties on each side of the entrance to West Pond (local names, local landmarks).*

Subparagraph 41.3(b)(4)(xiv) is amended to read as follows:

(xiv) [Noyac] *Noyack Creek. During the period May [1st] 1 through November [30th] 30 (both dates inclusive) all that area of [Noyac] Noyack Creek lying southerly of a line extending southwesterly from the southwesternmost point of land on Clam Island to the opposite shoreline located at Morton National Wildlife Refuge in Noyack.*

Clauses 41.3(b)(4)(xv)(a), (b) and (c) are amended to read as follows:

(a) During the period May [15th] 1 through [October 15th] *November 30 (both dates inclusive), all that area of Cold Spring Pond within the former Lobster Inn Boat Basin (local names, local landmark), lying northwest of a line extending northeasterly along the fixed wooden dock of the former Lobster Inn Restaurant to the opposite shoreline, and all that area lying southeast of a line extending southwesterly from the northwesternmost point of land on the unnamed peninsula bordering the northeastern side of the cove, continuing southwesterly to the opposite shoreline (adjacent to the former Lobster Inn Restaurant).*

(b) During the period January [1st] 1 through December [31st] *31 (both dates inclusive), all that area of the former Lobster Inn Boat Basin lying southeast of a line extending northeasterly along the fixed wooden dock of the former Lobster Inn Restaurant to the opposite shoreline.*

(c) During the period May [1st] 1 through November [30th] *30, both dates inclusive, all that area of Cold Spring Pond lying northeast of a line extending southeasterly from an orange marker located on the northern shoreline in the northeastern corner of the pond to another orange marker located on the eastern shoreline adjacent to Shrubland Road.*

Subparagraph 41.3(b)(5)(vii) is amended to read as follows:

(vii) [During the period May 15th through October 15th (both dates inclusive), all] *Devon Yacht Club. All that area of the Devon Yacht Club Boat Basin (local name), located on the southern side of Napeague Bay.*

Clause 41.3(b)(5)(viii)(a) is amended to read as follows:

(a) *Alewife Pond*. All that area of Alewife Pond, including entrance channel and all that area of Northwest Harbor, within [50] 300 yards in all directions from the inlet of Alewife Pond.

Clause 41.3(b)(5)(ix)(c) is amended to read as follows:

(c) In the absence of [the] *one or both* painted markers, all of Northwest Creek is uncertified.

Clause 41.3(b)(7)(iii)(c) is amended to read as follows:

(c) Wickham Creek. *During the period of May 15 through October 31, both dates inclusive, all that area of Wickham Creek and its tributaries.*

Subclauses 41.3(b)(7)(iii)(c)(1) and (2) are repealed.

Subclause 41.3(b)(7)(iii)(c)(3) is renumbered Subclause 41.3(b)(7)(iii)(c)(1).

Clause 41.3(b)(7)(xi)(e) is amended to read as follows:

(e) West Creek. *During the period of [May 1st through November 30th] January 1 through December 31, both dates inclusive, all that area of West Creek [including], and all that area of Great Peconic Bay within 750 feet in all directions of the southernmost point of the jetty on the east side of the mouth of West Creek.*

Subclause 41.3(b)(7)(xii)(b)(2) is amended to read as follows:

(2) During the period [April 15th to December 31st] *May 1 through November 30, both dates inclusive, all that area of Jockey Creek, Town Creek and tributaries, lying west of a line extending southerly from the south end of Terry Road directly to the opposite shore.*

Clause 41.3(b)(7)(xii)(d) is amended to read as follows:

(d) Goose Creek. *During the period [April 15th through December 31st] May 1 through November 30, both dates inclusive, all that area of Goose Creek lying south and west of the Goose Creek Bridge (local landmarks).*

Clause 41.3(b)(7)(xiii)(a) is amended to read as follows:

(a) *Oyster Ponds*. *During the period May 15[th] through October 31[st], both dates inclusive, all that area of Orient Harbor [lying east of a line extending northerly from the tip of the northwesternmost dock of the Orient Yacht Club to the northernmost corner of the bulkhead at the shoreline at the foot of the Harbor River Road] and its tributaries lying north and east of the fixed dock at Orient Yacht Club and then east of a line extending northerly from the northwestern corner of the northwestern most dock of the Orient Yacht Club to an orange marker on the beach 275 yards northwest of the northernmost corner of the bulkhead at the foot of Harbor River Road and all that area of Oyster Ponds in its entirety.*

Clauses 41.3(b)(7)(xiii)(c) and (d) are repealed.

Clause 41.3(b)(7)(xiii)(e) is renumbered Clause 41.3(b)(7)(xiii)(c).

Renumbered Clause 41.3(b)(7)(xiii)(c) is amended to read as follows:

(c) Spring Pond. *During the period January 1[st] through December 31[st], both dates inclusive, all that area of Spring Pond including tributaries, and all that area of Orient Harbor within 500 feet in all directions of the southeastern end of the easternmost bulkhead at the entrance to Spring Pond.*

Clause 41.3(b)(7)(xiii)(f) is repealed.

Subparagraph 41.3(b)(7)(xv) is amended to read as follows:

(xv) Little Peconic Bay. *Richmond Creek*. *During the period [April 1st] May 1 through October 31[st], both dates inclusive, all that area of Richmond Creek lying west of a line extending north from the easternmost point of land at the south side of the mouth of Richmond Creek to the opposite shore.*

Paragraph 41.3(b)(10) is amended to read as follows:

(10) Town of [Smith Town] *Smithtown*

Clauses 41.3(b)(10)(i)(a) and (b) are amended to read as follows:

(a) All that area of Smithtown Bay, including the Nissequogue River and its tributaries and Sunken Meadow Creek, lying south of a line extending northeasterly from the flagpole at the East Bath House at Sunken Meadow State Park (local landmark) to Buoy BW "NR", located (at coordinates 40° 55.395' N latitude and 73° 13.745' W longitude), approximately one mile north of the mouth of the Nissequogue River, thence southeasterly to the flagpole located at the Town of Smithtown Beach at Short Beach (local landmark).

(b) All that area within a one-half mile radius of Buoy BW "NR", (at coordinates 40° 55.395' N latitude and 73° 13.745' W longitude), approximately one mile north of the mouth of the Nissequogue River.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ENV-21-18-00028-P, Issue of May 23, 2018. The emergency rule will expire September 27, 2018.

**Text of rule and any required statements and analyses may be obtained from:** William Hastback, NYS Department of Environmental Conservation, 205 N. Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0479, email: william.hastback@dec.ny.gov

### Regulatory Impact Statement

#### 1. Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is given in Environmental Conservation Law (ECL) section 13-0307. Subdivision 1 of section 13-0307 of the ECL requires the Department of Environmental Conservation (the department) to periodically conduct examinations of all shellfish lands within the marine district to ascertain the sanitary condition of these areas. Subdivision 2 of this section requires the department to certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified. The statutory authority for promulgating regulations with respect to the harvest of shellfish is given in ECL section 13-0319.

#### 2. Legislative objectives:

There are two purposes of the legislation: to ensure that shellfish lands are appropriately classified as either certified or uncertified and to protect public health by preventing the harvest and consumption of shellfish from lands that do not meet the standards for a certified shellfish land. This legislation requires the department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in Part 47 of Title 6 NYCRR, promulgated pursuant to section 13-0319 of the ECL. Shellfish lands which meet these criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

#### 3. Needs and benefits:

To protect public health and to comply with ECL 13-0307, the Division of Marine Resources' Shellfish Sanitation Program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district in New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of SGAs. Annual water quality evaluation reports written in 2017 are prepared by the staff of the Shellfish Sanitation Program for each SGA. These reports present the results of statistical analyses of water quality data comprised of a minimum of 30 water quality data points. The years involved can vary based on the number of samples collected for each year, for each growing area.

The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of an SGA should be designated as certified or seasonally uncertified for the harvest of shellfish based on criteria in 6NYCRR Part 47. Seasonally uncertified areas are closed for the harvest of shellfish during particular months that are specified in regulations and those months can vary from SGA to SGA.

Regulations that designate shellfish lands as certified are needed to allow the harvest of shellfish from lands that meet the sanitary criteria for a certified area. Shellfish are a valuable state resource and, where possible, should be available for commercial and recreational harvest. The classification of previously uncertified shellfish lands as certified may provide additional sources of income for commercial shellfish diggers by increasing the amount of areas available for harvest. The direct harvest of shellfish for use as food is allowed from certified shellfish lands only. Recreational harvesters also benefit by having increased harvest opportunities and the ability to make use of a natural resource readily available to the public.

Regulations that designate shellfish lands as uncertified are needed to prevent the harvest and consumption of shellfish from lands that do not meet the sanitary criteria for a certified area. Shellfish harvested from uncertified shellfish lands have a greater potential to cause human illness due to the possible presence of pathogenic bacteria or viruses. These pathogens may cause the transmission of infectious disease to the shellfish consumer.

These regulations also protect the shellfish industry. Commercial shellfish harvesters and seafood wholesalers, retailers, and restaurants are adversely affected by public reaction to instances of shellfish related illness. By prohibiting the harvest of shellfish from lands that fail to meet the sanitary criteria, these regulations can ensure that only wholesome shellfish are allowed to be sold to the shellfish consumer.

Additionally, these regulations include changes to the shellfish growing area descriptions that will update, clarify and correct them to match the current physical appearance and names of local landmarks cited in the descriptions and to achieve better consistency within Part 41. These changes will aid harvesters and law enforcement officials in determining which areas are uncertified for the harvest of shellfish.

#### 4. Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The department cannot provide

an estimate of potential lost income to shellfish harvesters when areas are classified as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of December 31, 2017, the department had issued 1,727 New York State shellfish digger's permits for the year 2017. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish digger's permits for that type of recreational harvest is unknown. The department's records do not differentiate between full time and part-time commercial or recreational shellfish harvesters.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the department's proposed regulatory action. When a particular area is classified as uncertified (closed to shellfish harvesting), harvesters can shift their efforts to other certified areas.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the department. Without this information, the department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The department's actions to classify areas as certified or uncertified are not dependent on the shellfish resources in a particular area. They are based solely on the results of water quality analyses, the need to protect public health, and statutory requirements.

There is no cost to the department. Administration and enforcement of the proposed amendment are covered by existing programs.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

No new paperwork is required.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

There are no acceptable alternatives. ECL section 13-0307 stipulates that when the department has determined that a shellfish land meets the sanitary criteria for certified shellfish lands, the department must designate the land as certified and open to shellfish harvesting. All other shellfish lands must be designated as uncertified and closed to shellfish harvesting. These actions are necessary to protect public health. Failure to comply with the National Shellfish Sanitation Program (NSSP) guidelines could result in a ban on New York State shellfish in interstate commerce and would cause undue hardship to the commercial harvesting industry.

9. Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary, but participating states agree to follow NSSP water quality standards. Each state adopts its own regulations to implement a shellfish sanitation program consistent with the NSSP. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA, including removal of the state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's shellfish products from interstate commerce.

10. Compliance schedule:

Compliance with any new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties. Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes in the classification of shellfish lands by mail either prior to, or concurrent with, the adoption of new regulations. Therefore, immediate compliance can be readily achieved.

**Regulatory Flexibility Analysis**

1. Effect of rule:

As of December 31, 2017, there were 1,727 licensed shellfish diggers in New York State for the year 2017. The numbers of permits issued for areas in the State are as follows: Town of Babylon, 49; Town of Brookhaven,

274; Town of East Hampton, 242; Town of Hempstead, 111; Town of Huntington, 152; Town of Islip, 132; Town of North Hempstead, 7; Town of Oyster Bay, 107; Town of Riverhead, 75; Town of Shelter Island, 55; Town of Smithtown, 40; Town of Southampton, 175; Town of Southold, 258; New York City, 41; and Other, 9.

The Department of Environmental Conservation (the department) periodically conducts examinations of all shellfish lands within the marine district to ascertain the sanitary condition of these areas. As a result of these examinations, the department will designate lands as certified for the harvest of shellfish or uncertified for the harvest of shellfish. Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands are designated as uncertified, there may be some loss of income for shellfish diggers who are harvesting shellfish from the lands to be closed. This loss may be determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, the area's productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the department's sanitary criteria and are designated by the department as certified, there is a benefit to shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income for shellfish diggers. Again, the effect of the re-opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Shellfish growing area descriptions will be updated, clarified and corrected to match the current physical appearance and names of local landmarks cited in the descriptions and to achieve better consistency within Part 41. These changes will aid harvesters and law enforcement officials in determining which areas are uncertified for the harvest of shellfish.

Local governments on Long Island exercise management authority and share law enforcement responsibility for shellfish with the State and the counties of Nassau and Suffolk. These include the towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above the level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

2. Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

3. Professional services:

Small businesses and local governments will not require any professional services to comply with proposed rules.

4. Compliance costs:

There are no capital costs which will be incurred by small businesses or local governments.

5. Economic and technological feasibility:

There is no reporting, recordkeeping, or affirmative actions that small businesses or local governments must undertake to comply with the proposed rules. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with this rule.

6. Minimizing adverse impact:

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified prior to, or concurrent with the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specific months of the year will be designated as uncertified only during those months. During the other months, shellfish may be harvested from those lands when they are certified. To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from these changes in the classification of shellfish lands.

7. Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the department, is comprised of representatives of local baymen's associations, shellfish shippers and local town officials. Through their representatives, shellfish harvesters and shippers can express their opinions and give recommendations to the department concerning shellfish land



classification. Local governments, state legislators, and baymen’s organizations are notified by mail and given the opportunity to comment on any proposed rulemaking. The department will consider any such comments prior to filing a Notice of Adoption with the Department of State.

8. Cure period or other opportunity for ameliorative action:

Pursuant to SAPA 202-b (1-a)(b), no such cure period is included in the rule because of the potential adverse impact that it could have on the health of shellfish consumers. Immediate compliance is required to ensure that public health is protected.

9. Initial review of the rule, pursuant to SAPA § 207 as amended by L. 2012, ch. 462:

The rule will be reviewed in three years.

**Rural Area Flexibility Analysis**

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. This rule making only affects the marine and coastal district of the State; there are no rural areas within the marine and coastal district. The shellfish fishery is entirely located within the marine and coastal district, and is not located adjacent to any rural areas of the State. The proposed rule will not impose any reporting, record keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 41, DEC has determined that a Rural Area Flexibility Analysis is not required.

**Job Impact Statement**

1. Nature of impact:

Environmental Conservation Law section 13-0307 requires that the department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rule makings to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

The department does not have specific information regarding the locations in which individual diggers harvest shellfish, and therefore is unable to assess the specific job impacts on individual shellfish diggers. In general terms, amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area’s productivity, and the market value of the shellfish. In general, any negative impacts are small because the department’s actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

Amendments of 6 NYCRR Part 41 to designate areas as certified can have positive impacts on harvesting opportunities. This action results in financial benefits for commercial fisherman and increased opportunities for recreational shellfish harvesters. Increasing the amount of certified shellfish harvesting areas can provide a financial benefit due to the increased availability of shellfish resources.

2. Categories and numbers affected:

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean. As of December 31, 2017, there were 1,727 licensed shellfish diggers in New York State for the year 2017. The numbers of permits issued for areas in the State are as follows: Town of Babylon, 49; Town of Brookhaven, 274; Town of East Hampton, 242; Town of Hempstead, 111; Town of Huntington, 152; Town of Islip, 132; Town of North Hempstead, 7; Town of Oyster Bay, 107; Town of Riverhead, 75; Town of Shelter Island, 55; Town of Smithtown, 40; Town of Southampton, 175; Town of Southold, 258; New York City, 41; and Other, 9. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

3. Regions of adverse impact:

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located within or adjacent to Nassau County and Suffolk County. There is no potential adverse impact to jobs in any other areas of New York State.

4. Minimizing adverse impact:

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rule makings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the department

evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The department also operates conditional harvesting programs at the request of, and in cooperation with, local governments. Conditional harvesting programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the department operates shellfish transplant harvesting programs which allow removal of shellfish from closed areas for bacterial cleansing in certified areas, thereby recovering a valuable resource. Conditional harvesting and shellfish transplant programs increase harvesting opportunities by making the resource in a closed area available under controlled conditions.

5. Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rule makings to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Northern Catskill Riparian Areas**

**I.D. No.** ENV-21-18-00029-A

**Filing No.** 707

**Filing Date:** 2018-08-01

**Effective Date:** 2018-08-15

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

**Action taken:** Addition of section 190.36 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101(3)(b), 3-0101(1)(d), 3-0301(1)(b), (2)(m), 9-0105(1) and (3)

**Subject:** Northern Catskill Riparian Areas.

**Purpose:** To ensure public safety and protect natural resources on the Northern Catskill Riparian Areas.

**Text or summary was published in** the May 23, 2018 issue of the Register, I.D. No. ENV-21-18-00029-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Peter Frank, Bureau Chief, Forest Preserve, NYS DEC, 625 Broadway, Albany, NY 12233, (518) 473-9518, email: peter.frank@dec.ny.gov

**Additional matter required by statute:** A Short EAF was completed for compliance with the State Environmental Quality Review Act.

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

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**Department of Financial Services**

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**NOTICE OF ADOPTION**

**Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets**

**I.D. No.** DFS-18-17-00020-A

**Filing No.** 706

**Filing Date:** 2018-07-31

**Effective Date:** 2018-08-15

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

**Action taken:** Amendment of Part 361 (Regulation 146) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 302; Insurance Law, sections 301, 1109 and 3233

**Subject:** Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets.

**Purpose:** To allow for the implementation of a market stabilization pool for the individual and small group health insurance markets.

**Text or summary was published** in the May 3, 2017 issue of the Register, I.D. No. DFS-18-17-00020-P.

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

**Revised rule making(s) were previously published in the State Register** on May 16, 2018.

**Text of rule and any required statements and analyses may be obtained from:** Eamon Rock, NYS Dept. of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 474-4567, email: Eamon.Rock@dfs.ny.gov

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, 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 three public comments in response to the Revised Proposed Sixth Amendment to 11 NYCRR 361 (Insurance Regulation 146). After considering these comments, the Department has determined that no additional changes are necessary to the amended regulation.

In general, the comments set forth the commenters’ opinions as to the prudence of promulgating the amendment, rather than provide significant alternatives.

Comment: Two commenters raised issues of a purely legal nature as to perceived legal deficiencies, including perceived deficiencies of a procedural, jurisdictional, or constitutional nature.

Response: The Department has reviewed the issues raised in these comments and does not agree with the conclusions reached by the commenters. There are no legal defects that would prevent the adoption and enforceability of the amendment.

While the State Administrative Procedure Act (“SAPA”) does not require the Department to respond to the commenters’ legal arguments, the Department calls to the attention of the one commenter that raised issues as to the perceived impermissibility of the regulation under the federal Affordable Care Act (“ACA”), that the U.S. Department of Health and Human Services (“HHS”) has regularly and repeatedly opined that states may – and indeed has encouraged states to – use state authority to mitigate the effects of the magnitude of ACA-risk adjustment transfers. That is precisely what this amendment does.

Comment: One commenter, an insurer, expressed support for the Department’s actions in this area, characterizing them as “improving the stability of the individual and small group markets.” This commenter suggested that the Department go a step further than the revised proposed amendment by deciding now that a Market Stabilization mechanism will be utilized for the 2018 plan year.

Response: Given that the Market Stabilization mechanism is implemented only after the release of federal risk adjustment results for the applicable plan year, it is not possible for the Department to make the decision urged upon it at this time. Recent news reports from the Trump Administration concerning Risk Adjustment, and the destructive uncertainty that the Trump Administration’s actions in the health insurance field have created, are additional reasons why flexibility and adaptability are necessary here.

Comment: The insurer-commenter also suggested that the Department consider submitting a state adjustment under new federal ACA-risk adjustment rules for plan year 2020 and consider various anomalies that may affect ACA-risk adjustment in 2019 before approving 2019 rates.

Response: Both of the suggested actions fall outside of the promulgation of this amendment. Both the rate approval process and the new federal rules have their own comment periods associated with them, and the commenter is encouraged to provide its position during those periods.

Comment: One commenter, an insurer trade group, re-submitted its prior comments on the proposed amendment, while indicating that it was reiterating the positions it had taken in its previous comments with respect to the revised proposal. Those comments were addressed in the previous Assessment of Public Comments and the Department’s analysis of the issues raised then has not changed since that assessment; some comments are no longer relevant given the passage of time; and some comments relate to perceived procedural defects that are addressed above. Ultimately, this commenter noted that some of its members support the proposed action, while others oppose it.

Response: The Department notes that the trade group’s assessment that some members support, while others oppose, the amendment is borne out in two other comments received by the Department. Both of those comments were submitted by members of the insurer trade group: one that

supported and one that opposed the amendment. Further, as noted above, the Department considered the legal claim of procedural defects and determined that there are no legal defects that would prevent the adoption of the amendment. To the extent that the commenter suggested the Department should contain its efforts in stabilizing New York markets to working with HHS on changes to the ACA-risk adjustment formula and program because “[t]he benefit of working at the federal level for such changes is that. . . there is more of a consensus in support of the changes”, this is simply not the case. Unfortunately, since this comment was originally drafted there have been multiple legal challenges throughout the country to the federal ACA-risk adjustment rules and it has been reported that the Trump Administration may suspend ACA-risk adjustment payments altogether. The amendment is necessary to ensure the stability of New York markets.

Comment: The trade group-commenter also reiterated its position that any action by the Department should be made on a prospective basis and based on neutral principals. It appears from its previous comments that this comment particularly relates to providing insurers with “advance notice” of the ultimate size of uniform percentage and the size of the actual payment it will make, or receivable it will receive from the Market Stabilization mechanism. Further, the comments express questions about the level of discretion the Department will exercise in determining whether and to what extent a Market Stabilization mechanism should be implemented for a given plan year.

Response: The process to be followed and the factors to be considered are provided in the amendment. As this amendment addresses the disparate impact of the magnitude of ACA-risk adjustment transfers, as invited and encouraged by HHS, this requires that the Department determine that there was indeed an impact, and what level of mitigation is necessary in each year. Thus, per the amendment, the Department must wait until the ACA-risk adjustment has run its course for a plan year and the final results are released. The amendment also requires the uniform percentage to be determined based on “reasonable actuarial assumptions”. After review, the Department has determined that no changes are necessary based upon this comment.

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## Department of Health

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### NOTICE OF ADOPTION

#### Food and Beverages in Funeral Establishments

**I.D. No.** HLT-49-17-00002-A

**Filing No.** 703

**Filing Date:** 2018-07-30

**Effective Date:** 2018-08-15

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

**Action taken:** Amendment of sections 77.5, 78.1 and 79.4 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3401

**Subject:** Food and Beverages in Funeral Establishments.

**Purpose:** To lift the ban of the consumption of food and beverages in funeral establishments.

**Text of final rule:** Paragraph (6) of subdivision (c) of section 77.5 is amended as follows:

(6) Food and beverages. The provision of space, facilities, equipment, accommodations or supplies for, or the preparation, sale, service or distribution of, or the consumption of, food or nonalcoholic beverages [in any part of a funeral establishment] to or by friends, relatives, mourners, family, visitors or next of kin of any deceased person in the funeral establishment is [prohibited.] permitted, but not required to be offered. Food or nonalcoholic beverages may also be provided by a third-party catering service, provided that such catering service is not owned by or affiliated with the funeral firm engaged in funeral directing at the funeral establishment. This paragraph is subject to the following conditions:

(i) the preparation and serving of food and nonalcoholic beverages in the funeral establishment shall be limited to arranging, opening, displaying, and assembling items for consumption, and does not include cooking or heating of food items with the exception of hot beverages such as coffee, tea or similar items;

(ii) food items must be limited to incidental refreshments such as baked goods, sandwiches, snacks, platters, pre-packaged food items and

items which may be required by the religious practices of the family members, mourners, visitors or friends of the deceased;

(iii) the preparation and serving of any food and beverages shall be prohibited in the: preparation area as defined in section 77.5(d)(3) of this Part; and the chapel or reposing room as defined in section 77.5(d)(1) of this Part, whenever there is deceased person present for a viewing, visitation or funeral services;

(iv) any separate charges for the use of facilities for the serving of food and nonalcoholic beverages (a) shall be charged only for a specifically dedicated food and beverage service area, (b) shall be stated clearly on the General Price List, and (c) shall include any charges for cleaning, equipment or the like, as required by section 79.4(e)(6).

Subparagraph (iii) of paragraph (4) of subdivision (b) of section 78.1 is amended as follows:

Charges for additional services and merchandise selected by the customer, which the funeral firm purchases for the customer, such as hairdressing, flowers, death notices, pallbearers, clothing or burial garments, musicians and watcher, catering services, food, and nonalcoholic beverages, shall be specifically described and may be made either as a "Funeral Home Charge" under the section "Additional Services and Merchandise Selected," if the funeral firm charges for its services in purchasing these items, or as a "Cash Advance," if the funeral home does not charge the customer in excess of the amount advanced to a third party. If the funeral firm charges more than it advances to a third party or receives and retains a rebate, commission, trade or volume discount or other benefit, the items must be listed under the heading "Additional Services and Merchandise Selected."

Paragraph (9) of subdivision (e) of section 79.4 is amended as follows:

(9) Additional services and merchandise.

(i) The price of acknowledgment cards, catering services, food, nonalcoholic beverages, [and] or any additional services and merchandise routinely offered by the funeral firm must be stated with an explanation of what is included.

(ii) If the funeral firm offers to purchase additional merchandise or services and charges more than the actual cost or receives and retains a rebate, commission, trade or volume discount or other benefit, the firm must include a statement under this heading that it will purchase additional merchandise and services for the customer. In immediate conjunction with this statement must be the sentence, "The prices in this section include a charge for our services in buying these items."

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 77.5(c)(6)(iii).

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

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

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

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

Public comments were submitted to the NYS Department of Health (DOH) in response to the proposed regulation. The public comment period for this regulation ended on January 22, 2018. The Department received a total of four comments from representatives of the funeral directing community, including the New York State Funeral Directors Association, Service Corporation International which operates approximately 80 funeral firms in New York State, and two licensed, registered funeral directors.

COMMENT: Three of the four commenters expressed a similar concern, stating that the proposed language in § 77.5(c)(6)(iii) is too restrictive, insofar as it prohibits funeral firms from giving refreshments to families in the arrangement office during the arrangement conference.

RESPONSE: The intent of this regulation is to permit the service of food and beverages in funeral establishments except in areas where a deceased person may be present. In light of the comments received, the Department has made technical amendments to clarify that food and beverages may be served in a funeral establishment's arrangement office, in accordance with this intent. The changes protect the sanctity of the deceased and the public health, while allowing for the service of refreshments to families while making the funeral arrangements, as well as during visitations or calling hours where the chapel is being used for a memorial service in circumstances where the deceased person is not present (for example, when only a cremation urn is present).

COMMENT: One commenter supported the amended regulation with a general, positive statement about the allowance of food and beverages in funeral establishments.

RESPONSE: The Department notes the comment in support of this amendment. No change was made to the regulation in response to this comment.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Patients' Bill of Rights

I.D. No. HLT-33-18-00017-P

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

**Proposed Action:** Amendment of sections 405.7 and 751.9 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2803

**Subject:** Patients' Bill of Rights.

**Purpose:** Require general hospitals and diagnostic and treatment centers to update their statements of patient rights.

**Text of proposed rule:** Paragraph (2) of subdivision (b) of section 405.7 of Title 10 is amended to read as follows:

(2) treatment without discrimination as to race, color, religion, sex, gender identity, national origin, disability, sexual orientation, age, or source of payment;

Subdivision (c) of section 405.7 of Title 10 is amended to read as follows:

(c) Patients' Bill of Rights. For purposes of subdivision (a) of this section, the hospital shall utilize the following Patients' Bill of Rights:

Patients' Bill of Rights

As a patient in a hospital in New York State, you have the right, consistent with law, to:

(1) Understand and use these rights. If for any reason you do not understand or you need help, the hospital must provide assistance, including an interpreter.

(2) Receive treatment without discrimination as to race, color, religion, sex, gender identity, national origin, disability, sexual orientation, age, or source of payment.

(3) Receive considerate and respectful care in a clean and safe environment free of unnecessary restraints.

(4) Receive emergency care if you need it.

(5) Be informed of the name and position of the doctor who will be in charge of your care in the hospital.

(6) Know the names, positions, and functions of any hospital staff involved in your care and refuse their treatment, examination or observation.

(7) A no smoking room.

(8) Receive complete information about your diagnosis, treatment and prognosis.

(9) Receive all the information that you need to give informed consent for any proposed procedure or treatment. This information shall include the possible risks and benefits of the procedure or treatment.

(10) Receive all the information you need to give informed consent for an order not to resuscitate. You also have the right to designate an individual to give this consent for you if you are too ill to do so. If you would like additional information, please ask for a copy of the pamphlet "Do Not Resuscitate Orders - A Guide for Patients and Families."

(11) Refuse treatment and be told what effect this may have on your health.

(12) Refuse to take part in research. In deciding whether or not to participate, you have the right to a full explanation.

(13) Privacy while in the hospital and confidentiality of all information and records regarding your care.

(14) Participate in all decisions about your treatment and discharge from the hospital. The hospital must provide you with a written discharge plan and written description of how you can appeal your discharge.

(15) Identify a caregiver who will be included in your discharge planning and sharing of post-discharge care information or instruction.

(16) Review your medical record without charge and obtain a copy of your medical record for which the hospital can charge a reasonable fee. You cannot be denied a copy solely because you cannot afford to pay.

[(16)] (17) Receive an itemized bill and explanation of all charges.

(18) View a list of the hospital's standard charges for items and services and the health plans the hospital participates with.

(19) Challenge an unexpected bill through the Independent Dispute Resolution process.

[(17)] (20) Complain without fear of reprisals about the care and services you are receiving and to have the hospital respond to you and if you request it, a written response. If you are not satisfied with the hospital's response, you can complain to the New York State Health Department. The hospital must provide you with the Health Department telephone number.

[(18)] (21) Authorize those family members and other adults who will be given priority to visit consistent with your ability to receive visitors.

[(19)] (22) Make known your wishes in regard to anatomical gifts. [You] *Persons sixteen years of age or older* may document [your wishes in your] *their consent to donate their organs, eyes and/or tissues, upon their death, by enrolling in the NYS Donate Life Registry or by documenting their authorization for organ and/or tissue donation in writing in a number of ways (such as health care proxy, will, donor card, or other signed paper).* The health care proxy [or on a donor card.] is available from the hospital.

Subdivision (a) of section 751.9 is amended to read as follows:

(a) receive service(s) without regard to age, race, color, sexual orientation, religion, marital status, sex, *gender identity*, national origin or sponsor;

Subdivision (q) of section 751.9 is amended to read as follows:

(q) make known your wishes in regard to anatomical gifts. [You] *Persons sixteen years of age or older* may document [your wishes in your] *their consent to donate their organs, eyes and/or tissues, upon their death, by enrolling in the NYS Donate Life Registry or by documenting their authorization for organ and/or tissue donation in writing in a number of ways (such as health care proxy, will, donor card, or other signed paper).* The health care proxy [or on a donor card] is available from the center.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of Program 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:** 60 days after publication of this notice.

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

#### Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) § 2803 authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health (Commissioner), to implement the purposes and provisions of PHL Article 28 and to establish minimum standards governing the operation of health care facilities. Under PHL § 2803(1)(g), the Commissioner shall require that every general hospital adopt and make public an identical statement of the rights and responsibilities of patients.

Legislative Objectives:

The statement of rights of patients under PHL § 2803(1)(g) is intended to include the right to receive treatment without discrimination based on characteristics defined by Article 15 of New York Executive Law (the Human Rights Law), as well as other rights afforded to patients by statute. These include the right to have a caregiver involved in discharge planning, the right to receive information regarding the hospital's standard charges, the right to challenge unexpected bills through an independent dispute resolution process, and the right to make known a patient's wishes with regard to consenting to organ donation in the hospital setting.

Current Requirements:

General hospitals are required by § 405.7 of Title 10 of the New York Compilation of Codes, Rules and Regulations of New York (NYCRR) to provide treatment without discrimination as to race, color, religion, sex, national origin, disability, sexual orientation, age, or source of payment and to adopt and make public a Patients' Bill of Rights that informs patients of the right to receive treatment absent from such discrimination.

The Caregiver Advise, Record and Enable (CARE) Act, enacted as PHL Article 29-CCCC, gives hospital patients the right to have a caregiver involved in discharge planning. The Surprise Bill Law (Part H of Chapter 60 of the Laws of 2014) enacted PHL § 24 to give hospital patients the right to receive information regarding the hospital's standard charges and enacted Article 6 of the Financial Services Law to give them the right to challenge unexpected bills through an independent dispute resolution process.

PHL § 2803(1)(g) requires hospitals to inform patients of their right to make anatomical gifts and the means by which the patient may make such a donation. PHL §§ 4301, 4303, and 4310 include various ways that an individual who is 16 years of age or older may consent to organ donation, including through enrollment in the New York State Donate Life Registry.

Needs and Benefits:

The New York State Division of Human Rights implements the Human Rights Law and establishes regulations thereunder. Part 466 of Title 9 of

the NYCRR contains the general regulations of the Division of Human Rights. The statement of rights of patients under PHL § 2803(1)(g) includes the right to receive treatment without discrimination based on characteristics defined by the Human Rights Law and the regulations of the Division of Human Rights. On January 20, 2016, the Division of Human Rights adopted a regulation adding 9 NYCRR § 466.13. Section 466.13 clarifies that discrimination on the basis of gender identity is sex discrimination and further defines "gender identity" as:

having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.

The proposed amendments to 10 NYCRR §§ 405.7 and 751.9 with respect to gender identity will conform the Patient's Bill of Rights to New York's Human Rights Law.

Under the CARE Act, hospital patients have the right to have a caregiver involved in discharge planning. Under the Surprise Bill Law, hospital patients have the right to receive information regarding the hospital's standard charges and to challenge unexpected bills through an independent dispute resolution process. This proposed regulatory amendment conforms the Patient's Bill of Rights to these statutory requirements.

PHL § 2803(1)(g) requires hospitals to inform patients of his or her right to make anatomical gifts and the means by which the patient may make such a donation. PHL §§ 4301, 4303, and 4310 provide for the right of an individual who is 16 years of age or older to document their consent to make an anatomical gift by a variety of mechanisms in New York State (i.e., the New York State Donate Life Registry, health care proxy, wills, donor cards or a signed paper). This proposal updates the Patients' Bill of Rights to clarify that patients not only have the right to express their wish or intent to donate their organs, but have the right to consent to donation and to document such consent through various mechanisms including enrollment in the NYS Donate Life Registry.

COSTS:

Costs to Private Regulated Parties:

This amendment is a clarification of rights that patients already have in New York State. Health care facilities will incur minimal costs in order to change the Patients' Bill of Rights made available to patients. Hospitals and D&TCs may also need to update training materials for staff.

Costs to Local Government:

This proposal will not impact local governments unless they operate a general hospital or D&TC, in which case the impact would be the same as outlined above for private parties.

Costs to the Department of Health:

The proposed regulatory changes will not result in any additional operational costs to the Department of Health.

Costs to Other State Agencies:

The proposed regulatory changes will not result in any additional costs to other state agencies.

Local Government Mandate:

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

Paperwork:

General hospitals and D&TCs are already required to make the Patients' Bill of Rights available to patients. Therefore, the proposed regulations should not significantly increase their paperwork.

Duplication:

There are no relevant State regulations which duplicate, overlap or conflict with the proposed regulations.

Alternatives:

The alternative would be to take no action, which would result in a lack of consistency between the Human Rights Law and the Patients' Bill of Rights. Similarly, the Patient's Bill of Rights would be inconsistent with the PHL provisions related to the CARE Act, the Surprise Bill Law, and organ donation.

Federal Standards:

The proposed regulations do not duplicate or conflict with any federal regulations.

Compliance Schedule:

The regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

#### Regulatory Flexibility Analysis

Effect of Rule:

The proposed regulation will apply to all general hospitals and

diagnostic and treatment centers (D&TCs) in New York State. This proposal will not impact local governments or small business unless they operate a general hospital or D&TC. In such case, the flexibility afforded by the regulations is expected to minimize any costs of compliance as described below.

**Compliance Requirements:**  
These regulations will require general hospitals and D&TCs to change their patients' bill of rights.

**Professional Services:**  
General hospitals and D&TCs are already required to make the Patients' Bill of Rights available to patients.

**Compliance Costs:**  
Compliance costs are minimal, as they only require editing and reprinting the Patients' Bill of Rights.

**Economic and Technological Feasibility:**  
This proposal is economically and technically feasible.

**Minimizing Adverse Impact:**  
The anticipated impact of the proposal is minimal. General hospitals and D&TCs are already required to make the Patients' Bill of Rights available to patients.

**Small Business and Local Government Participation:**  
Organizations that include as members general hospitals and D&TCs were consulted on the proposed regulations. Additionally, the proposed regulation will have a 60-day public comment period.

**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 a party subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one is not included. As this proposed regulation does not create a new penalty or sanction, no cure period is necessary.

**Rural Area Flexibility Analysis**

Types and Estimated Numbers of Rural Areas:  
This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<http://quickfacts.census.gov>). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

There are 47 general hospitals, approximately 90 diagnostic and treatment centers (D&TCs), 159 nursing homes, and 92 certified home health agencies in rural areas.

Reporting, Recordkeeping, Other Compliance Requirements and Professional Services:

The proposed regulation is applicable to those general hospitals located in rural areas and is expected to impose minimal costs upon hospitals, which are already required to make the Patient's Bill of Rights available to patients. Because the proposed regulatory requirements can be incorporated into existing processes, they are not expected to increase the administrative burden on these entities.

**Costs:**  
Hospitals are already required to make the Patients' Bill of Rights available to patients. The cost of the small wording change to the Patients' Bill of Rights will be insubstantial.

**Minimizing Adverse Impact:**  
The impact is minimal.

**Rural Area Participation:**  
Organizations that include as members general hospitals and D&TCs located in rural areas were consulted on the proposed regulations.

**Job Impact Statement**

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. No adverse impact on jobs and employment opportunities is expected as a result of these proposed regulations.

**Department of Labor**

**EMERGENCY  
RULE MAKING**

**Home Care Aide Hours Worked**

**I.D. No.** LAB-17-18-00005-E

**Filing No.** 704

**Filing Date:** 2018-07-30

**Effective Date:** 2018-07-30

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

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

**Statutory authority:** Labor Law, sections 21(11), 659; State Administrative Procedure Act, section 202(6)

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

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

**Subject:** Home Care Aide Hours Worked.

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

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

§ 142-2.1 Basic minimum hourly wage rate and allowances.  
(a) The basic minimum hourly wage rate shall be, for each hour worked in:

- (1) New York City for
  - (i) Large employers of eleven or more employees \$11.00 per hour on and after December 31, 2016; \$13.00 per hour on and after December 31, 2017; \$15.00 per hour on and after December 31, 2018;
  - (ii) Small employers of ten or fewer employees

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

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

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

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

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

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

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment. *Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.*

§ 142-3.1 Basic minimum hourly wage rate.

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

(1) New York City for

(i) Large employers of eleven or more employees  
 \$11.00 per hour on and after December 31, 2016;  
 \$13.00 per hour on and after December 31, 2017;  
 \$15.00 per hour on and after December 31, 2018;  
 (ii) Small employers of ten or fewer employees  
 \$10.50 per hour on and after December 31, 2016;  
 \$12.00 per hour on and after December 31, 2017;  
 \$13.50 per hour on and after December 31, 2018;  
 \$15.00 per hour on and after December 31, 2019;

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

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

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

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

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

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

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

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

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

§ 143.7 An hour.

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt 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. LAB-17-18-00005-P, Issue of April 25, 2018. The emergency rule will expire September 27, 2018.

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

#### Regulatory Impact Statement

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

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

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

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

Administrative interpretations accompany statutory expansions. The above-referenced legislative expansions in 1972 and 2010 were each preceded by Commissioner's interpretations in the late 1960s and early 1980s that construed the statutory exclusions of domestic service and companions "in the home of the employer" to be inapplicable to domestic service and companions who were employed by agencies and placed in the home of a client. Such interpretations were affirmed by the Board of Standards and Appeals and its successor the Industrial Board of Appeals, and eventually by the Courts (see e.g., Settlement Home Care v. Industrial Board of Appeals, 151 A.D. 580 (2d Dept. 1989)). As the scope of mini-

minimum wage coverage expanded through administrative interpretations and legislative enactments, the Commissioner continued to interpret the statutory requirement to pay minimum wages for “each hour worked” to exclude sleep and meal periods of various categories of newly covered workers who were employed by agencies to work in the home of a client for extended periods of time. Those interpretations were set forth in investigators’ manuals, formal guidelines, legal opinions, and Commissioner’s determinations starting in the early 1970s, and were relied upon by the New York State Department of Health and by private agencies that employed home care aides. While the Commissioner did not amend the Wage Order’s regulations to expressly codify those interpretations, she did amend it in 1986 to provide for overtime to be calculated “in the manner and methods provided for in and subject to the exemptions of” the federal Fair Labor Standards Act (FLSA) (12 NYCRR §§ 142-2.2 & 142-3.2) and, in so doing, grew to increasingly look to, and rely upon, federal FLSA regulations interpreting hours worked (29 CFR Part 785) to address meal periods (29 CFR §§ 785.18-19) and sleeping time (29 CFR §§ 785.20-23) so that hours worked were calculated consistently at the state and federal level for overtime (and other) purposes.

**Needs and Benefits:** This emergency regulation is necessary to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage. See *Tokhtaman v. Human Care, LLC*, Docket No. 3671 151268/16, 2017 NY Slip Op 02759 (1st Dept. Apr. 11, 2017), leave for appeal denied; *Andryeyeva v. New York Health Care, Inc.*, 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017), leave for appeal granted; and *Moreno v Future Care Health Servs., Inc.*, 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017), leave for appeal granted. Absent a conflict between the First and Second Departments, and a final judgement in any of these cases that would make them ripe to be heard by the Court of Appeals, the Commissioner must take action now to avert an impending crisis. Emergency adoption of this regulation is necessary for the preservation of the public health, safety, and general welfare to ensure that home care aides will be available to provide care for, and avoid the institutionalization of, those who rely on home care.

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

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

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

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

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

**Alternatives:** There were no significant alternatives considered.

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

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

#### **Regulatory Flexibility Analysis**

**Effect of Rule:** The purpose and intent of this emergency rulemaking is to narrowly codify the Commissioner’s longstanding and consistent interpretation of Article 19 of the Labor Law and to make clear that the amended regulations shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The Department anticipates this will have a positive impact on small businesses as it will

eliminate any instability introduced by decisions recently issued by the State Appellate Divisions. See *Tokhtaman v. Human Care, LLC*, Docket No. 3671 151268/16, 2017 NY Slip Op 02759 (1st Dept. Apr. 11, 2017), leave for appeal denied; *Andryeyeva v. New York Health Care, Inc.*, 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017), leave for appeal granted; and *Moreno v Future Care Health Servs., Inc.*, 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017), leave for appeal granted.

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

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

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

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

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

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

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

#### **Rural Area Flexibility Analysis**

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

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

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

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

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

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

#### **Job Impact Statement**

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

**Categories and numbers affected:** The Department does not anticipate that this regulation will have an adverse impact on jobs or employment

opportunities in any category of employment. This regulation will help to ensure the stability of the jobs of home care workers who work shifts of 24 hours or more in New York State. According to the Department's Division of Research and Statistics, there are an estimated 330,650 home care aides employed across the state.

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

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

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

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

#### **Assessment of Public Comment**

The Department received comments both in writing and at a public hearing held on July 11, 2018, regarding a Notice of Proposed Rule Making (I.D. No. LAB-17-18-00005-P) published in the April 25, 2018 edition of the NYS Register (herein after "Proposed Rule Making"), or regarding related Notices of Emergency Rule Making (I.D. No. LAB-17-18-00005-P) published, most recently, in the June 20, 2018 edition of the NYS Register (hereinafter "Emergency Rule Making"), or both (hereinafter "Rule Makings"). The Department provides the following summaries and assessments of those comments.

Comment 1:

The Department should consider alternatives before adopting the Proposed Rule Making on a permanent going forward basis.

Response 1:

The Department is readopting the Emergency Rule Making for a period of sixty days to maintain the status quo while the Department continues to evaluate what action should be taken on the Proposed Rule Making on a permanent going forward basis in light of the comments received.

Comment 2:

The Department should make the Emergency Rule Making permanent by adopting the Proposed Rule Making to avoid disruptions to home care providers, workers, patients, and the State.

Response 2:

See Response 1.

Comment 3:

The Department should rescind or withdraw the Rule Makings because they are contrary to the decisions of the Appellate Division and conflict with the protections contained in Article 19 of the Labor Law.

Response 3:

See Response 1.

Comment 4:

Home care workers play a vital role in the health care system and they should be paid for all hours spent in clients' homes. Such workers are some of the most underpaid and vulnerable workers in the State.

Response 4:

The Department recognizes the vital role that home care workers play in the health care system in New York State. For that reason, the Department is readopting the Emergency Rule Making for a period of sixty days to maintain the status quo while the Department continues to evaluate what action should be taken on the Proposed Rule Making on a permanent going forward basis in light of the comments received.

Comment 5:

If the Department does not adopt the Proposed Rule Making, then changes would need to be made to the State's Medicaid reimbursement system.

Response 5:

The Department has not determined whether to adopt the Proposed Rule Making (see Response 1) and notes that any changes to the State's Medicaid reimbursement system would not be within the Department's rule making authority under the Labor Law.

Comment 6:

The health care industry should move away from single 24-hour shifts in favor of multiple shifts during each 24-hour period. The use of 24-hour shifts should be limited to only where it is medically necessary.

Response 6:

See Response 5.

Comment 7:

Many employers in the home health care industry do not currently comply with the requirements to pay for periods of time when sleep is interrupted to perform work and when workers received less than 5 hours of uninterrupted sleep, as required by the Emergency Rule Making and by the prior regulations and administrative interpretations.

Response 7:

Employees who believe their employers are failing to comply with the current Emergency Rule Making and the prior interpretations requiring payment of wages for hours worked due to interruptions of sleep time should file a complaint with the Department's Division of Labor Standards.

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## Long Island Power Authority

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### NOTICE OF ADOPTION

#### **The Authority's Time-of-Use Pilot Rates**

**I.D. No.** LPA-15-18-00011-A

**Filing Date:** 2018-07-30

**Effective Date:** 2018-08-01

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

**Action taken:** The Long Island Power Authority adopted modifications to its Tariff for Electric Service to implement a new time-of-use rate option.

**Statutory authority:** Public Authorities Law, section 1020-f(u) and (z)

**Subject:** The Authority's time-of-use pilot rates.

**Purpose:** To update the Authority's time-of-use rate pilot options.

**Text of final rule:** See Appendix in the back of this issue.

**Final rule as compared with last published rule:** Substantial revisions were made in the following section: Leaf 279I.

**Text of rule and any required statements and analyses may be obtained from:** Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: jbell@lipower.org

#### **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**

A revised job 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.

#### **Assessment of Public Comment**

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

### NOTICE OF ADOPTION

#### **The Authority's Low-Income Customer Discounts**

**I.D. No.** LPA-15-18-00012-A

**Filing Date:** 2018-07-30

**Effective Date:** 2018-08-01

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

**Action taken:** The Long Island Power Authority adopted modifications to its Tariff for Electric Service to update and increase its low-income customer discounts consistent with New York State policy.

**Statutory authority:** Public Authorities Law, section 1020-f(u) and (z)

**Subject:** The Authority's low-income customer discounts.

**Purpose:** To update and increase the Authority's low-income customer discounts consistent with New York State policy.

**Text or summary was published** in the April 11, 2018 issue of the Register, I.D. No. LPA-15-18-00012-P.



**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: jbell@lipower.org

**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**  
 A revised job 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.

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

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

**Net Energy Metering and Related Provisions of the Authority’s Tariff for Electric Service**

**I.D. No.** LPA-33-18-00018-P

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

**Proposed Action:** Amendment of Authority’s Tariff for Electric Service.

**Statutory authority:** Public Authorities Law, section 1020-f(u) and (z)

**Subject:** Net energy metering and related provisions of the Authority’s Tariff for Electric Service.

**Purpose:** To conform the Tariff to orders issued in the Value of Distributed Energy Resources proceeding of the New York DPS.

**Substance of proposed rule:** The Long Island Power Authority (the “Authority”) is considering modifications to its Tariff for Electric Service (“Tariff”) to effectuate Phase Two of the Value of Distributed Energy Resources (“VDER”) process established by the New York Department of Public Service (the “DPS”).

Background of VDER  
 On March 9, 2017, the New York Public Service Commission (the “PSC”) adopted Phase One of VDER,<sup>1</sup> which began a transition from net energy metering–(the existing framework for compensating DER installed behind-the-meter)–to a more accurate, value-based compensation framework that will benefit all customers by promoting sustainable DER development at a cost that is commensurate with the benefits it provides.<sup>2</sup> The cornerstone of the new compensation framework introduced in Phase One is the “Value Stack”, which determines the compensation of eligible behind-the-meter DER by summing the components of value the DER provides to the grid, the utility, and the utility’s other customers.

On December 19, 2017, the Authority’s Board of Trustees adopted modifications to the Authority’s Tariff implementing the PSC’s Phase One Order. The Phase One Order provided that new demand-metered commercial customers would be compensated using the Value Stack. Mass market (i.e. residential and small commercial) customers who add solar or other DER by January 1, 2020 will continue to receive net energy metering for twenty years.

DPS Phase Two Process  
 The DPS has established a collaborative working group process to determine the appropriate compensation system for DER added in 2020 and beyond.<sup>3</sup> The VDER Phase Two process is an informal, deliberative model open to participation by all interested stakeholders. The process includes two parallel working groups: a “Value Stack” working group to address improvements to the existing value stack compensation framework, and a “Rate Design” working group to address the mass market successor tariff to net energy metering. The Rate Design working group will also address the related topics of: standby rate design, buy-back rates,

grid access charges, non-bypassable fees, or other methods to mitigate costs posed on non-participants.

The DPS working groups allow interested stakeholders to provide input to DPS Staff that will be incorporated into straw proposals on these topics. Ultimately, DPS Staff will file white papers in the PSC’s Value of DER proceeding for formal public comment. The Long Island office of the DPS has arranged for a video conference link enabling local stakeholders to participate in the statewide working groups from the Long Island office. Current working group schedules and meeting agendas are posted on the DPS VDER website.<sup>4</sup> Whenever public comment hearings on VDER and related topics are scheduled by the DPS, notice of the hearings will be posted on the DPS VDER website. Additional public comment hearings will be held by the Authority in Nassau and Suffolk Counties to facilitate participation by Long Island stakeholders. The dates and locations of these local hearings will be posted on the Authority’s website.

This process has been designed as a forum for the voices of all New Yorkers to be heard, and Long Island stakeholders are encouraged to participate actively in the working groups, file comments in response to white papers, and attend public hearings.

Adoption of VDER Phase Two in Long Island  
 Orders issued by the PSC pursuant to the process described above will be presented, together with a compendium of public comments received, for consideration and adoption by the LIPA Board of Trustees at a regularly scheduled meeting of the Board following issuance of the PSC order and local public comment hearings in Nassau and Suffolk Counties.<sup>5</sup>

<sup>1</sup> Case 15-E-0751 et al., In the Matter of the Value of Distributed Energy Resources, Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters (issued March 9, 2017).

<sup>2</sup> The principles guiding this transition to a net metering successor were developed in the Reforming the Energy Vision (“REV”) initiative. Case 14-M-0101, Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan (issued February 26, 2016) (REV Framework Order or Track One Order); Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016) (Track Two Order).

<sup>3</sup> <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/8A5F3592472A270C8525808800517BDD?OpenDocument>

<sup>4</sup> The DPS VDER website is available here: <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/8A5F3592472A270C8525808800517BDD?OpenDocument>

<sup>5</sup> The schedule of LIPA Board meetings is available here: <https://www.lipower.org/schedule/>

**Text of proposed rule and any required statements and analyses may be obtained from:** Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: [tariffchanges@lipower.org](mailto:tariffchanges@lipower.org)

**Data, views or arguments may be submitted to:** Michael Worden, Department of Public Service, New York State Department of Public Service, 3 Empire Plaza, Albany, New York 12223-0948, (518) 486-2483, email: [Michael.Worden@dps.ny.gov](mailto:Michael.Worden@dps.ny.gov)

**Public comment will be received until:** January 1, 2020.

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

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

**Office for People with  
 Developmental Disabilities**

**NOTICE OF ADOPTION**

**Certificate of Incorporation**

**I.D. No.** PDD-21-18-00046-A

**Filing No.** 705

**Filing Date:** 2018-07-31

**Effective Date:** 2018-08-15

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

**Action taken:** Amendment of Part 681 of Title 14 NYCRR.

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

**Subject:** Certificate of Incorporation.

**Purpose:** Remove a requirement for certificate holders that is no longer required under Mental Hygiene Law section 16.07.

**Text or summary was published** in the May 23, 2018 issue of the Register, I.D. No. PDD-21-18-00046-P.

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

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

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

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The agency received no public comment.

## Public Employment Relations Board

### EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Rules and Regulations to Effectuate the Purposes of the Public Employees' Fair Employment Act (Civil Service Law Art. 14)

**I.D. No.** PRB-33-18-00003-EP

**Filing No.** 689

**Filing Date:** 2018-07-27

**Effective Date:** 2018-07-27

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

**Proposed Action:** Amendment of section 204.4 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 205.5(l)

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

**Specific reasons underlying the finding of necessity:** Based upon the current legal climate, and feedback from constituents, we have reason to believe that the decision in *Janus v. AFSCME*, 585 U.S. \_\_\_ (2018), could destabilize collective bargaining throughout the State for not just the State but for counties, municipalities, towns, and villages and raise significant questions about the duty of fair representation that a union owes to non-members. *Janus v. AFSCME* holds that mandatory payments for collective representation are unconstitutional for employees who are not member of the union (i.e. agency fee payers). Allowing expedited review by the Board will clarify the purely legal rights and responsibilities of the parties at the earliest possible time, thereby reducing the potential damage to labor relations and the delivery of services to the people of the State of New York.

The Rule is designed to obtain expedited determinations by the Board when a dispute presents an issue or issues of law relating to the scope of any duty of fair representation allegedly owed by an employee organization to a non-member, or to any member seeking to terminate membership in an employee organization. Accordingly, while PERB is submitting this Notice of Proposed Rule Making, it is also submitting this Notice of Emergency Adoption, effective immediately.

**Subject:** Rules and regulations to effectuate the purposes of the Public Employees' Fair Employment Act (Civil Service Law art. 14).

**Purpose:** Allow for expedited treatment of cases which present issues of law relating to the scope of the duty of fair representation.

**Text of emergency/proposed rule:** § 204.4

(a) Immediately after the conference referred to in section 212.2 of Part 212 of this Chapter, and if one or more of the parties has made a request

that a dispute involving primarily a disagreement as to the scope of negotiations under the act be processed expeditiously, or if the director shall deem it appropriate to do so, the director shall so notify the board and transmit the papers to the board. The board shall then inform the parties as to whether it will accord expedited treatment to the matter. If the board determines that the matter will be expedited, it will also notify the respondent of the due date for its answer, and the parties of the due date for briefs. The board may also direct that oral argument be held before it, or that a hearing be held before the full board, one of its members, or an administrative law judge. If the board determines that expedited treatment will not be accorded, the matter will be handled in accordance with sections 204.2(b) and 204.3 of this Part and Parts 212 and 213 of this Chapter.

(b) *At the request of any party, or if the director shall deem it appropriate to do so, the director shall, within a reasonable period of time after a conference, make a preliminary determination whether a dispute presents an issue or issues of law relating to the scope of any duty of fair representation allegedly owed by an employee organization to a non-member, or to any member seeking to terminate membership in an employee organization, or related question. After such preliminary determination, the director shall, upon determining that the matter warrants expedited treatment, so notify the board and transmit the papers to the board. A determination by the director that the matter does not warrant expedited treatment shall not be subject to review by the board pursuant to Part 213. If the board determines that expedited treatment of the matter is warranted, it will so inform the parties. The board will notify the parties of the due date for briefs, and may also direct that oral argument be held before it, or that a hearing be held before the full board, one of its members, or an administrative law judge. If the board determines that expedited treatment will not be accorded, the matter will be remanded and processed in accordance with sections 204.2(b) and 204.3 of this Part and Parts 212 and 213 of this Chapter.*

([b]c) If a hearing is held:

(1) Any objections to the conduct of a hearing, including objections to the introduction of evidence, may be oral or written, must be accompanied by a short statement of the grounds for such objection, and shall be included in the record.

(2) There shall be no intermediate report from a board member or an administrative law judge who may be assigned to hold the hearing. Upon the completion of the hearing, such board member or administrative law judge shall transmit the record to the full board for a determination without making any recommendations.

**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 October 24, 2018.

**Text of rule and any required statements and analyses may be obtained from:** Sarah Coleman, Deputy Chair, Public Employment Relations Board, PO Box 2074, Empire State Plaza, Bldg. 2, Floor 20, Albany, NY 12220-0074, (518) 457-2578, email: scoleman@perb.ny.gov

**Data, views or arguments may be submitted to:** Sarah Coleman, Deputy Chair, Public Employment Relations Board, PO Box 2074, Empire State Plaza, Bldg. 2, Floor 20, Albany, NY 12220-0074, (518) 457-2578, email: scoleman@perb.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### Regulatory Impact Statement

1. **Statutory Authority:** The Public Employees' Fair Employment Act (Civil Service Law Art. 14), better known as the "Taylor Law," was enacted in 1967. The Taylor Law established the Public Employment Relations Board ("PERB") to resolve disputes between public employers and legally recognized unions, as well as between union members and their unions. Civil Service Law § 205. PERB also certifies bargaining units and representatives in written decisions. Id.

Civil Service Law § 205.5(l) provides that PERB shall have the power "[t]o make, amend and rescind, from time to time, such rules and regulations, including but not limited to those governing its internal organization and conduct of its affairs, and to exercise such other powers, as may be appropriate to effectuate the purposes and provisions of [Article 14]."

2. **Legislative Objectives:** The proposed rules fulfill the legislative policy, as set forth in Civil Service Law § 205.5(l), that PERB make, amend and rescind rules and regulations to effectuate the purposes of the Taylor Law.

3. **Needs and Benefits:** The proposed new rules expedite the method by which certain claims will be heard and processed to a decision on the merits of the dispute by PERB. No costs of implementation or continuation of the rules is anticipated.

Based upon the current legal climate, and feedback from constituents, we have reason to believe that the decision in *Janus v. AFSCME*, 585 U.S. \_\_\_ (2018), could destabilize collective bargaining throughout the State for not just the State but for counties, municipalities, towns, and villages

and raise significant questions about the duty of fair representation that a union owes to non-members. *Janus v. AFSCME* holds that mandatory payments for collective representation are unconstitutional for employees who are not member of the union (i.e. agency fee payers). Allowing expedited review by the Board will clarify the purely legal rights and responsibilities of the parties at the earliest possible time, thereby reducing the potential damage to labor relations and the delivery of services to the people of the State of New York.

The Rule is designed to obtain expedited determinations by the Board when a dispute presents an issue or issues of law relating to the scope of any duty of fair representation allegedly owed by an employee organization to a non-member, or to any member seeking to terminate membership in an employee organization. Accordingly, while PERB is submitting this Notice of Proposed Rule Making, it is also submitting this Notice of Emergency Adoption, effective immediately.

4. Costs: The proposed rules are designed to reduce costs to regulated parties by eliminating one layer of review. Parties to disputes that are granted expedited review will litigate their cases directly to the Board rather than to administrative law judges in the first instance.

5. Local Government Mandates: The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork: No additional paperwork is required as a result of this proposal.

7. Duplication: This regulation does not duplicate any existing federal, state or local government regulation.

8. Alternatives: The alternative of no action was considered but rejected on the ground that the cases subject to this proposed new rule involved fundamental constitutional rights and potential liabilities that would grow significantly more onerous if the disputes are protracted.

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

10. Compliance Schedule: This rule shall take effect immediately upon publication in the State Register.

#### ***Regulatory Flexibility Analysis***

A regulatory flexibility analysis is not required for this proposed rule since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. The rule allows for expedited treatment of cases which present issues of law relating to the scope of the duty of fair representation under the Public Employees' Fair Employment Act (the Taylor Law).

#### ***Rural Area Flexibility Analysis***

A rural area flexibility analysis is not required for this rule since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. The rule allows for expedited treatment of cases which present issues of law relating to the scope of the duty of fair representation under the Public Employees' Fair Employment Act (the Taylor Law).

#### ***Job Impact Statement***

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. The rule allows for expedited treatment of cases which present issues of law relating to the scope of the duty of fair representation under the Public Employees' Fair Employment Act (the Taylor Law).