RULE MAKING ACTIVITIES

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

AAM -the abbreviation to identify the adopting agency

01 -the *State Register* issue number

96 -the year

00001 -the Department of State number, assigned upon receipt of notice.

E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00002-A
Filing No. 401
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: 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 or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00002-P.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00012-A
Filing No. 398
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: 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 or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00012-P.

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

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

Assessment of Public Comment

At its regularly scheduled public meeting, held in Albany, NY on March 15, 2017, the State Civil Service Commission approved multiple positions in this job title for placement outside of the competitive class. Article V, section 6, of the State Constitution requires that appointments in the classified service of the State shall be "made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" In Civil Service Law sections 41 and 42, the Legislature has set forth classes of positions for which competitive examination is not practicable, thereby authorizing the filling of positions in the exempt and non-competitive jurisdictional classes, respectively. The State Civil Service Commission may place positions and titles in exempt and non-competitive classes in accordance with powers conferred by section 6 of the Civil Service Law.

Thirty-four (34) public comments were received opposing the Commission's placement of the positions subject to this rule making outside of the competitive class. All submitters identified themselves as current or former State employees or as affiliated with the Public Employees Association Inc., AFL-CIO. Almost all of the public comments were duplicative "form letter"-style responses. No public comment clearly set forth why competitive examination was practicable for the subject positions or proposed any alternative to the proposed rule making, other than to posit that the proposed jurisdictional classification was somehow contrary to or a purported circumvention of the merit system. By contrast, the appointing authority and Department of Civil Service personnel professionals have established, in detail, why competitive examination would be impracticable for the subject positions based upon the carefully articulated duties and qualifications necessary for successful job performance. Accordingly, the Commission continues to find that these positions properly belong outside of the competitive class and this amendment to the Appendices of Title 4 of NYCRR has been approved for adoption without modification.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00013-A
Filing No. 403
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete a position from and classify a position in the exempt class.

Text or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00013-P.

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

Text of 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

Assessment of Public Comment

At its regularly scheduled public meeting, held in Albany, NY on March 15, 2017, the State Civil Service Commission approved multiple positions in this job title for placement outside of the competitive class. Article V, section 6, of the State Constitution requires that appointments in the classified service of the State shall be "made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" In Civil Service Law sections 41 and 42, the Legislature has set forth classes of positions for which competitive examination is not practicable, thereby authorizing the filling of positions in the exempt and non-competitive jurisdictional classes, respectively. The State Civil Service Commission may place positions and titles in exempt and non-competitive classes in accordance with powers conferred by section 6 of the Civil Service Law.

Thirty-four (34) public comments were received opposing the Commission's placement of the positions subject to this rule making outside of the competitive class. All submitters identified themselves as current or former State employees or as affiliated with the Public Employees Association Inc., AFL-CIO. Almost all of the public comments were duplicative "form letter"-style responses. No public comment clearly set forth why competitive examination was practicable for the subject positions or proposed any alternative to the proposed rule making, other than to posit that the proposed jurisdictional classification was somehow contrary to or a purported circumvention of the merit system. By contrast, the appointing authority and Department of Civil Service personnel professionals have established, in detail, why competitive examination would be impracticable for the subject positions based upon the carefully articulated duties and qualifications necessary for successful job performance. Accordingly, the Commission continues to find that these positions properly belong outside of the competitive class and this amendment to the Appendices of Title 4 of NYCRR has been approved for adoption without modification.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00014-A
Filing No. 402
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To classify positions in the exempt and non-competitive classes.

Text or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00014-P.

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

Text of 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

Assessment of Public Comment

At its regularly scheduled public meeting, held in Albany, NY on March 15, 2017, the State Civil Service Commission approved multiple positions in this job title for placement outside of the competitive class. Article V, section 6, of the State Constitution requires that appointments in the classified service of the State shall be "made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" In Civil Service Law sections 41 and 42, the Legislature has set forth classes of positions for which competitive examination is not practicable, thereby authorizing the filling of positions in the exempt and non-competitive jurisdictional classes, respectively. The State Civil Service Commission may place positions and titles in exempt and non-competitive classes in accordance with powers conferred by section 6 of the Civil Service Law.

Thirty-four (34) public comments were received opposing the Commission's placement of the positions subject to this rule making outside of the competitive class. All submitters identified themselves as current or former State employees or as affiliated with the Public Employees Association Inc., AFL-CIO. Almost all of the public comments were duplicative "form letter"-style responses. No public comment clearly set forth why competitive examination was practicable for the subject positions or proposed any alternative to the proposed rule making, other than to posit that the proposed jurisdictional classification was somehow contrary to or a purported circumvention of the merit system. By contrast, the appointing authority and Department of Civil Service personnel professionals have established, in detail, why competitive examination would be impracticable for the subject positions based upon the carefully articulated duties and qualifications necessary for successful job performance. Accordingly, the Commission continues to find that these positions properly belong outside of the competitive class and this amendment to the Appendices of Title 4 of NYCRR has been approved for adoption without modification.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00016-A
Filing No. 400
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: 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 or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00016-P.

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

Text of 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

Assessment of Public Comment

At its regularly scheduled public meeting, held in Albany, NY on March 15, 2017, the State Civil Service Commission approved multiple positions in this job title for placement outside of the competitive class. Article V, section 6, of the State Constitution requires that appointments in the classified service of the State shall be "made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" In Civil Service Law sections 41 and 42, the Legislature has set forth classes of positions for which competitive examination is not practicable, thereby authorizing the filling of positions in the exempt and non-competitive jurisdictional classes, respectively. The State Civil Service Commission may place positions and titles in exempt and non-competitive classes in accordance with powers conferred by section 6 of the Civil Service Law.

Thirty-four (34) public comments were received opposing the Commission's placement of the positions subject to this rule making outside of the competitive class. All submitters identified themselves as current or former State employees or as affiliated with the Public Employees Association Inc., AFL-CIO. Almost all of the public comments were duplicative "form letter"-style responses. No public comment clearly set forth why competitive examination was practicable for the subject positions or proposed any alternative to the proposed rule making, other than to posit that the proposed jurisdictional classification was somehow contrary to or

a purported circumvention of the merit system. By contrast, the appointing authority and Department of Civil Service personnel professionals have established, in detail, why competitive examination would be impracticable for the subject positions based upon the carefully articulated duties and qualifications necessary for successful job performance. Accordingly, the Commission continues to find that these positions properly belong outside of the competitive class and this amendment to the Appendices of Title 4 of NYCRR has been approved for adoption without modification.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-18-17-00017-A
Filing No. 399
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

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

Text or summary was published in the May 3, 2017 issue of the Register, I.D. No. CVS-18-17-00017-P.

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

Text of 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

Assessment of Public Comment

At its regularly scheduled public meeting, held in Albany, NY on March 15, 2017, the State Civil Service Commission approved multiple positions in this job title for placement outside of the competitive class. Article V, section 6, of the State Constitution requires that appointments in the classified service of the State shall be "made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" In Civil Service Law sections 41 and 42, the Legislature has set forth classes of positions for which competitive examination is not practicable, thereby authorizing the filling of positions in the exempt and non-competitive jurisdictional classes, respectively. The State Civil Service Commission may place positions and titles in exempt and non-competitive classes in accordance with powers conferred by section 6 of the Civil Service Law.

Thirty-four (34) public comments were received opposing the Commission's placement of the positions subject to this rule making outside of the competitive class. All submitters identified themselves as current or former State employees or as affiliated with the Public Employees Association Inc., AFL-CIO. Almost all of the public comments were duplicative "form letter"-style responses. No public comment clearly set forth why competitive examination was practicable for the subject positions or proposed any alternative to the proposed rule making, other than to posit that the proposed jurisdictional classification was somehow contrary to or a purported circumvention of the merit system. By contrast, the appointing authority and Department of Civil Service personnel professionals have established, in detail, why competitive examination would be impracticable for the subject positions based upon the carefully articulated duties and qualifications necessary for successful job performance. Accordingly, the Commission continues to find that these positions properly belong outside of the competitive class and this amendment to the Appendices of Title 4 of NYCRR has been approved for adoption without modification.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Regulations Governing the Harvest of Lobster

I.D. No. ENV-20-18-00003-EP
Filing No. 394
Filing Date: 2018-04-26
Effective Date: 2018-04-26

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

Proposed Action: Repeal of section 44.1(h)(3) of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0105 and 13-0329

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

Specific reasons underlying the finding of necessity: This proposed rule will repeal 6 NYCRR paragraph 44.1(h)(3) and expand lobster fishing opportunities. Lobster Management Area ("LMA") 4, off the south shore of Long Island, is closed for one month in the spring, while LMA 6, Long Island Sound and the East End, is closed for three months in the fall. Current regulations completely prohibit lobster permit holders who are allowed to fish in both LMA 4 and 6 from fishing for four months out of the year. The Atlantic States Marine Fisheries Commission required New York to implement this rule for closed seasons, referred to as the "most restrictive rule," when closed seasons regulations were first adopted in 2012.

The "most restrictive rule" concept is pervasive across all aspects of lobster management. Lobster fishing occurs in a regulatory patchwork of LMAs that are governed by varying federal and state regulations. When regulations differ across states or LMAs, a lobster permit holder must follow the "most restrictive rule" that applies. For example, when minimum size restrictions vary across LMAs, a lobster permit holder who fishes across multiple LMAs may only possess the larger, more restrictive size, regardless of the exact location from which the lobster is taken. This rulemaking relates to the application of the "most restrictive rule" to closed seasons. The "most restrictive rule" concept is extremely burdensome in this context: when lobster permit holders fish across multiple LMAs, they must follow all the closed season rules in every LMA in which they are permitted to fish. Therefore, current regulations require permit holders who fish across LMAs 4 and 6 to completely refrain from fishing in both areas when either area has a closed season.

This rulemaking is needed to correct a regulatory inconsistency that disfavors New York State lobster permit holders. When NOAA Fisheries adopted the closed season rule for LMAs 4 and 5, stretching from New Jersey to North Carolina, the federal agency did not implement the "most restrictive rule," so Federal lobster permit holders to the south who have lobster trap allocations in both LMAs 4 and 5 can fish in the open LMA when the other LMA has a closed season. New York requested that the Atlantic States Marine Fisheries Commission American Lobster Fishery Management Board ("Board") review this inconsistency. As a result of this review, the Board repealed the "most restrictive rule" for closed areas at the 2017 annual Board meeting and has permitted New York to manage its lobster fishery in a less restrictive way, creating management equity between New York and other mid-Atlantic states. DEC proposes to repeal this rule, implemented in 6 NYCRR paragraph 44.1(h)(3), to allow New York's lobster permit holders who have lobster trap allocations in both LMAs 4 and 6 to fish in the open LMA when the other area is closed.

The normal rule making process would not repeal this rule before the start of LMA 4 closed season on April 30, 2018. If this rule is not repealed by this date, lobster permit holders who have lobster trap allocations in both LMA 4 and 6 will not be able to fish for lobsters in either area for the entire month of May. If it is not immediately repealed, New York State lobster permit holders who have trap allocations in LMA 4 and 6 will be subject to more restrictive regulations than those who hold permits for other combinations of LMAs that are off other states. Therefore, the protection of the general welfare compels the department to immediately repeal this rule to prevent loss of income and ensure the equitable treatment of New York State lobster permit holders.

Subject: Regulations governing the harvest of lobster.

Purpose: To repeal the most restrictive rule as it applies to closed seasons for lobster harvest.

Text of emergency/proposed rule: 6 NYCRR Section 44.1, "Lobsters," is amended as follows:

Paragraph 6 NYCRR 44.1(h)(3) is repealed.

Paragraph 44.1(h)(4) is renumbered 44.1(h)(3).

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 July 24, 2018.

Text of rule and any required statements and analyses may be obtained from: Kim McKown, New York State Department of Environmental Conservation, 205 North Belle Mead Rd., Suite 1, East Setauket, NY 11733, (631) 444-0454, email: kim.mckown@dec.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.

Additional matter required by statute: The proposed rulemaking action is subject to SEQR as an Unlisted action and a Short EAF was completed. The Department has determined that an EIS need not be prepared and has issued a negative declaration. The EAF and negative declaration are available upon request.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law ("ECL") sections 3-0301, 13-0105 and 13-0329 authorize the Department of Environmental Conservation ("DEC") to establish regulations that affect landings of lobsters for Lobster Management Areas ("LMA") 1, 2, 3, 4, 5, and Outer Cape Cod for American lobsters.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters in a manner that is consistent with marine fisheries conservation and management policies and interstate fishery management plans.

3. Needs and benefits:

This rulemaking is necessary to reduce the economic burden on some New York State licensed lobster harvesters, who are unable to take lobsters for four months each year due to the closed seasons in LMAs 4 and 6. Current regulations prevent lobster permit holders who have lobster trap allocations in both LMA 4 and 6 from harvesting lobsters anywhere when either area is closed. The closures in LMA 4 and 6 total four months each year, imposing a significant economic hardship on lobster harvesters.

This proposed rule will liberalize the lobster fishery through the repeal of 6 NYCRR paragraph 44.1(h)(3) which implemented the "most restrictive rule" for closed seasons. The "most restrictive rule" concept is pervasive across all aspects of lobster management. Lobster fishing occurs in a regulatory patchwork of LMAs that are governed by varying federal and state regulations. When regulations differ across states or LMAs, a lobster permit holder must follow the "most restrictive rule" that applies. For example, when minimum size restrictions vary across LMAs, a lobster permit holder who fishes across multiple LMAs may only possess the larger, more restrictive size, regardless of the exact location from which the lobster is taken. This rulemaking relates to the application of the "most restrictive rule" to closed seasons. The "most restrictive rule" concept is extremely burdensome in this context: when lobster permit holders fish across multiple LMAs, they must follow all the closed season rules for every LMA in which they are permitted to fish. Therefore, current regulations require permit holders who fish across LMAs 4 and 6 to completely refrain from fishing in both areas when either area has a closed season.

Current regulations prohibit permit holders who have allocations in both LMA 4 and 6 from fishing for four months out of the year. LMA 4, off the south shore of Long Island, is closed for one month in the spring, while LMA 6, Long Island Sound and the East End, is closed for three months in the fall. Current regulations prevent a lobster permit holder who has trap allocations in LMA 4 and LMA 6 from fishing in both areas when only one of the areas has a mandated closed season. The Atlantic States Marine Fisheries Commission ("ASMFC") required New York to implement this "most restrictive rule" when closed seasons regulations were first adopted in 2012.

This rulemaking is needed to correct a regulatory inconsistency that is detrimental to New York State lobster permit holders. When NOAA Fisheries adopted the closed season rule for LMAs 4 and 5, stretching from New Jersey to North Carolina, the federal agency did not implement the "most restrictive rule," so federal lobster permit holders to the south who have lobster trap allocations in both LMAs 4 and 5 can fish in the open LMA when the other LMA has a closed season. New York requested that the ASMFC American Lobster Fishery Management Board ("Board) review this inconsistency. As a result of this review, the Board repealed the "most restrictive rule" for closed areas at the 2017 annual Board meeting and has permitted New York to manage its lobster fishery in a less restrictive way, creating management equity between New York and other mid-Atlantic states. DEC proposes to repeal this rule, implemented in 6 NYCRR paragraph 44.1(h)(3), to allow New York's lobster permit holders who have lobster trap allocations in both LMAs 4 and 6 to fish in the open LMA when the other area is closed.

The normal rule making process would not repeal this rule before the start of LMA 4 closed season on April 30, 2018. If this rule is not repealed by this date, lobster permit holders who have lobster trap allocations in both LMA 4 and 6 will not be able to fish for lobsters in either area for the entire month of May. If it is not immediately repealed, New York State lobster permit holders who have trap allocations in LMA 4 and 6 will be subject to more restrictive regulations than those who hold permits for other combinations of LMAs that are off other states. Therefore, for the protection of the general welfare, DEC recommends an immediate repeal of this rule to prevent loss of income and ensure the equitable treatment of New York State lobster permit holders.

4. Costs:

There are no new costs to state and local governments from this action. The department will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying recreational and commercial permit holders of the new rules.

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

The amendment does not duplicate any state or federal requirement.

8. Alternatives:

"No action" alternative: if New York does not immediately repeal this rule, some New York lobster harvesters would be denied the economic benefit of being able to fish in alternate fishing areas during closed seasons. Currently some of our lobster harvesters are burdened by these double the management measures required by the ASMFC. This proposed rulemaking's increased economic opportunity for New York's permit holders will have a negligible affect on the Southern New England Lobster stock.

9. Federal standards:

The amendment to Part 44 is in compliance with the ASMFC Fishery Management Plan for American lobster.

10. Compliance schedule:

The proposed regulation is being adopted by emergency rule making and therefore will take effect immediately upon filing with Department of State. Regulated parties must comply immediately and will be notified of the changes to the regulations through appropriate news releases, by mail, and through DEC's website.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule making will remove an inequitable regulatory burden on lobster permit holders through the liberalization of closed season rules. Current regulations prevent lobster permit holders who have lobster trap allocations in both Lobster Management Area ("LMA") 4 and LMA 6 from fishing when either area is closed. LMA 4 includes waters off the south shore of Long Island while LMA 6 includes Long Island Sound and the East End. The closures in LMA 4 and 6 total 4 months each year, causing a loss of income and a significant economic hardship on local lobster harvesters. This proposed rule will repeal a burdensome closed season rule at 6 NYCRR paragraph 44.1(h)(3). The proposed repeal will allow New York's lobster permit holders who have lobster trap allocations in both LMAs 4 and 6 to fish in the open LMA when the other area is closed.

During 2017, approximately 20 percent of New York State lobster permit holders had lobster trap allocations that allowed them to fish their lobster traps in either LMA 4 or 6. These permit holders were authorized to fish 26 percent of New York's lobster trap allocation. Current regulations force permit holders to either fish their traps in only one LMA or fish in both LMAs and subject themselves to both closed seasons, which exposes these dual-area fishers to two times the management burden compared to people fishing in other areas. Historically, most of these permit holders moved their gear between areas. This proposed repeal will relieve these permit holders of this unfair management burden and will allow these permit holders to resume historic fishing habits.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry that complies with the proposed rule.

5. Economic and technological feasibility:

Compliance with the proposed regulations does not require any additional expenditure on the part of affected businesses. Because the

proposed repeal will reduce the management burden and expand the fishing areas available to lobster permit holders who have trap allocations in both LMA 4 and LMA 6, this proposed repeal may increase the income of some lobster permit holders.

6. Minimizing adverse impact:

This proposed repeal is necessary to reduce the economic hardship that this current regulation places on New York lobster permit holders who fish in both LMA 4 and LMA 6.

7. Small business and local government participation:

New York State lobster permit holders had an opportunity to comment on this proposed rule during the Marine Resource Advisory Council Meeting on March 6, 2018. The proposed rule making was agreed to by consensus of the Marine Resource Advisory Council members on March 6, 2018.

8. For rules that either establish or modify a violation or penalties associated with a violation:

Pursuant to the State Administrative Procedure Act § 202-b(1-a)(b) (SAPA), a cure period is not included in the rule because of the potential adverse impact on the resource. Cure periods for the illegal taking of fish or wildlife are neither desirable nor recommended. Immediate compliance is required to ensure that the general welfare of the public is protected.

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

The department will conduct an initial review of the rule within three years as required by SAPA § 207(1)(b).

Rural Area Flexibility Analysis

The Department of Environmental Conservation (DEC) 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 lobster 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 44, DEC has determined that a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

This rulemaking will reduce the economic burden on New York State licensed lobster harvesters of being unable to take lobsters for 4 months each year due to the closed seasons in Lobster Management Areas ("LMA") 4 and 6. Current regulations prohibit lobster permit holders who have lobster trap allocations in both LMA 4 and 6 from fishing when either area is closed. The closures in LMA 4 and 6 total 4 months each year, causing a loss of income and a significant economic hardship on local lobster harvesters.

This proposed rule will repeal 6 NYCRR paragraph 44.1(h)(3) which implemented the "most restrictive rule" for closed seasons, effectively liberalizing the lobster fishery. The "most restrictive rule" concept is pervasive across all aspects of lobster management. Lobster fishing occurs in a regulatory patchwork of LMAs that are governed by varying federal and state regulations. When regulations differ across states or LMAs, a lobster permit holder must follow the "most restrictive rule" that applies. For example, when minimum size restrictions vary across LMAs, a lobster permit holder who fishes across multiple LMAs may only possess the larger, more restrictive size, regardless of the exact location from which the lobster is taken. This rulemaking relates to the application of the "most restrictive rule" to closed seasons. The "most restrictive rule" concept is extremely burdensome in this context: when lobster permit holders fish across multiple LMAs, they must follow all the closed season rules for every LMA in which they are permitted to fish. Therefore, current regulations require permit holders who fish across LMAs 4 and 6 to completely refrain from fishing in both areas when either area has a closed season.

Current regulations prohibit permit holders who have allocations in both LMA 4 and 6 from fishing for four months out of the year. LMA 4, off the south shore of Long Island, is closed for one month in the spring, while LMA 6, Long Island Sound and the East End, is closed for three months in the fall. Current regulations prevent a lobster permit holder who has trap allocations in LMA 4 and LMA 6 from fishing in both areas when only one of the areas has a mandated closed season. The Atlantic States Marine Fisheries Commission required New York to implement this "most restrictive rule" when closed seasons regulations were first adopted in 2012.

This rulemaking is needed to correct a regulatory inconsistency that is detrimental to New York State lobster permit holders. When NOAA Fisheries adopted the closed season rule for LMAs 4 and 5, stretching from New Jersey to North Carolina, the federal agency did not implement the "most restrictive rule," so federal lobster permit holders to the south who have lobster trap allocations in both LMAs 4 and 5 can fish in the open LMA when the other LMA has a closed season. New York requested that the Atlantic States Marine Fisheries Commission American Lobster Fishery Management Board ("Board") review this inconsistency. As a result of this review, the Board repealed the "most restrictive rule" for closed areas at the 2017 annual Board meeting and has permitted New York to manage its lobster fishery in a less restrictive way, creating management equity between New York and other mid-Atlantic states. DEC proposes to repeal this rule, implemented in 6 NYCRR paragraph 44.1(h)(3), to allow New York's lobster permit holders who have lobster trap allocations in both LMAs 4 and 6 to fish in the open LMA when the other area is closed.

If this rule is not repealed by this date, lobster permit holders who have lobster trap allocations in both LMA 4 and 6 will not be able to fish for lobsters in either area for the entire month of May. If it is not immediately repealed, New York State lobster permit holders who have trap allocations in LMA 4 and 6 will be subject to more restrictive regulations than those who hold permits for other combinations of LMAs that are off other states. Therefore, the protection of the general welfare compels the department to immediately repeal this rule to prevent loss of income and ensure the equitable treatment of New York State lobster permit holders.

2. Categories and numbers affected:

In 2017, there were 60 state permit holders who were allowed to fish almost 30,000 traps in either LMA 4 or 6. There were also approximately 10 additional federal permit holders who were allowed to fish nearly 10,000 traps in both areas. Only a small portion (17 percent) of these permit holders actively fished during 2017, as reflected by harvest reports. They harvested over 45,000 pounds of lobsters during 2017.

3. Regions of adverse impact:

The proposed regulation is less restrictive than rules in place for the 2017 fishing season and therefore should not result in any adverse impacts.

4. Minimizing adverse impact:

There will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making.

5. Self-employment opportunities:

Lobster fishers are, for the most part, small businesses, owned and often operated by a single owner. This rule making will expand the fishing opportunities for lobster fishers who have trap tag allocations in both LMA 4 and 6.

6. (IF APPLICABLE) Initial review of the rule, pursuant to SAPA § 207 as amended by L. 2012, ch. 462:

The department will conduct an initial review of the rule within three years as required by SAPA § 207(b).

PROPOSED RULE MAKING HEARING(S) SCHEDULED

CO_2 Emissions Standards for Major Electric Generating Facilities

I.D. No. ENV-20-18-00006-P

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

Proposed Action: Amendment of Parts 200 and 251 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303 and 19-0305

Subject: CO_2 Emissions Standards for Major Electric Generating Facilities.

Purpose: To establish CO_2 emissions standards for existing major electric generating facilities.

Public hearing(s) will be held at: 11:00 a.m., July 16, 2018 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129A/B, Albany, NY; 11:00 a.m., July 18, 2018 at Department of Transportation, One Hunters Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY; and 11:00 a.m., July 24, 2018 at Department of Environmental Conservation, 6274 Avon-Lima Rd. (Rtes. 5 and 20), Conference Rm., Avon, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule (Full text is posted at the following State website: http://www.dec.ny.gov/regulations/propregulations.html #public): The Department is proposing to revise 6 NYCRR Part 251, CO_2 Performance Standards for Major Electric Generating Facilities (Part 251).

Part 251 currently imposes carbon dioxide (CO_2) emission limits on new major electric generating facilities, as well as on existing electric generating facilities that increase capacity by at least 25 megawatts (MW). The proposed revisions to Part 251 would establish CO_2 emission rate requirements applicable to non-modified existing major electric generating facilities, and would also include attendant revisions to 6 NYCRR Part 200, General Provisions. The revisions to Part 200 are necessary to update incorporated references to federal rules.

Section 251.1, Definitions: There are no changes being proposed to the definitions section.

Changes to Section 251.2, Applicability: July 12, 2012, the effective date of the original Part 251, was added to subdivision (a) to clarify the applicability of Part 251 to new sources and modified existing sources. In addition, this subdivision was amended for organizational purposes to include "Modified Existing Sources." Notwithstanding these revisions, the substantive applicability to such new sources and modified existing sources is unchanged by the proposed revisions.

Subdivision (b) of Section 251.2 was amended as follows: "(b) 'Non-Modified Existing Sources'. The provisions of subdivision 251.3(b) would apply to owners or operators of non-modified existing major electric generating facilities that are not subject subdivision 251.3(a)." Through this proposed revision, Part 251 would also apply to non-modified existing sources, in addition to its current applicability to new sources and modified existing sources.

Section 251.3, Emission limits: The section was reorganized to differentiate between (1) the current CO_2 limits for new and modified existing sources, and (2) the proposed new CO_2 emission limits for non-modified existing sources. The limits in subdivision 251.3(a) apply to new and modified existing sources, and are unchanged by the proposed revisions. The limits in proposed subdivision 251.3(b) apply to non-modified existing sources and are as follows: "(1) Beginning on December 31, 2020, owners or operators of a non-modified existing source are required to meet an emission rate of 1,800 pounds of CO_2 per MW hour gross electrical output (output-based limit) or 180 pounds of CO_2 per million Btu of input (input-based limit) for each fossil fuel combusted. As of December 31, 2020, owners or operators of a non-modified existing source shall not fire any single fossil fuel, alone or in combination with any other fuel, with an emission rate that is greater than or equal to 1,800 pounds of CO_2 per MW hour gross electrical output or 180 pounds of CO_2 per million Btu of input." In addition, these emission limits in subdivision (b) would be measured on an annual basis, calculated by dividing the annual total of CO_2 emissions for the calendar year by either the annual total (gross) MW generated (output-based limit) or the annual Btu input (input-based limit) over the same calendar year for each fuel combusted. As provided for in the current Section 251.4, an owner or operator of a non-modified existing facility subject to the CO_2 emission limits in subdivision 251.3(b) must specify which form of CO_2 emission limit the owner or operator will comply with, the input-based limit or the output-based limit.

No substantive changes were made to Sections 251.4, Permit requirements or 251.5, Monitoring.

Section 251.6, Recordkeeping and reporting was amended to include annual report requirements, if an owner or operator is unable to demonstrate compliance with the provisions in subdivision 251.3(b) by following the other monitoring, recordkeeping, and reporting provisions in Part 251.

No changes were made to Section 251.7, Severability.

Changes to Section 200.9 Referenced Material: This Section was amended to update references incorporated throughout Part 251.

Text of proposed rule and any required statements and analyses may be obtained from: Laura Stevens, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: air.regs@dec.ny.gov

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

Public comment will be received until: July 29, 2018.

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

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

Summary of Regulatory Impact Statement (Full text is posted at the following State website: http://www.dec.ny.gov/regulations/propregulations.html#public):

INTRODUCTION

Governor Andrew M. Cuomo has established a State goal of reducing carbon dioxide (CO_2) emissions from the energy sector by 40 percent by 2030. To help achieve this goal, New York State must ensure that electric generating units (EGUs) burning coal are repowering to a cleaner fuel or closed no later than 2020.

The Department is proposing to revise 6 NYCRR Part 251, CO_2 Performance Standards for Major Electric Generating Facilities and 6 NYCRR Part 200, General Provisions. The revisions to Part 200 update incorporated references to federal rules. This is not a mandate on local governments. It applies equally to any fossil fuel fired major electric generating facility. Part 251 does not mandate any particular project or activity by any local government.

STATUTORY AUTHORITY

The statutory authority to promulgate revisions to Part 251 is derived from the Department's obligation to prevent and control air pollution, as set out in the Environmental Conservation Law (ECL) at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, and 19-0305.

LEGISLATIVE OBJECTIVES

The proposed revisions to Part 251 would mitigate higher CO_2 emission rates from the State's existing fleet of fossil fuel-fired electric generating facilities, while retaining more stringent CO_2 performance standards for new and modified sources. Part 251 and the proposed revisions work in conjunction with other State programs - such as the Regional Greenhouse Gas Initiative (RGGI) as implemented by the Department in 6 NYCRR Part 242, CO_2 Budget Trading Program - in order to minimize CO_2 emissions from the power sector in the State. This in turn serves to lessen the State's contribution to atmospheric concentrations of GHGs. Increased atmospheric concentrations of GHGs are contributing to global climate change, and hence endangering public health and welfare in the State.

Part 251 will serve to prevent the operation of high-carbon sources of energy, such as coal-fired major electric generating facilities that do not utilize carbon capture and sequestration (CCS) or some other advanced CO_2 emission reduction technology.

To meet the State's commitments, and consistent with existing legislative enactments, the Department is empowered to promote the safety, health and welfare of the public, protect the State's natural environment, and also help ensure a safe, dependable and economical supply of energy to the people of the State. There is strong scientific evidence that the earth's climate is changing and that greenhouse gases (GHGs) from fossil fuel combustion and other human activities are the major contributor to this change. Climate change represents an enormous environmental challenge for the State because, unabated, it will have serious adverse impacts on the State's natural resources, public health and infrastructure.

Among the GHGs, CO_2 is the chief contributor to climate change. Emission sources that fire carbon-containing material, such as fossil fuels, emit significant quantities of CO_2. Electricity generation is responsible for approximately 17 percent of all GHGs emitted in New York State. In 2014, fuel combustion by the electricity generation sector in New York State emitted approximately 33.5 million tons of CO_2 into the atmosphere.[1] In 2016, electric generating units in the State subject to RGGI emitted approximately 30.7 million tons[2] of CO_2 into the atmosphere.

NEEDS AND BENEFITS

As part of Governor Cuomo's 40 percent by 2030 CO_2 emission reduction goal, the State must ensure that EGUs burning coal are repowering to a cleaner fuel or closed no later than 2020. Climate change represents one of the most pressing environmental challenges for the State, the nation, and the world, and reducing GHG emissions, including CO_2 is a means to reduce or stem the pace of climate change. The proposed revisions to Part 251 serve to further CO_2 emissions reductions from the power sector, in order to mitigate the State's contribution to climate change.

Stakeholder Outreach

The Department held stakeholder meetings on August 21, 2017 and August 28, 2107 to discuss the likely elements of the proposed revisions to Part 251, and to obtain feedback. The stakeholder group consisted of the regulated community (electric generating facility representatives) to be affected by the proposed regulation, consultants (both technical and legal), and interested environmental advocacy groups. The Department reviewed these comments, and incorporated considerations of issues discussed at the stakeholder meeting, in further developing the revisions to Part 251.

CO_2 Emission Standards and Requirements

The proposed revisions will establish CO_2 emissions standards for non-modified existing major electric generating facilities, while leaving unchanged the existing CO_2 emission standards for new and modified major electric generating facilities. All non-modified fossil-fuel fired existing major electric generating facilities that are not currently subject to Part 251 would be required to meet an emissions limit of either 1,800 lbs/MW-hr gross electrical output or 180 lbs/mmBTU of input.

COSTS

Potential Impacts on Electricity Prices and Reliability

No existing coal-fired electric generation emission sources are expected to continue operating in New York beyond December 31, 2020 based in part on the proposed revisions to Part 251. Such a unit could apply CCS

technology to reduce its CO_2 rate to comply with the proposed emission standard. The required application of CCS technology would create a significant increase in capital and operation costs when compared to base coal without CCS technology. Natural gas and oil-fired units will be able to meet the proposed emissions standards, and thus will not have to contend with CCS technology.

The Department does not anticipate any reliability issues as a result of affected electric generating facility closings attributable to the proposed Part 251 revisions. The 2016 NYSIO Reliability Needs Assessment analyzed various scenarios to determine their impact. The scenario in which there were no coal-fired power plants operating in New York State found a relatively small increase in the loss of load expectancy (LOLE) from 0.04 to 0.06 days per year in 2017. This scenario assesses the retirement of the last coal plant in New York State, which would represent the loss of approximately 687 MW of capacity.

Costs to the Regulated Community

Existing coal-fired major EGUs will not be able to meet the proposed CO_2 emission standard without the installation of controls (such as CCS). CCS technology would add significantly to the cost of construction and operation of existing coal-fired EGUs, and ultimately this expenditure would be anticipated to be passed along as increased electricity costs for the end user. Natural gas and oil-fired units will be able to meet the proposed emission limits, and thus will not have to contend with CCS technology. Absent the installation of CCS or other technology, coal-fired major EGUs will need to repower to a cleaner fuel or cease operations. Either option will impose associated costs upon the facility, and possibly the surrounding community.

The communities surrounding Cayuga and Somerset could incur significant tax implications if the facilities cease operations beyond 2020. Both of these facilities, however, have other compliance options under the proposed revisions to Part 251, including repowering to a cleaner fuel or employing CCS or another advanced CO_2 abatement technology. Further, even absent these revisions and as previously stated, market forces have already resulted in a shift away from coal generation toward other generating technologies. In particular, for both of the facilities impacted by the proposed revisions, a review of available operating data shows a significant decline in their operating capacities over the past few years.

Costs to the Department

The Department will not incur additional costs associated with the implementation of the proposed revisions and can properly administer the proposed revisions with the application of existing resources. Current Department staff will review permit applications and monitoring plans, as well as executing and modifying permits and inspecting subject sources.

PAPERWORK

This rule will impose minimal additional paperwork for recordkeeping and monitoring to demonstrate compliance with the annual CO_2 emission standards, but it is not expected to be unduly burdensome. Facilities subject to this regulation are already required to meet regulatory requirements for CO_2 emissions under Subpart 202-2 and Part 242, and are already required to meet emission standards for other air contaminants and have systems in place to monitor emissions and submit annual and semi-annual reports to the Department. The facility owner may need to modify the data acquisition handling system software, in order to compute and report CO_2 monitoring data in pounds per gross electric output rate in terms of megawatt/hr, or fuel input rate in terms of million Btu per hour. Facilities subject to the proposed revisions to Part 251 are already subject to Subpart 202-2 and Part 242, and would already have to compute and report CO_2 emissions data under Subpart 202-2 and Part 242. The records and reports will be required to be kept and submitted in the same formats used to track other pollutants with emission standards.

LOCAL GOVERNMENT MANDATE

This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Local governments have no additional compliance obligations as compared to other subject entities. There are currently three municipally owned major electric generating facilities in New York State. All three facilities are non-modified existing major electric generating facilities that would be subject to the proposed revisions to Part 251. Since all three facilities burn gas or oil, and have CO_2 emission rates less than the proposed limits, they are already in compliance with the proposed revisions to Part 251.

DUPLICATION

Facilities subject to Part 251 are also be subject to the Part 242 requirements. Therefore, this proposed regulation does not duplicate any existing monitoring or record keeping requirements.

ALTERNATIVES

The following alternatives have been evaluated to address the goals of Part 251 as set forth above:

(1) Take no Action: This option was rejected as it would not prevent the most carbon intensive existing non-modified sources of electricity generation.

(2) RGGI Cap Adjustment: A reduction of the RGGI annual cap would increase CO_2 allowance prices, making it less economically feasible for the most carbon intensive electric generating facilities to continue to operate. However, the allowance price increase may not be sufficient to ensure that the most carbon intensive existing electric generating facilities would cease operation or repower to a cleaner fuel by 2020. Therefore, this option was rejected.

(3) Establish a different CO_2 emission limit or specific CO_2 emission standard for each source and fuel type. However, a single CO_2 emission standard that applies equally to all non-modified existing major electric generating facilities best serves the Department's objective of furthering CO_2 emission reductions.

FEDERAL STANDARDS

As a result of several actions by EPA, GHGs, including CO_2, became "subject to regulation" under the Act as of January 2, 2011. EPA modified the relevant applicability thresholds for GHGs for purposes of PSD and Title V permitting under the Act in the GHG Tailoring Rule. The Department incorporated these modified thresholds into its Parts 200, 201, and 231. This means that new major stationary sources, and major modifications at existing stationary sources, are subject to BACT for GHGs under the PSD permitting program, if the source emits GHGs above the relevant applicability threshold. While the applicability provisions are separate and not identical, a source that is subject to Part 251 may also be subject to BACT for GHGs under the PSD permitting program.

There currently is no specific federal CO_2 emission standard for stationary sources. Therefore, the proposed revisions may be considered more stringent than the current federal standards. The proposed Part 251 standards are protective of public health and the environment in the absence of similar federal emission standards. The potential adverse impact to global air quality and New York State's environment from CO_2 emissions necessitates that New York State take action now to halt the increase in CO_2 emissions that contribute to climate change.

COMPLIANCE SCHEDULE

The CO_2 emission limit applicable to non-modified existing sources in the proposed revisions to Part 251 will be effective as of December 31, 2020. Owners or operators of non-modified existing major electric generating facilities will not be required to comply with the proposed CO_2 limits until December 31, 2020. Notwithstanding this compliance schedule, pursuant to Article 19 of the ECL, the revisions to Part 251 will be effective thirty days after its filing with the Department of State.

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[1] New York State Greenhouse Gas Inventory: 1990-2014 and Forecast 2012-2030. Final Report, December 2016, Revised February 2017, New York State Energy Research and Development Authority, Albany, NY.

[2] https://rggi-coats.org/eats/rggi

Regulatory Flexibility Analysis

EFFECT OF RULE ON SMALL BUSINESSES AND LOCAL GOVERMENTS

There are currently three municipally owned major electric generating facilities in New York State. The Samuel A. Carlson Generating Station is owned by the Jamestown Board of Public Utilities (JBPU). The JBPU consists of two coal-fired stoker boilers that were converted to burn gas and oil and a natural gas-fired combustion turbine. The Village of Freeport owns and operates two natural gas-fired combustion turbines. Finally, Rockville Center owns and operates stationary internal combustion engines. All three facilities are subject to the proposed revisions to Part 251, however, since all three facilities burn gas or oil and have CO_2 emission rates less than the emissions limit proposed in the revision to Part 251, they are already in compliance with the emissions limit being proposed in the revision to Part 251.

None of the existing facilities mentioned above are owned or operated by a small business. Sources of applicable size and capacity are not generally operated by small businesses, due to the significant capital costs necessary to operate such a facility.

COMPLIANCE REQUIREMENTS

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. Under the proposed revisions to Part 251, all non-modified fossil-fuel fired existing major electric generating facilities, not currently subject to Part 251, would be required to meet a carbon dioxide (CO_2) emissions limit of either 1,800 lbs/MW-hr gross electrical output (output-based limit) or 180 lbs/mmBtu of input (input-based limit). Facilities subject to this Part will also be required to meet a 12-month rolling average or annual CO_2 emission standard. They are also required to meet regulatory requirements for other regulated pollutants (e.g., a limit for emissions of SO_2 and/or NOx). To demonstrate compliance with other applicable regulations already in place, including in Part 242 and via federal monitoring requirements contained within 40 CFR Part 75, both a CO_2 continuous emission monitoring system (diluent monitor) and a fuel flow monitor

would already have been installed. Thus, as monitoring equipment is generally already required by other existing State and federal regulations, there will be no additional costs incurred by regulated facilities to demonstrate compliance with the proposed CO_2 standard. Newly subject sources will have standard operating expenses associated with operating permit requirements, including provisions for recordkeeping, monitoring and reporting necessary to demonstrate compliance with this rule.

PROFESSIONAL SERVICES

The Department believes that professional services would be required to support the employment of CCS or another advanced CO_2 emission reduction technology, a conversion of the existing coal units to natural gas or for the replacement of the units with combined cycle units at the two coal-fired facilities impacted by the proposed revisions to Part 251. There may also be a need for professional services, if the facilities opt to shut down, for decommissioning, dismantling and clean-up as needed. Given the number of options available and the variability of the costs associated with each option, the Department does not have a cost estimate for professional services. The Department anticipates that any costs for professional services would represent a small percentage of the overall costs for the selected option.

COSTS

The Department has determined that existing combined cycle combustion turbines, existing natural gas-fired boilers, existing natural gas-fired stationary internal combustion engines, existing oil-fired simple cycle combustion turbines, and existing oil-fired stationary internal combustion engines can meet the proposed CO_2 emission standards in Part 251.

No existing coal-fired electric generation emission sources are expected to continue operating in New York beyond 2020 based in part on the proposed revisions to Part 251. If, however, the owner or operator of such a unit wishes, it could apply 15 to 20 percent CCS or other advanced CO_2 emission reduction technology to reduce the unit's CO_2 rate to a level that complies with the proposed emission standard revisions in Part 251. While the Department does not have cost estimates for retrofitting an existing coal facility with CCS, based on a review of existing data for new installations it is the Department's belief that application of that technology as a response to the revisions to Part 251 would be cost prohibitive. This is further supported by a Global CCS Institute publication where the costs of retrofitting relative to a sources unique circumstances are evaluated. It is noted in that publication that "… the actual impact of the factors driving retrofitting cost will be site and situation specific. It is estimated that retrofitting CCS is unlikely for plants older than ten to twelve years, as total CCS cost would be at least 30 percent higher compared to new power plants (for same scale plants), and possibly much more, depending on the specific case. There are two exceptions when the retrofit cost penalty could be significantly lower. The first is for very young (less than five to seven years), and very efficient coal power plants. If the plant was built as 'capture ready', and the retrofit planned to minimize downtime, the additional costs could be 10 percent or even lower…"[1]

MINIMIZING ADVERSE IMPACT

The Department has considered the issues and determined that Part 251 will not have an adverse impact on small businesses or local governments. The ability of a source to meet the requirements of Part 251 will not be influenced by whether the source is owned by a local government or small business, as compared to some other entity. The proposed regulation establishes specific CO_2 emission standards for non-modified existing major electric generating facilities.

In satisfying the requirements of section 202-b for minimizing adverse impacts to small business, the State Administrative Procedures Act (SAPA) requires that each proposal address the following:

(1) 'Establishment of differing compliance requirements or reporting times.' The compliance and reporting times are consistent with other air permitting regulations and quarterly, semi-annual and annual reporting that affected facilities would already be subject to.

(2) 'Use of performance rather than design standards.' Part 251 is a unit-specific rule making based on performance standards and technology currently available. Part 251 restricts emissions of CO_2 at subject facilities, but does not dictate what design or control strategies facilities must implement to achieve compliance with applicable rates.

'Exemption from coverage by the rule for small business and local governments.' The Department has determined that Part 251 should apply to sources regardless of ownership. CO_2 emissions may be significant from municipally-owned power stations and facilities and the objectives of this rule would not be met if certain owners or operators were exempted from its provisions.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The State Administrative Procedures Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rule making process and or public hearings. The Department held a stakeholder meetings on August 21, 2017 and August 28, 2017to discuss the likely elements of the proposed Part 251 and to obtain feedback. The Department also conducted additional stakeholder outreach during the development of Part 251, prior to its formal proposal for public comment. The Department will hold public hearings on Part 251 and small businesses and local governments will be able to comment on the proposed rule during the notice and comment period.

CURE PERIOD OR AMELIORATIVE ACTION

No additional cure period or other additional opportunity for ameliorative action is included in Part 251. First, because of the nature of Part 251 as a performance standard that only applies to certain facilities, Part 251 will not result in immediate violations or impositions of penalties for existing facilities. However, the CO_2 emission limit applicable to non-modified existing sources in the proposed revisions to Part 251 will be effective as of December 31, 2020. Therefore, owners and operators of non-modified existing major electric generating facilities will not be required to comply with the CO_2 emission limit of either 1,800 lbs/Mw-hr gross electrical output (output-based limit) or 180 lbs/mmBtu of input (input based limit) until December 31, 2020. This will allow owners and operators of affected sources time to comply with the proposed revisions to Part 251.

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[1] https://hub.globalccsinstitute.com/publications/carbon-capture-storage-assessing-economics/52-cost-variations-between-ccs-applications

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

The proposed rulemaking will apply statewide, however the areas surrounding the two coal-fired major electric generating facilities, namely Tompkins and Niagara Counties, will be affected the most.

Rural areas are defined as rural counties in New York State that have populations of less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile, and villages within those towns.

COMPLIANCE REQUIREMENTS

Under the proposed revisions to Part 251, all non-modified fossil-fuel fired existing major electric generating facilities, not currently subject to Part 251, would be required to meet a carbon dioxide (CO_2) emissions limit of either 1,800 lbs/MW-hr gross electrical output (output-based limit) or 180 lbs/mmBtu of input (input-based limit). Facilities subject to this Part will also be required to meet a 12-month rolling average or annual CO_2 emission standard. They are also required to meet regulatory requirements for other regulated pollutants (e.g., a limit for emissions of SO_2 and/or NOx). To demonstrate compliance with other applicable regulations already in place, including in Part 242 and via federal monitoring requirements contained within 40 CFR Part 75, both a CO_2 continuous emission monitoring system (diluent monitor) and a fuel flow monitor would already have been installed. Thus, as monitoring equipment is generally already required by other existing State and federal regulations, there will be no additional costs incurred by regulated facilities to demonstrate compliance with the proposed CO_2 standard. Newly subject sources will have standard operating expenses associated with operating permit requirements, including provisions for recordkeeping, monitoring and reporting necessary to demonstrate compliance with this rule.

COSTS

In order to meet the proposed CO_2 emission standard, coal-fired major electric generating units that do not employ carbon capture and sequestration (CCS) or other advanced CO_2 emission reduction technology will need to repower to a cleaner fuel or cease operations by December 31, 2020. Either option will impose associated costs upon the owners or operators of the facility, and possibly the surrounding community. Cayuga Operating Company has prepared a Repowering Proposal,[1] and a Revised Repowering Proposal,[2] which detail its projection of economic and employment effects the facility and surrounding community will face under various repowering options. The Cayuga facility is currently the largest taxpayer in all three local tax bases: the county (1.3 percent), town (6.9 percent) and school district (10.5 percent) tax bases. In 2012, AES Energy, the owners of the Somerset electric generating facility at that time, contributed 80 percent of the Town of Somerset tax base, 70 percent of the Baker School District tax base, and five percent of the Niagara County tax base.

To improve a coal-fired plant's CO_2 emission rate, an existing facility could co-fire with natural gas, convert to natural gas, repower to natural gas-fired combustion turbines or replace the facility with a natural gas combined cycle plant. Since the CO_2 performance standard in the proposed revisions applies to each fossil fuel combusted at a non-modified existing facility, the costs associated with co-firing with natural gas are not being evaluated as part of this proposal But an analysis, discussion and cost data for conversion, repowering and replacement is provided below. In an October 1, 2013 article in Power,[3] "capital costs for implementing a complete coal to natural gas conversion (outside of new pipeline costs)

can range from $100,000 to $250,000 per MW." The article also notes that there could be additional costs associated with decommissioning (demolition, removal and remediation) that could range from $3,000 to $30,000 per MW.[4] The article further touches on the savings as they relate to the risks when completing a life cycle analysis to compare the cost associated with repowering versus a complete replacement with a new combined cycle plant. In a January 2017 EIA document, the total overnight capital costs of new electric generating technology in upstate New York could cost as much as $1,283 per kW.[5] Independent of the option chosen, there would also be gas infrastructure costs associated with any new pipelines or other infrastructure needed to supply fuel for the conversion, repower or replacement.

No existing coal-fired electric generation emission sources are expected to continue operating in New York beyond 2020 based in part on the proposed revisions to Part 251. If, however, such a unit wishes, it could apply 15 to 20 percent CCS or other advanced CO_2 emission reduction technology to reduce its CO_2 rate to a level that complies with the proposed emission standard revisions in Part 251. While the Department does not have cost estimates for retrofitting an existing coal facility with CCS, based on a review of existing data for new installations it is the Department's belief that application of that technology as a response to the revisions to Part 251 would be cost prohibitive. This is further supported by a Global CCS Institute publication where the costs of retrofitting relative to a sources unique circumstances are evaluated. It is noted in that publication that "… the actual impact of the factors driving retrofitting cost will be site and situation specific. It is estimated that retrofitting CCS is unlikely for plants older than ten to twelve years, as total CCS cost would be at least 30 percent higher compared to new power plants (for same scale plants), and possibly much more, depending on the specific case. There are two exceptions when the retrofit cost penalty could be significantly lower. The first is for very young (less than five to seven years), and very efficient coal power plants. If the plant was built as 'capture ready', and the retrofit planned to minimize downtime, the additional costs could be 10 percent or even lower…"[6]

MINIMIZING ADVERSE IMPACT

As detailed above, the communities surrounding Cayuga and Somerset could incur significant tax implications if the facilities cease operations beyond 2020. Both of these facilities, however, have other compliance options under the proposed revisions to Part 251, including repowering to a cleaner fuel or employing CCS or another advanced CO_2 abatement technology. Further, even absent these revisions and as previously stated, market forces have already resulted in a shift away from coal generation toward other generating technologies. In particular, for both of the facilities impacted by the proposed revisions, a review of available operating data shows a significant decline in their operating capacities over the past few years.

RURAL AREA PARTICIPATION

The Department held stakeholder meetings on August 21, 2017 and August 28, 2107 to discuss the likely elements of the proposed revisions to Part 251, and to obtain feedback. The stakeholder group consisted of the regulated community (electric generating facility representatives) to be affected by the proposed regulation, consultants (both technical and legal), and interested environmental advocacy groups. During these meetings, the Department presented some of the draft conditions of the rule, answered questions regarding the proposed rule, and requested feedback on the proposed revisions. The Department reviewed these comments, and incorporated considerations of issues discussed at the stakeholder meeting, in further developing the revisions to Part 251. The Department also met with the New York Independent System Operator (NYISO) on September 14, 2017. The Department will hold public hearings on Part 251 in upstate and other rural areas and will notify interested parties of this proposed rulemaking.

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[1] Cayuga Repowering Proposal, March 26, 2013. Available at: http://www3.ps.ny.gov/W/PSCFC9542CC5BE76085257FE300543D5E?OpenDocument

[2] Cayuga Repowering Proposal, Revised Repowering Proposal, February 6, 2015. Available at: http://www3.ps.ny.gov/W/PSCFC9542CC5BE76085257FE300543 D5E?OpenDocument

[3] http://www.powermag.com/utility-options-for-leveraging-natural-gas/?pagenum=1

[4] Ibid.

[5] https://www.eia.gov/outlooks/aeo/assumptions/pdf/table_8.2.pdf

[6] https://hub.globalccsinstitute.com/publications/carbon-capture-storage-assessing-economics/52-cost-variations-between-ccs-applications

Job Impact Statement

NATURE OF IMPACT

Under the proposed Part 251 revisions, a non-modified existing coal-fired major electric generating facility could not continue firing coal without the use of advanced carbon dioxide (CO_2) emission reduction technology, such as Carbon Capture and Sequestration (CCS). Alternatively, the owners or operators of such a facility could choose to repower to a cleaner fuel or cease operations by December 31, 2020, in order to comply with the proposed revisions. Under all scenarios, including utilizing CCS, repowering or ceasing operation, there will be economic and employment effects associated with the action that the owners or operators of the facility choose to comply with the proposed Part 251 revisions.

CATEGORIES AND NUMBERS OF EMPLOYMENT OPPORTUNITIES AFFECTED

To estimate the potential impacts on jobs and local communities, the Department pulled data from publicly available documents that referenced potential actions that the facilities most likely to be impacted by the revisions to Part 251 could undertake to comply. For example, Cayuga Operating Company, which operates a facility that would be subject to the revisions to Part 251, has prepared a Repowering Proposal,[1] and a Revised Repowering Proposal[2] which detail the company's projection of economic and employment effects the facility and surrounding community will face under various repowering options. The Cayuga facility is currently the largest taxpayer in all three local tax bases: the county (1.3 percent), town (6.9 percent) and school district (10.5 percent) tax bases. The following options were highlighted in the Repowering Proposal:

- Option 1 would be to repower two existing coal boilers to operate on natural gas, while maintaining the remainder of the existing facility. Under this option, Cayuga projects that there would be 67 construction jobs, and 30 permanent jobs. Under this option, Cayuga projects that their property tax obligation for the 2017-2036 period would be $82,634.
- Option 2 would be to repower to simple cycle natural gas fired units. Under this option, Cayuga projects 312 construction jobs, and five permanent jobs. Under this option, Cayuga projects that their property tax obligation for the 2017-2036 period would be $167,870.
- Option 3 would be to construct a new gas-fired combined cycle unit, using an existing steam powered turbine, and repowering one existing coal-fired unit to natural gas. Under this option, Cayuga projects 233 construction jobs, and 30 permanent jobs. Under this option, Cayuga projects that their property tax obligation for the 2017-2036 period would be $139,695.
- Option 4 would be to construct two new natural gas-fired combined cycle units. Under this option, Cayuga projects 397 construction jobs, and 30 permanent jobs. Under this option, Cayuga projects that their property tax obligation for the 2017-2036 period would be $219,423.

Under the Revised Repowering Proposal, units 1 and 2 would be repowered to natural gas, with one of the units retaining the capability to fire coal as a back-up fuel. Under this revised option, Cayuga projects 118 construction jobs, and 30 permanent jobs. The company also projects there would be indirect employment benefits of 60 jobs in the region. Cayuga projects the decreased tax revenue would result in a decrease of 7.4 percent to the local budget, and an 11.7 percent decrease in the school district budget, resulting in the elimination of 15 teacher positions, and cuts to educational programs and extracurricular activities. Homeowner tax bills are projected to increase by about $600 per year.[3] It should be noted that a proposal that retained the capability to fire some coal would not comply with the proposed revisions to Part 251. Moreover, while the various repowering options at Cayuga could have various impacts, these options were already being considered prior to the proposed revisions to Part 251. Therefore, any such costs are not necessarily a result of the proposed revisions to Part 251.

In January 2010, AES Energy, the owners of the Somerset electric generating facility at that time, along with Eastern Energy, Niagara County, the Barker School District and the Town of Somerset entered into a PILOT agreement whereby AES would make payments of $15.8 million yearly for five years.[4] In September 2010 and again in October 2010, AES requested amendments to the PILOT agreement to lower their payments. In their request dated October 29, 2010, AES cited several factors increasing the financial stress on the company. Those factors were reduced natural gas pricing, low energy demand and economic recession, high coal and transportation costs, and state-driven energy efficiency and demand-side management programs. In 2012, AES contributed 80 percent of the Town tax base, 70 percent of the school tax base, and five percent of the county tax base.

In May 2016 Riesling Power, with its subsidiary Heorot Power, purchased both the Cayuga and Somerset facilities. As of that time, there were 74 people employed at Somerset.[5]

REGIONS OF ADVERSE IMPACT

As detailed above, the communities surrounding the Cayuga and Somerset facilities could incur significant employment and tax implications if the facilities cease operations.

MINIMIZING ADVERSE IMPACT

The Cayuga and Somerset facilities have several compliance options

under the proposed revisions to Part 251, including repowering to a cleaner fuel or employing CCS or another advanced CO_2 abatement technology. Further, even absent these revisions and as previously stated, market forces have already resulted in a shift away from carbon-intensive coal generation toward other less carbon intensive generating technologies. In particular, for both of the facilities impacted by the proposed revisions, a review of available operating data shows a significant decline in their operating capacities over the past few years.

[1] Cayuga Repowering Proposal, March 26, 2013. Available at: http://www3.ps.ny.gov/W/PSCFC9542CC5BE76085257FE300543D5E?OpenDocument

[2] Cayuga Repowering Proposal, Revised Repowering Proposal, February 6, 2015. Available at: http://www3.ps.ny.gov/W/PSCFC9542CC5BE76085257FE300543 D5E?OpenDocument

[3] Cayuga Repowering Proposal, Revised Repowering Proposal, February 6, 2015. Available at: http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-e-0577

[4] Available at www.niagaracountybusiness.com

[5] http://www.ithacajournal.com/story/news/local/2016/07/29/new-cayuga-plant-owner-eyes-continued-operation/87672984

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Repeal and Replace 6 NYCRR Parts 243, 244 and 245 and Amend 6 NYCRR Part 200

I.D. No. ENV-20-18-00007-P

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

Proposed Action: Amendment of Part 200; repeal of Parts 243, 244 and 245; and addition of new Parts 243, 244 and 245 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105

Subject: Repeal and replace 6 NYCRR Parts 243, 244 and 245 and amend 6 NYCRR Part 200.

Purpose: Parts 243, 244 and 245 set forth the process the department will use to allocate allowances under EPA's CSAPR Trading Programs.

Public hearing(s) will be held at: 11:00 a.m., July 16, 2018 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129A/B, Albany, NY; 11:00 a.m., July 18, 2018 at Department of Transportation, One Hunter's Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY; and 11:00 a.m., July 24, 2018 at Department of Environmental Conservation, 6274 Avon-Lima Rd. (Rtes. 5 and 20), Conference Rm., Avon, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule (Full text is posted at the following State website: http://www.dec.ny.gov/regulations/propregulations.html #public): The New York State Department of Environmental Conservation (Department) repealed 6 NYCRR Part 243, CAIR NO_x Ozone Season Trading Program, 6 NYCRR Part 244, CAIR NO_x Annual Trading Program, and 6 NYCRR Part 245, CAIR SO_2 Trading Program (collectively, the New York State Clean Air Interstate Rules or NYS CAIR) on November 12, 2015 and replaced them with three new rules; 6 NYCRR Part 243, Transport Rule NO_x Ozone Season Trading Program, 6 NYCRR Part 244, Transport Rule NO_x Annual Trading Program, and 6 NYCRR Part 245, Transport Rule SO_2 Trading Program. These rules were adopted to allow the Department to allocate Transport Rule allowances to regulated entities in New York. On December 1, 2015 the Department submitted these rules to EPA for incorporation into the New York State Implementation Plan (SIP). EPA provided comments on the aforementioned SIP submission on June 2, 2016 and November 28, 2016. On September 7, 2016, EPA finalized the Cross-State Air Pollution Rule (CSAPR) Update to address the air quality impacts that result from the interstate transport of ozone air pollution in the eastern United States, particularly the transport of Ozone Season NO_x. In this rulemaking the Department proposes to repeal and replace Parts 243, 244 and 245 to address the issues raised by EPA's comments and to conform to CSAPR and the CSAPR Update. In addition, attendant changes will be made to 6 NYCRR Part 200.

CSAPR is a regional cap-and-trade program that regulates emissions from large fossil fuel-fired electricity generating units (EGUs) that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. The proposed changes are necessary to ensure New York State receives EPA approval and maintains control of CSAPR allowance allocations to regulated entities within the state under Parts 243, 244 and 245.

Applicability

Sections 243.1, 244.1 and 245.1

The applicability requirements for Parts 243, 244 and 245 are defined in federal regulations (40 CFR 97.804, 40 CFR 97.404 and 40 CFR 97.604). Although the proposed Parts 243, 244 and 245 have the same applicability as the current regulations, the text of the proposed version is much shorter in length. The proposed applicability sections are shorter because the current regulations incorporate the CSAPR rules in their entirety, whereas the proposed rules only incorporate, by reference, the requisite applicability sections of the federal regulations.

Definitions

Sections 243.2, 244.2 and 245.2

The definitions sections of the proposed Parts 243, 244 and 245 incorporate by reference definitions from the federal CSAPR regulations. In the current regulations, definitions were copied directly from the federal rule, while in the proposed set of regulations several of these terms are incorporated by reference. The proposed regulations list the term to be defined followed by a citation of the exact location of this definition in the federal CSAPR regulations. The only definitions unique to Parts 243, 244 and 245 are those related to the New York State Energy Research and Development Authority (NYSERDA) Energy Efficiency and Renewable Energy Technology (ERRET) Account. This account is specific to New York State and proceeds from the sale of allowances will support NYSERDA programs that encourage energy efficiency measures and renewable energy technologies.

Trading Program Budgets

Sections 243.3, 244.3 and 245.3

The trading program budget sections of the proposed Parts 243, 244 and 245 detail the allocation methodology of New York State's CSAPR allowances. In general, five percent of the allowances are set aside for new units, ten percent go to NYSERDA, and the rest of the allowances are allocated to facilities based on an average of the amount they emitted over the three most recent calendar years for which data is available. In the trading program budget section of the proposed Parts 243, 244 and 245, a citation to the federal CSAPR rules which references the incorrect state allowance budget was corrected. This section of the proposed rules also includes additional language to clarify that three full calendar years of data are needed to calculate facility level allowance allocation amounts. Partial years do not count. Language was also added to this section to make clear that Indian country new unit set asides are handled by EPA and taken out of New York's allowance budget before any other distributions are performed.

Timing Requirements for Allowance Allocations

Sections 243.4, 244.4 and 245.4

The schedules and deadlines for the Department to submit allowance allocations to the EPA Administrator for the EERET account and existing electricity generating units in the state can be found under the timing requirements for allowance allocations sections of Parts 243, 244 and 245. The current rules only specify that by December 1, 2015 the Department will submit allowance allocations to EPA for the 2017 and 2018 control periods. The proposed rule goes further to provide deadlines for when the allowance allocations need to be submitted to EPA for the 2019 and 2020 control periods, the 2021 and 2022 control periods and every year thereafter.

New Unit Set-aside Allocations

Sections 243.5, 244.5 and 245.5

The new unit set-aside allocation sections detail how much of the state's budget of allowances is set aside for new units, the actions a designated representative would need to take for a unit be considered new, how long it takes for a new unit to be considered an existing unit, and where any extra new unit allowances go if they are not needed for new units. The proposed rules correct the deadline for when the Department needs to submit the recommended allowances for any of New York's new units to the EPA Administrator from October 31st to July 1st of each year. It also clarifies the number of control periods for which a new unit will receive allocations from the new unit set aside budget before it switches over to the allocation methodology that applies to existing units.

Energy Efficiency and Renewable Energy Technology Account

Sections 243.6, 244.6 and 245.6

The energy efficiency and renewable energy technology (EERET) account sections of Parts 243, 244 and 245 provide NYSERDA direction

regarding the sale of allowances allocated to the EERET account. These sections of Parts 243, 244 and 245 direct NYSERDA to make allowances available for sale on the open market no later than 30 days after they are deposited in the EERET account. These sections also include an explanation of what happens if allowances are forfeited back to the Department because NYSERDA failed to sell or distribute the EERET account allowances within the prescribed time period. New text was added to the proposed rules to address the handling of unallocated Indian country new unit set aside allowances. Such allowances will be deposited into the EERET account.

Changes to Part 200

Section 200.9 was modified to list the specific sections of 40 CFR 97 and the Federal Register that are incorporated by reference in Parts 243, 244 and 245.

Text of proposed rule and any required statements and analyses may be obtained from: Marie Barnes, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: air.regs@dec.ny.gov

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

Public comment will be received until: July 29, 2018.

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

Regulatory Impact Statement

INTRODUCTION

On November 12, 2015 New York State promulgated 6 NYCRR Part 243, Transport Rule NO_x Ozone Season Trading Program, 6 NYCRR Part 244, Transport Rule NO_x Annual Trading Program, and 6 NYCRR Part 245, Transport Rule SO_2 Trading Program. These rules were adopted to allow the Department to allocate Cross-State Air Pollution Rule (CSAPR) allowances to regulated entities in New York. On December 1, 2015 the Department submitted Parts 243, 244 and 245 to EPA for incorporation into the New York State Implementation Plan (SIP). EPA provided comments on the aforementioned SIP submission on June 2, 2016 and November 28, 2016. In this rulemaking the Department is proposing to repeal and replace Parts 243, 244 and 245 to address issues raised by EPA's comments. In addition, attendant changes will be made to 6 NYCRR Part 200.

CSAPR is a regional cap-and-trade program that regulates emissions from large fossil fuel-fired electricity generating units (EGUs) that have a nameplate capacity greater than 25 megawatts electrical (MWe) and produce electricity for sale. The proposed changes are necessary to ensure that New York State receives EPA's SIP approval and maintains control of CSAPR allocations to regulated entities within the state under Parts 243, 244 and 245.

STATUTORY AUTHORITY

The statutory authority for this action is found in the Environmental Conservation Law (ECL), Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105.

ECL Section 1-0101 makes it the policy of New York State to conserve, improve and protect natural resources, the environment, and control air pollution in order to enhance the health, safety, and welfare of the people of New York State and their overall economic and social wellbeing and coordinate the State's environmental plans, functions, powers and programs with those of the federal government and other regions and manage air resources. This section also makes it the policy of the State to foster, promote, create and maintain conditions for air resources that are shared with other states.

ECL Section 3-0301 states that it shall be the responsibility of the Department to carry out the environmental policy of the state. In furtherance of that mandate, Section 3-0301(1)(a) gives the Commissioner authority to "[c]oordinate and develop policies, planning and programs related to the environment of the state and regions thereof. . . ." Section 3-0301(1)(b) directs the Commissioner to "[p]romote and coordinate management of air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion."[1] Pursuant to ECL Section 3-0301(1)(i), the Commissioner is charged with promoting and protecting the air resources of New York State by providing for the prevention and abatement of air pollution. Section 3-0301(2)(a) authorizes the Commissioner to adopt rules and regulations "to carry out the purposes and provisions" of the ECL. Section 3-0301(2)(g) allows the Commissioner to enter and inspect sources of air pollution and to verify their compliance with applicable regulations. Section 3-0301(2)(m) gives the Commissioner authority to "[a]dopt such rules, regulations, and procedures as may be necessary, convenient, or desirable to effectuate the purposes of this chapter."

ECL Section 19-0103 declares that it is the policy of New York State to maintain a reasonable degree of purity of air resources, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the State, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the state.

ECL Section 19-0105 declares that it is the purpose of ECL Article 19 to safeguard the air resources of New York State under a program that is consistent with the policy expressed in Section 19-0103 and other provisions of Article 19.

ECL Section 19-0107 provides definitions to be used in the application of the requirements of Article 19 of the ECL.

ECL Section 19-0301 declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution and shall include in such regulations provisions prescribing the degree of air pollution that may be emitted to the air by any source in any area of the state.

ECL Section 19-0302. This section states that permit applications, renewals, modifications, suspensions and revocations will be governed by rules and regulations adopted by the Department, and that permits issued may not "include performance, emission or control standards more stringent than any established by the Act or by [EPA] unless such standards are authorized by rules or regulations."[2]

ECL Section 19-0303 provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution, various air contamination sources, and particular areas of the state.

ECL Section 19-0305 authorizes the Department to enforce the codes, rules and regulations established in accordance with Article 19.

ECL Section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA. Section 19-0311 specifically requires that complete permit applications must include, among other things, compliance plans and schedules of compliance. This section further expresses that any permits issued must include, among other things, terms setting emissions limitations or standards, terms for detailed monitoring, record keeping and reporting, and terms allowing Department inspection, entry, and monitoring to assure compliance with the terms and conditions of the permit.

ECL Sections 71-2103 and 71-2105 describe the civil and criminal penalty structures for violations of Article 19.

LEGISLATIVE OBJECTIVES

Articles 1 and 3 of the ECL set out the overall state policy of reducing air pollution and providing clean, healthy air for the citizens of New York. These Articles provide general authority to adopt and enforce measures to achieve this goal, including the regulation of stationary sources of air pollution.

In addition to the general powers and duties of the Department and Commissioner to prevent and control air pollution found in Articles 1 and 3 of the ECL, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air resources of New York from pollution. To facilitate this purpose, the Legislature authorized the Department to formulate, adopt, amend, and repeal codes, rules, and regulations for preventing, controlling, or prohibiting air pollution. The legislative policy, as set forth in the Article 19, is to maintain a reasonable degree of purity of air resources which is consistent with public health and welfare, industrial development of the state, propagation and protection of flora and fauna, and the protection of physical property and other resources, while integrating sound environmental practices.

This proposal furthers these statutory and public policy objectives because it would allow the Department to control emissions of NO_x and SO_2 that contribute to local and regional nonattainment of the ozone and PM2.5 National Ambient Air Quality Standards (NAAQS). State regulation of these pollutants protects New York's air resources as well as the health and welfare of the public.

NEEDS AND BENEFITS

On November 12, 2015, the Department promulgated Parts 243, 244 and 245. These regulations make explicit the allowance allocation method New York uses to distribute federal CSAPR allowances for NO_x ozone season emissions, annual NO_x emissions and annual SO_2 emissions. Parts 243, 244 and 245 give the state control of CSAPR allowance allocation to New York sources affected by CSAPR beginning with the 2017 control period. The responsibility for implementing all other aspects of CSAPR remains with EPA under a Federal Implementation Plan (FIP). Parts 243, 244, and 245 establish, only, the allocation methodology New York will use to distribute CSAPR allowances to in-state sources. Since all other portions of CSAPR remain under EPA control, and the Department submitted these regulations to EPA as a partial SIP. EPA approval of the Department's SIP is needed to maintain control of the allocation process.

In its comments on Parts 244 and 245[3], EPA recommended technical corrections, clarifications, cross-reference revisions and deadline adjustments. EPA did not comment on Part 243 since the Transport Rule NO_x Ozone Season Trading Program was being replaced by the CSAPR NO_x Ozone Season Group 2 Trading Program. Although specific comments on Part 243 were not provided, EPA's suggested revisions to Parts 244 and 245 easily transfer to Part 243. Addressing these comments will correct inaccuracies and provide symmetry between CSAPR and the amendments being proposed to Parts 243, 244 and 245.

The proposed replacement of Parts 243, 244 and 245 will address:

- Erroneous citations of the federal rule for NYS allowance budgets and definitions,
- Incorrect deadlines for:
  - Submitting allocations to EPA for control periods
  - Submitting New Unit Set Aside (NUSA) allocations to EPA, and
- Improper inclusion of Indian Country NUSA allowances in the NYS budget

EPA also requested minor editorial changes to:

- Incorporate by reference different parts of CSAPR into the Department's rules,
- Match definitions in this set of rules to CSAPR,
- Clarify the timing and method for when a new unit becomes an existing unit for allowance allocation purposes,
- Include a disposition mechanism for any unallocated Indian Country NUSAs,
- Ensure petitions for applicability determinations are received by EPA, and
- Change the term "Transport Rule" to "CSAPR" for consistency between state and federal rules.

COSTS

New York's proposed revisions to Parts 243, 244 and 245 are administrative corrections that will not result in additional costs to affected sources, the Department or local government entities.

PAPERWORK

The proposed repeal and replacement of Parts 243, 244 and 245 will not impose any new paperwork requirements for regulated parties.

LOCAL GOVERNMENT MANDATES

This proposal is not expected to result in any additional recordkeeping, reporting, or other requirements for any local government entity.

DUPLICATION

The proposed regulations do not duplicate, overlap, or conflict with any other State or federal requirements.

ALTERNATIVES

The Department considered alternatives before submitting a proposal for repeal and subsequent replacement of Parts 243, 244 and 245:

First, the Department could repeal 6 NYCRR Parts 243, 244 and 245 and accept full implementation of the FIP. This would result in EPA allocating CSAPR allowances to NYS generators under the FIP. EPA's FIP allocation strategy does not change over time and may not reflect operational changes within the mix of sources that generate electricity throughout New York. The Department would lose control over allowance allocation, and could no longer utilize the allocation program to meet the specific needs of New York's regulated community. In addition, allowances for the Energy Efficiency Renewable Energy Technology (EERET) account, administered and sold by NYSERDA, to support clean energy programs that reduce emissions would not exist under this alternative.

Second, the Department could take no action. Taking no action would lead to EPA rejecting the Department's previously submitted revisions to the SIP resulting in EPA's full implementation of the FIP. In addition, the inoperable regulations would cause confusion in the regulated community. Under this alternative, Parts 243, 244 and 245, although still effective, would be irrelevant as allowances would be allocated by EPA under a FIP. Consistent with the repeal alternative above, the Department would lose control of the allowance allocations and the sale of allowances by NYSERDA would not exist.

FEDERAL STANDARDS

This proposal does not result in the imposition of requirements that exceed any minimum standards of the federal government for the same or similar subject areas.

COMPLIANCE SCHEDULE

The proposed revisions result in administrative corrections that do not alter the compliance schedule currently in operation under EPA's FIP.

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[1] Internal citations omitted.

[2] Internal citations omitted.

[3] EPA sent comments to DEC regarding Parts 244 and 245 on June 2, 2016 and November 28, 2016.

Regulatory Flexibility Analysis

EFFECT OF RULE

There are no small businesses affected by this rulemaking. The only local government affected by this rulemaking is the Jamestown Board of Public Utilities (JBPU) operator of the Samuel A. Carlson Generating Station. S.A. Carlson is an electricity generation station located in Jamestown, New York. S.A. Carlson operates 3 units that are regulated under the Cross-State Air Pollution Rule (CSAPR).

COMPLIANCE REQUIREMENTS

This rulemaking does not impose any new compliance obligations on regulated entities. This rulemaking, once approved by EPA as part of the New York State Implementation Plan (SIP), will give the Department the authority to allocate CSAPR allowances to regulated entities in New York as well as the New York State Energy Research and Development Authority. EPA is responsible for implementing and enforcing the provisions of the CSAPR program. Affected facilities must have sufficient allowances in their CSAPR accounts on the compliance dates in the federal program.

PROFESSIONAL SERVICES

JBPU operates S.A. Carlson's units in compliance with CSAPR using the current amount of budgeted allowances and will not need any additional professional services as a result of this proposal.

COMPLIANCE COSTS

Under the Department's proposed allocation method, the affected units at S.A. Carlson are expected to receive CSAPR allowances for the 2017 NO_x control periods that are very close to what the average actual emissions have been in recent years. S.A. Carlson has switched fuel from coal to primarily natural gas. This will essentially eliminate the need for SO_2 allowances. As of September 1, 2017, CSAPR annual allowances were selling for \$3.50/ton NO_x and \$1.75/ton SO_2. On that date, NO_x Ozone Season Group 2 allowances were selling for \$530/ton. [1]

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

S.A. Carlson no longer burns coal in any of the electricity generating units at their facility. Units #11 and #12 have been shut down. Unit #20 continues to burn natural gas. The remaining units at the facility (#9, #10) have switched from coal to natural gas. This will minimize the need for NO_x allowances and virtually eliminate the need for SO_2 allowances. The Department expects that S.A. Carlson will be provided with an adequate number of allowances to operate within the emissions cap. The NO_x allowances allocated to the facility for 2017 and 2018 under the Department's allocation strategy is 154 tons. The facility emitted 128 tons of NO_x in 2015 and 114 tons in 2016. The facility emitted less than one ton of SO_2 in 2015 and 2016.

EPA allocated 31 tons of NO_x Ozone Season Group 2 allowances to S.A. Carlson for 2017 and 2018 using a procedure analogous to that used by the Department for the annual CSAPR programs. The facility emitted 47 tons of NO_x during the 2015 ozone season and 51 tons of NO_x during the 2016 ozone season. Had the CSAPR NO_x Ozone Season Group 2 program been in place those years, the facility would have had to purchase up to 20 allowances which would have cost approximately \$10,600 per year based on the September 1, 2017 market conditions. During the 2016 ozone season, the facility generated 74,834 megawatt-hours of electricity.[2] The unit cost for NO_x allowances for the 2016 ozone season would have been \$0.14 per megawatt-hour.

MINIMIZING ADVERSE IMPACT

The Department does not expect these rules will impose any adverse economic impacts on small businesses or local governments. CSAPR regulates NO_x and SO_2 emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. These rules only address the method by which allowances are allocated to affected units within New York State. All of the compliance obligations for the affected facilities are currently governed by EPA's Federal Implementation Plan and will remain the same if the Department transitions to a partial SIP and begins to allocate allowances for the 2017 control periods. The Department would review the allocations every year in order to account for any operational changes. By adjusting allocations on a periodic basis, the Department can adapt to an ever-changing electricity marketplace and regulatory environment. This approach is more flexible than EPA's allocation strategy in which allocations do not change over time.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department held stakeholder meetings on July 12, 2017 and September 5, 2017 in which facility representatives of affected CSAPR sources, including local governments, were provided an opportunity to provide pre-proposal input on the rule making process.

The Department plans on holding public hearings during the proposal stage. The location of this hearing will be convenient for persons from local governments and small businesses to participate. Additionally, there would be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments on the proposed regulation.

CURE PERIOD

In accordance with NYS State Administrative Procedures Act (SAPA) Section 202-b, this rulemaking does not include a cure period because the Department is undertaking this rulemaking for EPA approval of part of the New York SIP and to give the Department the authority to allocate CSAPR allowances to regulated entities in New York as well as the New York State Energy Research and Development Authority.

[1] "Argus Air Daily", Issue 17-169, September 1, 2017.

[2] EPA Clean Air Markets Division, www.epa.gov/airmarkets.

Rural Area Flexibility Analysis

A RAFA is not required for this rulemaking. The Cross-State Air Pollution Rule (CSAPR) regulates the Environmental Protection Agency's (EPA's) regional NO_x and SO_2 cap and trade program designed to control emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. Parts 243, 244 and 245 were adopted on November 12, 2015 to give DEC the authority to allocate federal CSAPR allowances to in-state generators and the New York State Energy Research and Development Authority. This rulemaking would only make corrections, requested by EPA, to Parts 244 and 245, along with the replacement of Part 243 pursuant to the EPA's CSAPR Update Rule adopted on September 7, 2016. The Department does not expect that this rulemaking would impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The compliance obligations for the affected facilities are currently governed by EPA under CSAPR and will remain the same when the Department begins to allocate allowances for the 2017 control periods.

Job Impact Statement

A JIS is not required. CSAPR regulates EPA's regional NO_x and SO_2 cap and trade program designed to control emissions from large fossil fuel-fired electricity generating units that have a nameplate capacity greater than 25 megawatts electrical and produce electricity for sale. Parts 243, 244 and 245 were adopted on November 12, 2015 to give DEC the authority to allocate federal CSAPR allowances to in-state generators and the New York State Energy Research and Development Authority. This rulemaking would only make corrections, requested by EPA, to Parts 244 and 245, along with the replacement of Part 243 pursuant to the EPA's CSAPR Update Rule adopted on September 7, 2016. The Department does not expect this rule to have an adverse impact on jobs and employment opportunities. The compliance obligations for the affected facilities are currently governed by EPA under CSAPR and will remain the same when the Department begins to allocate allowances for the 2017 control periods.

Department of Financial Services

NOTICE OF ADOPTION

Special Risk Insurance

I.D. No. DFS-52-17-00001-A
Filing No. 397
Filing Date: 2018-04-30
Effective Date: 2018-05-16

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

Action taken: Amendment of Part 16 (Regulation 86) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 307, 308 and art. 63

Subject: Special Risk Insurance.

Purpose: To update section 16.12(e) to incorporate changes and additions to class 2 risks introduced by 5/10/17 Public Notice.

Text or summary was published in the December 27, 2017 issue of the Register, I.D. No. DFS-52-17-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. DFS-18-17-00020-RP

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

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

Statutory authority: Financial Services Law, sections 202 and 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 small group health insurance market.

Substance of revised rule (Full text is posted at the following State website: https://www.dfs.ny.gov): The title of Part 361 is amended to better capture the application of the Part.

The title of Section 361.6 is amended to clarify the time period of its application.

A new Section 361.9, entitled "Market stabilization pools for the small group health insurance market for the 2017 plan year," is added that permits the application of a market stabilization mechanism on the small group health insurance market for the 2017 plan year if the Superintendent determines that the federal risk adjustment program has adversely impacted the small group health insurance market in the State and that amelioration is necessary. The market stabilization mechanism will comprise of a transfer equal to a uniform percentage of ACA-risk adjustment transfers, as deemed necessary to correct any one or more of the adverse market impact factors specified in the Section. The uniform percentage may not exceed 30 percent. The contents of this section have been previously promulgated by the Superintendent on an emergency basis.

A new Section 361.10, entitled "Market stabilization pools for the individual and small group health insurance markets for plan years 2018 and thereafter," is added that permits the application of a market stabilization mechanism on the individual and small group health insurance markets for the 2018 plan year and all plan years thereafter, if the Superintendent determines that the federal risk adjustment program has adversely impacted the individual and small group health insurance market in the State and that amelioration is necessary. The market stabilization mechanism will comprise of a transfer equal to a uniform percentage of ACA-risk adjustment transfers, as deemed necessary to correct any one or more of the adverse market impact factors specified in the Section.

Revised rule compared with proposed rule: Substantial revisions were made in section 361.9.

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

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

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

Revised Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301, 1109, and 3233.

Financial Services Law § 202 establishes the office of the Superintendent of Financial Services ("Superintendent").

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

Insurance Law § 1109 subjects health maintenance organizations ("HMOs") complying with Public Health Law Article 44 to certain sections of the Insurance Law and authorizes the Superintendent to promulgate regulations effecting the purpose and provisions of the Insurance Law and Public Health Law Article 44.

Insurance Law § 3233 requires the Superintendent to promulgate regulations to assure an orderly implementation and ongoing operation of the open enrollment and community rating requirements in Insurance Law §§ 3231 and 4317, which may include mechanisms designed to share risks or prevent undue variations in insurer claims costs.

2. Legislative objectives: Insurance Law § 3233 requires the Superintendent to promulgate regulations to assure an orderly implementation and ongoing operation of the open enrollment and community rating requirements in Insurance Law §§ 3231 and 4317, applicable to small group and individual health insurance policies and contracts, including member contracts under Article 44 HMOs and Medicare Supplement policies and contracts. The regulations may include mechanisms designed to share risks or prevent undue variations in claims costs. A risk adjustment program is intended, in part, to reduce or eliminate premium differences between insurers and HMOs (collectively, "carriers") based solely on expectations of favorable or unfavorable risk selection.

Pursuant to this mandate, the Superintendent promulgated 11 NYCRR 361 (Insurance Regulation 146), under which the Department established risk adjustment for community rated small group and individual health insurance and Medicare Supplement policies and contracts. Subsequently, the federal Affordable Care Act ("ACA") required the Center for Medicare and Medicaid Services ("CMS") to administer a risk adjustment program for the individual and small group health insurance markets, but not for Medicare Supplement policies and contracts. A state may establish its own risk adjustment program pursuant to 45 C.F.R. § 153.310(a)(1). In addition, a U.S. Health and Human Services ("HHS") interim final rule, dated May 11, 2016, invites states to examine local approaches under state legal authority to help ease the transition to new health insurance markets. See 81 Fed. Reg. at 29152. Starting with policy year 2014, the Superintendent suspended New York's pre-ACA risk adjustment program for individual and small group health insurance markets, and New York's individual and small group health insurance markets since have been subject only to the federal program.

This rule accords with the public policy objectives that the Legislature sought to advance in Insurance Law § 3233 by establishing market stabilization pools for the small group health insurance market for the 2017 plan year, and for the individual and small group health insurance markets for the 2018 plan year and all plan years thereafter, to ameliorate any disproportionate impact that federal risk adjustment may have on carriers, address the unique aspects of the individual and small group health insurance markets in New York, and prevent unnecessary instability in the health insurance market.

3. Needs and benefits: In the early 1990s, the New York Legislature enacted Insurance Law § 3233 because it recognized the need for a mechanism to stabilize the health insurance markets and premium rates in New York so that premiums do not unduly fluctuate and carriers are reasonably protected against unexpected significant shifts in the number of insureds. More recently, the federal government recognized in the ACA that a federal risk adjustment mechanism would help provide affordable health insurance, reduce incentives for carriers to avoid enrolling less healthy people, and stabilize premiums in the individual and small group health insurance markets.

Prior to implementation of the ACA in 2014, the New York Department of Financial Services ("Department"), after consultation with carriers, concluded New York should use the federal risk adjustment program, rather than have the state implement the ACA-risk adjustment. CMS conducted risk adjustment in 2014 and announced preliminary risk adjustment results for plan year 2015 in April 2016. These results have had a disproportionate impact on certain carriers in the New York market as a whole. Similarly, in 2017, DFS reviewed preliminary and final data from the 2016 plan year that raises the same concerns.

CMS has proposed changes to its programs and may make additional changes. However, the federal risk adjustment methodology still does not yet adequately address the impact of administrative costs or profit of the carriers, or the manner in which New York counts children in certain calculations. The federal risk adjustment methodology also does not properly account for network differences, plan efficiencies, effective care coordination, and disease management. The Superintendent anticipates that the federal risk adjustment program will continue to adversely impact the individual and small group health insurance markets in this State for the 2017 plan year and beyond to such a degree as to require a remedy. Many factors are expected to cause the adverse impact, including:

(1) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the calculation is based in part upon a medical loss ratio computation that includes administrative expenses, profits and claims rather than only using claims; and

(2) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the program does not appropriately address this State's rating tier structure. For New York, the federal risk adjustment program alters the definition of billable member months to include a maximum of one child per contract in the billable member month count. This understatement of billable member month counts: (a) lowers the denominator of the calculation used to determine the statewide average premium and plan liability risk scores; (b) results in the artificial inflation of both the statewide average premium and plan liability risk scores; and (c) further results in inflated payments transfers through the federal risk adjustment program.

This rule authorizes the Superintendent to implement a market stabilization pool for the small group market for the 2017 plan year and for the individual and small group health insurance markets for the 2018 plan year and beyond if, after reviewing the impact of the federal risk adjustment program on New York markets for the respective plan year, the Superintendent determines that a market stabilization mechanism is a necessary amelioration.

The rule requires a carrier designated as a receiver of a payment transfer from the federal risk adjustment program to remit to the Superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool. The Superintendent will determine the uniform percentage based on reasonable actuarial assumptions. For the 2018 plan year, the superintendent provided guidance prior to the submission of rates as to the expected uniform percentage to be applied. The uniform percentage shall be in addition to the 14% adjustment due to CMS's removal of non-claims based administrative expenses from the federal risk adjustment calculation. The 2018 plan year is the first year that CMS's removal of non-claims based administrative expenses from the federal risk adjustment calculation will be in effect. For the 2019 plan year and beyond, the superintendent will provide guidance to carriers, within a reasonable time before the date on which rate applications must be submitted to the department, as to the assumptions for market stabilization they should include in developing premium rates for the applicable plan year.

The market stabilization mechanism under the rule is distinct from the federal risk adjustment and will address the disparate impact of federal risk adjustment on the state's market. The state mechanism would merely address the needs of the New York market arising out of this disparate impact and would not serve to undo the federal mechanism. It would not hinder or impede the ACA's implementation because the federal risk adjustment still would be performed. A carrier is able to comply with both the federal risk adjustment program and this state's market stabilization mechanism because the state mechanism would be implemented after the federal risk adjustment.

4. Costs: This rule imposes compliance costs on carriers that elect to issue policies or contracts subject to the rule. The costs are difficult to estimate and will vary from carrier to carrier depending on the impact of the federal risk adjustment program on the market, including federal payment transfers, statewide average premiums, and the ratio of claims to premiums.

The Department will incur costs for the implementation and continuation of this rule. Department staff are needed to review the impact that the federal risk adjustment program will have on the market. Furthermore, if the Superintendent implements a market stabilization pool, the Department must then send a billing invoice to each carrier required to make a payment into the pool, collect the payments, notify each carrier of the amount the carrier will receive from the market stabilization pool, and distribute the payments from the pool. However, the Department should be able to absorb these costs in its ordinary budget. Under § 361.7 of the existing rule, the Superintendent also could hire a firm to administer the pool. The cost necessary to hire such a firm would have to be determined consistent with state procurement requirements.

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

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

6. Paperwork: This rule requires carriers designated as receivers of a payment transfer from the federal risk adjustment program to remit an amount equal to a uniform percentage of that payment transfer to the Superintendent as determined by the Superintendent. The rule also requires the Superintendent to send a billing invoice to each carrier required to make a payment, collect the payments, notify each carrier of the amount the carrier will receive from the market stabilization pool, and make distributions from the pool to the carriers.

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

8. Alternatives: The Department considered not establishing a market stabilization pool for the individual group health insurance market. However, the Department is concerned about the disproportionate impact that federal risk adjustment may have on carriers in both the small group and individual markets and possible unnecessary instability in either health insurance market that would adversely impact insureds. As a result, the Department determined that it is necessary to establish a market stabilization pool for both the individual and small group health insurance markets.

The Department also considered a cap of other than 30% of the amount to be received from the federal risk program for the 2017 plan year and 40% of the amount to be received from the federal risk program for the 2018 plan year, with regard to the uniform percentage of the payment

transfer for the market stabilization pool under this rule. However, Department actuaries considered the fact that (1) the federal risk adjustment program calculates risk scores and payments transfers based in part upon a medical loss ratio computation that includes administrative expenses, profits, and claims, and (2) it does not appear to fully address New York's rating tier structure. The actuaries determined that (1) up to 30% of the amount to be received from the federal risk adjustment program is the maximum amount that would be necessary for a payment transfer under this rule for the 2017 plan year and (2) up to 40% of the amount to be received from the federal risk adjustment program is the maximum amount that would be necessary for a payment transfer under this rule for the 2018 plan year. No cap was included for any year after 2018 in light of the difficulties in precisely forecasting the appropriate cap for these future years at the current time.

9. Federal standards: The rule does not exceed any minimum standards of the federal government for the same or similar subject areas. Rather, the amendment to the rule complements the federal risk adjustment program consistent with guidance from federal regulators.

10. Compliance schedule: The regulation will take effect upon publication of the Notice of Adoption in the State Register.

Revised Regulatory Flexibility Analysis

After revision of the rule it remains the case that the proposed rule will not have a substantial adverse impact on small businesses and local governments for the reasons set forth below. Changes made to the last published rule do not necessitate revision to the previously published statement.

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

Local governments: The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at insurers and HMOs that elect to issue policies or contracts subject to the rule.

Revised Rural Area Flexibility Analysis

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

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule imposes additional reporting, recordkeeping, and other compliance requirements by requiring carriers, including carriers located in rural areas, designated as receivers of a payment transfer from the federal risk adjustment program, to remit a uniform percentage of that payment transfer to the Superintendent of Financial Services ("Superintendent") as determined by the Superintendent. However, no carrier, including carriers in rural areas, should need to retain professional services to comply with this rule.

3. Costs: This rule imposes compliance costs on carriers that elect to issue policies or contracts subject to the rule, including carriers in rural areas. The costs are difficult to estimate and will vary from carrier to carrier depending on the impact of the federal risk adjustment program on the market, including federal payment transfers, statewide average premiums, and the ratio of claims to premiums. However, any additional costs to carriers in rural areas should be the same as for carriers in non-rural areas.

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

5. Rural area participation: Carriers in rural areas will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department's website.

Revised Job Impact Statement

After revision of the rule it remains the case that this rule should not adversely impact jobs or employment opportunities in New York State. This rule authorizes the Superintendent of Financial Services ("Superintendent") to implement a market stabilization pool for the individual and small group health insurance markets if, after reviewing the impact of the federal risk adjustment program on this market, the Superintendent determines that a market stabilization mechanism is a necessary amelioration. This rule prudently ameliorates a possible disproportionate impact that federal risk adjustment may have on insurers and health maintenance organizations, addresses the needs of the individual and small group health insurance markets in New York, and prevents unnecessary instability in the overall health insurance market. Changes made to the last published rule do not necessitate revision to the previously published statement.

Assessment of Public Comment

The Department of Financial Services (the "Department") has received several comments in response to the Proposed Sixth Amendment to 11 NYCRR 361 (Insurance Regulation 146). After consideration of these comments and in response thereto, the Department has revised the proposed amendment to incorporate matters previously promulgated on an emergency basis.

In general, the comments set forth the commenters' opinions as to the prudence of issuing the proposed amendment, rather than provide significant alternatives. Some commenters raised issues of a purely legal nature as to perceived legal deficiencies, including perceived deficiencies of a procedural, jurisdictional, or constitutional nature. 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 entry into force of the proposed amendment.

While the State Administrative Procedure Act ("SAPA") does not require the Department to respond to the legal arguments of commenters, 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"), which has the regulatory – and sole enforcement – authority over the ACA, has regularly 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 the Proposed Amendment does.

Comment: One industry commenter suggested that the Department explain in more detail the issues with ACA-risk adjustment that the Department seeks to address.

Response: After review, the impacts that the proposed amendment seeks to remedy are amply addressed both in the text of the proposed amendment and in HHS's own rulemaking, including as recently as the 2019 Final Notice of Benefit and Payment Parameters, where HHS notes the disparate impact and again encourages states to take action under state authority to address the magnitude of risk adjustment transfers. This is also true of section 361.9, as added in the revised rulemaking. No changes were made in response to this comment.

Comment: One commenter noted that the proposed amendment provides significant discretion in implementing the market stabilization pool and the uniform percentage that will be applied if the pool is implemented and further suggested that the Department add criterion limiting that discretion and clarify that the uniform percentage selected under the proposed rule be based on reasonable actuarial assumptions.

Response: The proposed amendment contemplates only the discretion necessary to adapt to the new circumstance of any particular plan year. The proposed amendment would only allow for the implementation of a market stabilization pool based on a determination that the ACA-risk adjustment adversely impacted the particular market and only if it is determined necessary. These criteria are sufficient guides of discretion in this area, particularly given the difficulty in anticipating all the ways in which the market may in the future be impacted. Further, the proposed amendment and section 361.9 as added in the revised rulemaking, already require that the determination of the uniform percentage must be determined "based on reasonable actuarial assumptions". As such, no changes were made in response to this comment.

Comment: One commenter suggested that the proposed amendment should be changed to account for regional differences and to correct geographic biases.

Response: Because the proposed amendment and section 361.9 added in the revised rulemaking seek to remedy the disparate impact of the ACA-risk adjustment program that applies uniformly statewide, the Department has determined that this is not the appropriate place to deal with regional differences. As such, no changes were made in response to this comment.

Comment: One commenter suggested that the proposed amendment failed to account for notice to the carriers about what the uniform percentage will be for a particular year, so that insurers may use that information in setting rates.

Response: The proposed amendment contains a provision requiring the Department to provide guidance before the date on which rate applications are required. Additionally, that guidance may include the anticipated uniform percentage adjustment. Given that the decision whether to implement a market stabilization pool and the final determination of the uniform percentage adjustment must come after ACA-risk adjustment has been finalized and only after the implementation is determined necessary, it would not be possible to give any further guidance than contemplated in the proposed amendment. As such, no changes were made in response to this comment.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Suitability in Life Insurance and Annuity Transactions

I.D. No. DFS-52-17-00020-RP

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

Proposed Action: Amendment of Part 224 (Regulation 187) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 308, 309, 2103, 2104, 2110, 2123, 2208, 3209, 4224, 4226, 4525 and art. 24

Subject: Suitability in Life Insurance and Annuity Transactions.

Purpose: Establish suitability standards for life insurance and clarify that a transaction must be in the best interest of the consumer.

Substance of revised rule (Full text is posted at the following State website: http://www.dfs.ny.gov): The words "life insurance" were added to the title of the regulation consistent with the amendments made to the text of the regulation and standards already established by the Insurance Law.

Section 224.0 is revised to expand the purpose of the regulation to apply to life insurance and explain that the sections of the Insurance Law that establish standards of conduct for insurers and producers require any recommended transaction to be in the best interest of the consumer and to appropriately address the insurance needs and financial objectives of the consumer at the time of the transaction.

Section 224.1 is amended to apply the standards set forth in the regulation to life insurance transactions.

Section 224.2 is revised to replace the term "contract" with the term "policy" for consistency with the amendment, and to expand the exemptions.

Section 224.3 adds new definitions and revises current definitions consistent with the broadening of the regulation, which now includes life insurance and transactions other than a purchase or replacement, such as modifications and elections of contractual provisions. The amendment to this section adds to the definition of "suitability information" for consistency purposes and adds a definition for the term "suitable." The amendment to this section also adds definitions of "transaction", "sales transaction" and "in-force transaction."

Section 224.4 is amended so that the duties of insurers and producers, in addition to applying to annuity recommendations, also now apply to life insurance recommendations. Section 224.4 is amended to clarify that a producer, or an insurer where no producer is involved, shall act in the best interest of the consumer. The section is also amended to explain that the producer, or the insurer where no producer is involved, acts in the best interest of the consumer when the recommendation is based on the consumer's suitability information and reflects the care that a prudent person in a like capacity would exercise in a similar situation., when the transaction is suitable, and when the consumer has been reasonably informed of the consequences of the transaction. The section also clarifies that the financial or other interests of the producer, insurer, or other party other than the consumer, shall not be considered in any respect in making the recommendation. Section 224.4 is amended to add new subsections that: require a producer, or an insurer where no producer is involved, to disclose to the consumer the information used to provide the recommendation and document with a consumer signed statement any refusal to provide suitability information or any decision to enter into a sales transaction that is not based on the producer's recommendation; prohibit a producer from making a recommendation unless the producer has a reasonable basis to believe that the consumer can meet the financial obligations under the policy; and prohibit a producer from stating that a recommendation is part of the financial or investment planning unless the producer has an appropriate professional designation. Section 224.4 is amended to state that any requirement applicable to a producer under the regulation applies to every producer in the transaction who has participated in the making of the recommendation and received compensation as a result of the sales transaction, regardless of the level of contact made with the consumer. Section 224.4 is also amended to state that nothing in the regulation shall be construed to prohibit or limit compensation of a producer that is otherwise permitted under the Insurance Law and Part 30 of this Title (Insurance Regulation 194). This section is also amended to clarify that a producer may limit the range of policies recommended to consumers based on a captive or affiliation agreement with a particular insurer as long as required disclosures are provided.

A new section 224.5 is added to address duties of insurers and producers with respect to in-force transactions and to establish a best interest standard of care. The new section explains that the producer, or the insurer where no producer is involved, acts in the best interest of the consumer when the recommendation is based on the consumer's suitability information and reflects the care that a prudent person in a like capacity would exercise in a similar situation, when the transaction is suitable, and when the consumer has been reasonably informed of the consequences of the transaction. The section also clarifies that the financial or other interests of the producer, insurer, or other party other than the consumer, shall not be considered in any respect in making the recommendation. The section prohibits a producer from stating that a recommendation is part of the financial or investment planning unless the producer has an appropriate professional designation, and also states that any requirement applicable to a producer under the regulation applies to every producer in the transaction who has participated in the making of the recommendation. Lastly, this new section 224.5 prohibits a producer from making a recommendation to a consumer to enter into an in-force transaction about which the producer has inadequate knowledge.

Section 224.5 is renumbered to section 224.6 and adds new subdivisions requiring an insurer to: not effectuate a sales transaction unless the transaction is suitable based on the consumer's suitability information; establish, maintain, and audit a system of supervision that is designed to achieve compliance with this Part; ensure that producers are adequately trained with respect to the insurer's policies to make recommendations; establish and maintain procedures to prevent financial exploitation and abuse; provide any policy information reasonably requested by the consumer regarding the consumer's in-force policy; provide comparison information showing differences between fee-based and commission-based versions of a product; and provide relevant policy information and information required by Regulation 60 to a producer for evaluating a replacement transaction.

Section 224.6 is renumbered to section 224.7 and deletes the word "insurance" that precedes the word "producer" to be consistent with the definition of "producer" in section 224.3(c).

Section 224.7 is renumbered to section 224.8 and changes the placement of the words "Insurance Law" consistent with other recent regulatory revisions.

Section 224.9 is added to address the effective date.

Revised rule compared with proposed rule: Substantial revisions were made in sections 224.2, 224.3, 224.4, 224.5 and 224.6.

Text of revised proposed rule and any required statements and analyses may be obtained from James V. Regalbuto, Deputy Superintendent for Life Insurance, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5027, email: james.regalbuto@dfs.ny.gov

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

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

Summary of Revised Regulatory Impact Statement (Full text is posted at the following State website:http://www.dfs.ny.gov):

1. Statutory authority: The authority of the Superintendent of Financial Services ("Superintendent") to promulgate the First Amendment to Insurance Regulation 187 (11 NYCRR 224) derives from Financial Services Law ("FSL") sections 202 and 302, and Insurance Law ("IL") sections 301, 308, 309, 2103, 2104, 2110, 2123, 2208, 3209, 4224, 4226, 4525, and Article 24.

FSL section 202 establishes the office of the Superintendent.

FSL section 302 and IL section 301, in pertinent part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the IL, FSL, or any other law, and to prescribe regulations interpreting the IL.

IL section 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

IL section 309 authorizes the Superintendent to make examinations into the affairs of entities doing or authorized to do business in this state as often as the Superintendent deems it expedient.

IL sections 2103 and 2104 set forth licensing requirements for insurance agents.

IL section 2110 authorizes the Superintendent to revoke or suspend the license of an insurance producer if, after notice and hearing, the producer has demonstrated untrustworthiness or incompetence, violated the IL or regulations promulgated thereunder, or engaged in certain other specified behavior.

IL section 2123, among other things, prohibits an insurance agent, insurance broker, or representative of an insurer from making misrepresentations or misleading statements about a life insurance ("LI") policy or annuity contract or an incomplete comparison for the purpose of inducing, or tending to induce, a person to lapse, forfeit or surrender any insurance policy.

IL section 2208 provides that an officer or employee of an authorized insurer that has been certified pursuant to IL Article 22 is subject to IL section 2123.

IL Article 24 prohibits unfair methods of competition and unfair or deceptive acts or practices.

IL section 3209 mandates disclosure requirements in the sale of LI, annuities and funding agreements and authorizes the Superintendent to promulgate regulations to implement this section.

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

IL section 4525 applies IL sections 2110(a), (b), (d)-(f), 2123, 3209 and 4226, and IL Articles 2, 3, and 24, to authorized fraternal benefit societies.

IL section 4226 prohibits an authorized life insurer from making misrepresentations, misleading statements about a LI policy or annuity contract or an incomplete comparison for the purpose of inducing, or tending to induce, a person to lapse, forfeit or surrender any insurance policy.

2. Legislative objectives: IL sections 2103, 2104, 2110, 2123, 2208 and Article 24 establish standards of conduct for insurance producers, including competent and trustworthy standards. IL section 4226 establishes standards of conduct for LI companies and fraternal benefit societies (collectively, "insurers"), and Article 24 permits the Superintendent to regulate trade practices in the business of insurance to prevent acts or practices that are unfair or deceptive.

This amendment accords with the public policy objectives that the Legislature sought to advance in IL 2103, 2104, 2110, 2123, 2208 and Article 24 by clarifying the duties and obligations of insurance producers and insurers to ensure that a transaction is in the consumer's best interest and appropriately addresses the consumer's insurance needs and financial objectives at the time of the transaction.

3. Needs and benefits. 11 NYCRR 224 (Insurance Regulation 187) was promulgated in 2013 and was based on the National Association of Insurance Commissioners' ("NAIC") Suitability in Annuity Transactions Model Regulation ("NAIC Model"). Since 2013, the Department of Financial Services ("Department") has monitored the financial market and the application of the regulation's standards. The primary objective of this amendment is to address deficiencies in the regulation.

The purchase of annuities and LI has become a more complex financial transaction, resulting in a greater reliance on professional advice. Products offer a wider range of benefits which are more complex, making disclosure alone inadequate and additional standards of care necessary.

A number of Department investigations and examinations since 2013 have demonstrated the need for a best interest standard of care for LI and annuity sales. The Department believes, in light of all of the facts and its expertise, that a regulation is needed to prevent insurers and producers from recommending a transaction that is properly disclosed and determined to be suitable for a consumer, but that is otherwise not in the best interest of that consumer and is designed to maximize compensation to the sellers.

The U.S. Department of Labor ("DOL") issued 29 C.F.R. 2510 (the "Rule") which expands the federal definition of investment advice and requires financial advisors to adhere to enhanced standards of conduct. The Rule makes the sale of many insurance products involving qualified money subject to a fiduciary standard. As an alternative, an exemption exists under the Best Interest Contract Exemption (26 C.F.R. 2550), where the producer would still be required to act in the best interest of the consumer. Although delays and conflicting court decisions leave the Rule's implementation uncertain, the Department believes that the best interest standard is an important consumer protection and intends to pursue this protection for NY consumers. According to the DOL's Regulatory Impact Analysis, conflicted advice is causing harm to consumers; disclosure alone would not remedy the harm. This is consistent with the Department's own observations in New York. Like the DOL, the Department believes that regulatory action is necessary. The amendment imposes a consistent standard of care across LI and annuity product lines and protects consumers from conflicted recommendations.

Regulation 187 requires a producer, or insurer where no producer is involved, to have reasonable grounds for believing that the recommendation is suitable for the consumer based on information provided by the consumer. This amendment defines "suitability" and specifies a best interest standard of care that applies to all transactions in NY, including inforce transactions generating new sales compensation, to ensure fair treatment of consumers purchasing both retirement and non-retirement annuity and LI products. This amendment adds consumer protections by: prohibiting producers from implying that any recommendation is financial planning unless the producer has such a designation; prohibiting producers from recommending a sales transaction unless the consumer has the financial ability to handle the policy; and requiring disclosure requirements to prevent financial abuse.

4. Costs: Insurers and insurance producers subject to this amendment likely will incur costs because of this amendment. The amendment expands the regulation's current training requirement, requires an insurer to establish and maintain procedures to prevent financial exploitation and abuse, and requires an insurer to provide a consumer with all relevant information to evaluate a transaction.

This amendment requires a producer or an insurer to also disclose to a consumer all relevant suitability information that provides the basis for a recommendation to enter into a sales transaction involving LI, and to document any LI sales recommendation subject to 11 NYCRR § 224.4(a) and (b) and, if relevant, to obtain a signed statement documenting a consumer's refusal to provide suitability information and when a transaction is not recommended.

However, the amendment takes a principle-based approach to compliance with the requirements of the regulation, which is expected to greatly minimize costs by allowing the leveraging of existing systems and procedures. While the costs to implement this amendment may vary by size and business, and thus difficult to estimate, the Department does not anticipate the costs to be significant. Some producers have indicated implementing a best interest standard regardless of what happens with the Rule. The Department believes that cost savings will result where the same standards apply across product types.

Insurers and producers in NY have different business models and are at different levels of readiness for compliance with the Rule. The amendment is consistent with the core requirements of the Rule but significantly less onerous in terms of supervision and compliance requirements. Firms that already comply with the Rule have minimal additional costs to comply with the amendment. The benefits of the regulation are expected to be substantial. The elimination of conflicted recommendations to consumers is expected to yield great cost savings to consumers.

This amendment does not impose additional costs on the Department or state or local governments.

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

6. Paperwork: The amendment adds a documentation requirement for any sales recommendation for LI; requires an insurer to provide a consumer with all relevant policy information with respect to evaluating a transaction; and requires an insurer to provide a producer with all relevant replacement information necessary for the evaluation of the replacement. The documentation required by this amendment with respect to LI is similar to the requirements of the current Regulation 187 and Financial Industry Regulatory Authority ("FINRA") Rule 2111 with respect to annuities. Minimal additional paperwork, including obtaining a consumer signed statement, is expected but over time costs are likely to be reduced because of consistency.

7. Duplication: The amendment does not duplicate, overlap, or conflict with other state requirements. The amendment has the potential to partially duplicate the Rule, if the Rule is fully implemented in that both rules impose a best interest standard of care and a recordkeeping requirement. Since the best interest standard of care and the recordkeeping requirement in the regulation are consistent with the Rule, there is currently no conflict. Also, it is possible that there would be no overlap whatsoever since recent conflicting court decisions have left uncertainty about the implementation of the Rule and the SEC process is uncertain.

8. Alternatives: Since the promulgation of Regulation 187 in 2013, the Department monitored developments in suitability standards and ascertained that additional oversight and regulation is needed to provide a level playing field and to protect consumers when they are considering the purchase of LI and annuities in NY or are considering a modification to existing LI and annuities. The Department participated in discussions with various stakeholders, a trade association for independent insurance agents and brokers regarding the potential impact of the Rule, finalized on April 8, 2016, and the proposed amendment on consumers, producers and insurers. The Department has conducted outreach to discuss the Rule and participated in discussions with the NAIC's Annuity Suitability Working Group.

The Department considered not implementing the amendment, but the Department has rejected this alternative because doing nothing would be disadvantageous to consumers. Moreover, NY consumers should not be denied the protections of this proposal because other regulators in other jurisdictions have not adopted similar protections. The Department is the sole regulator for the majority of insurance activities occurring in NY and maintains unique expertise that makes it appropriate for the Department to lead on issues of insurance regulation.

9. Federal standards: The Rule includes standards that apply to certain annuities and LI that involve qualified funds. The standards in this amendment utilize the standards imposed by the Rule in imposing a best interest standard of care; however, since the Rule applies only in certain circumstances where the producer receives commission from the annuity transaction; the annuity's funding comes from a tax-qualified source; or where the annuity contract or LI policy results from reinvestment of qualified

plan and IRA distributions, the amendment extends those requirements to all LI and annuity transactions in NY, regardless of the source of funds or the manner of compensation, to achieve a consistent regulatory scheme for all product types in NY. It should be noted that recent conflicting court decisions have created uncertainty about the implementation of the Rule.

10. Compliance schedule: The amendment will take effect March 1, 2019. As of the effective date, insurers and producers must comply with the requirements of the rule for any transaction with respect to an annuity contract. Six months from the effective date, insurers and producers must comply with the requirements of the rule for any transaction with respect to a LI policy.

Revised Regulatory Flexibility Analysis

1. Effect of the amendment: This amendment requires insurers to establish standards and procedures for recommendations to consumers with respect to life insurance and annuity contracts so that any transaction with respect to those contracts is in the best interest of the consumer and appropriately addresses the insurance needs and financial objectives of the consumer at the time of the transaction. The amendment clarifies statutory duties and obligations of insurance producers and insurers to establish consistent standards of conduct regardless of the product type or the source of assets funding the products.

Authorized life insurance companies and fraternal benefit societies (collectively, "insurers"), and insurance producers are subject to this amendment. The Department of Financial Services ("Department") finds that the rule, as applicable to insurers, will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that none of the insurers authorized to do a life insurance business in New York State come within the definition of "small business" as defined in State Administrative Procedure Act ("SAPA") § 102(8). The Department reviewed filed reports on examination and annual statements of such authorized insurers and concluded that none of these entities come within the definition of "small business" because there are none that are both independently owned and have fewer than one hundred employees. In contrast to insurers, the Department believes that many producers are likely to be small businesses within the definition of "small business" set forth in SAPA § 102(8), because many are independently owned and operated, and employ fewer than 100 employees. Approximately 143,000 insurance agents and 15,000 insurance brokers have the life insurance line of authority. It is not known, however, how many of them are small businesses.

This amendment should not impose any adverse compliance requirements or adverse impacts on local governments because the amendment affects entities authorized to sell life insurance and annuity contracts, none of which are local governments.

2. Compliance requirements: Producers that are small businesses subject to the amendment must make suitable recommendations for life insurance and annuity transactions that are based on relevant suitability information obtained from, and are in the best interests of, consumers. While Insurance Regulation 187 currently applies only to annuity contracts, this amendment now requires a producer to also disclose to a consumer all relevant suitability considerations and product information that provide the basis for a recommendation to enter into a life insurance transaction, and to document: any life insurance recommendation, facts and analysis subject to 11 NYCRR § 224.4(a) and (b); a consumer's refusal to provide suitability information, if any, with a consumer signed statement; and that a life insurance transaction is not recommended if a consumer decides to enter into a life insurance transaction that is not based on the producer's recommendation with a consumer signed statement. Additionally, a producer may limit the range of policies recommended to consumers based on a captive or affiliation agreement with a particular insurer as long as required disclosures are made.

3. Professional services: No professional service is required to meet the requirements of this amendment.

4. Compliance costs: Producers that are small businesses subject to this amendment will likely incur minimal costs because of this amendment. The amendment takes a principle-based approach to compliance with the requirements of the regulation, which is expected to greatly minimize costs. The proposal does not impose any particular systems or procedures for meeting the requirements of the regulation. Rather, producers are free to leverage existing systems and procedures. For example, most producers already have systems and procedures in place to document information about their clients and to document their interaction or conversations with their clients. These existing systems and procedures can also be used to document the client's suitability information and the basis for the producer's recommendation to the consumer. Many producers are already documenting recommendations made to consumers, disclosing limitations to captive or affiliation agreements, and using a best interest standard of care for consumers. Accordingly, any costs incurred by producers that are small businesses subject to this amendment should be minimal, as the producers will already have in place standards and procedures that can be leveraged to comply with this amendment. Also, producers already have procedures in place to document their recommendations with respect to suitability of the sale of annuities. While the costs to implement this amendment may vary by size and business of the producer, and thus are difficult to estimate, the Department does not anticipate the costs to be significant. Likewise, many producers were already preparing to implement the DOL Rule by making changes to processes, procedures and technology. Although, recent conflicting court decisions have left uncertainty about the implementation of the DOL rule, much of the work to prepare for the DOL rule has already been done. Some producers have indicated an intention to move forward with implementing a best interest standard regardless of what happens with the DOL Rule. The Department anticipates that many producers have already incurred up-front costs in anticipation of the DOL Rule so can leverage the systems that are already in place to include additional requirements under the Proposed Amendment which would have a de minimum impact on what's already been done. The Department believes that there will eventually be a cost savings to producers that are able to apply the same standards across all product types and avoid maintaining separate systems for separate product lines. Documentation benefits the producer and the consumer and is a prudent business practice.

Indeed, the Department anticipates that future costs may decrease over time by establishing one consistent best interest standard that will apply to all recommendations made for all product transactions. Additionally, costs borne by producers related to improper sales are anticipated to decrease over time as better-trained and supervised producers come into compliance with the regulation and the number of improper or conflicted sales decrease.

As stated above, there are approximately 143,000 insurance agents and 15,000 insurance brokers with the life insurance line of authority. It is not known, however, how many of them are small businesses, but each have different business models that may be impacted by the proposed amendment differently. These firms are also subject in various respects to the DOL Rule and, despite the uncertainty created by recent court cases, are at different levels of readiness for compliance with that regulation. The Department went to great lengths to ensure that the proposed amendment was consistent with the core requirements of the DOL Rule but significantly less onerous in terms of supervision and compliance requirements. The Departments believes that firms that have already brought themselves into compliance with the DOL Rule would have minimal additional costs to comply with the proposed amendment, regardless of whether or not the DOL Rule ultimately takes full effect. The Department further held multiple meetings with regulated entities and interested parties to ascertain which, if any, components of the proposed amendment might increase costs for particular firms; those provisions were then removed or significantly reduced in scope.

Importantly, the benefits of the regulation are expected to be substantial. Consumers often are unaware they have received conflicted recommendations from producers and the harm caused by such conflicts are not readily apparent, materialize over the many years of a life insurance policy or annuity contract or take the form of an "opportunity cost," i.e., the lost benefits from not having taken the option in the best interest of the consumer at the time. The elimination of conflicted recommendations to consumers is expected to yield cost savings to consumers in the form of lower cost and better suited product recommendations, lower transactions costs to remedy improper recommendations, fewer replacements of insurance policies and fewer complaints to producers over time.

There are no costs to other government agencies or local governments.

5. Economic and technological feasibility: Although there may be minimal additional costs associated with complying with the amendment, compliance should be economically feasible for producers that are small businesses.

6. Minimizing adverse impact: There is little or no adverse economic impact on producers that are small businesses. The compliance, documentation and recordkeeping requirements of this amendment should have little impact on producers that are small businesses. Differing compliance, reporting requirements or timetables for producers that are small businesses are not feasible since the impact on regulated parties is already minimal and the standards established would be the same across product lines.

7. Small business and local government participation: Affected producers that are small businesses will have an opportunity to participate in the rulemaking process once the proposed amendment is published in the State Register and posted on the Department's website.

Revised Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Life insurance companies, fraternal benefit societies, and insurance producers covered by this amendment do business in every county in this state, including rural areas as defined in the State Administrative Procedure Act § 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: 11 NYCRR 224 (Insurance Regulation 187) currently contains reporting requirements for annuity transactions, and the amendment expands those requirements to apply to life insurance too. The amendment requires a life insurance company or a fraternal benefit society (collectively, "insurer"), or an insurance producer, including those located in a rural area, to disclose to the consumer all relevant suitability considerations and product information that provide the basis for any life insurance recommendation and to document: any recommendation, facts and analysis subject to 11 NYCRR § 224.4(a) and (b); the consumer's refusal to provide suitability information, if any, with a consumer signed statement; and that a life insurance transaction is not recommended if a consumer decides to enter into a life insurance transaction that is not based on the producer's or insurer's recommendation with a consumer signed statement. Additionally, a producer may limit the range of policies recommended to consumers based on a captive or affiliation agreement with a particular insurer as long as required disclosures are made. Because insurers already adhere to these requirements for annuity transactions, they should be able to extend their current supervisory systems and training procedures to apply to life insurance, and should not need to establish new procedures or systems to comply with this amendment.

This amendment also requires an insurer, including an insurer located in a rural area, to: establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producer's compliance with the amendment; establish procedures designed to prevent financial exploitation and abuse; provide to the consumer all relevant policy information used to evaluate a transaction; provide comparison information showing differences between fee-based and commission-based versions of the same product; and provide to the producer all policy information used to evaluate the suitability of a proposed replacement.

3. Costs: Insurers, including insurers located in a rural area, likely will incur costs because of this amendment. The amendment expands the training requirement so that an insurer is responsible for ensuring that every insurance producer recommending the insurer's life insurance contracts is adequately trained to make the recommendation. It also requires an insurer to establish and maintain procedures designed to prevent financial exploitation and abuse, establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producer's compliance with the amendment; provide comparison information showing differences between fee-based and commission-based versions of the same product, and requires an insurer to provide a consumer with all relevant policy information. The amendment further requires an insurer to provide a producer with all relevant replacement information necessary to evaluate suitability.

This amendment now requires a producer or an insurer to also disclose to a consumer all relevant suitability considerations and product information that provide the basis for a recommendation to enter into a life insurance transaction, and to document: any life insurance recommendation, facts and analysis subject to 11 NYCRR § 224.4(a) and (b); a consumer's refusal to provide suitability information, if any, with a consumer signed statement; and that a life insurance transaction is not recommended if a consumer decides to enter into a life insurance transaction that is not based on the producer's or insurer's recommendation with a consumer signed statement.

However, the amendment takes a principle-based approach to compliance with the requirements of the regulation, which is expected to greatly minimize costs. The proposal does not impose any particular systems or procedures for meeting the requirements of the regulation. Rather, insurers and producers are free to leverage existing systems and procedures. For example, most producers already have systems and procedures in place to document information about their clients and to document their interaction or conversations with their clients. These existing systems and procedures can also be used to document the client's suitability information and the basis for the producer's recommendation to the consumer. Also, insurers already have in place the standards and procedures to comply with the suitability requirements of the existing regulation. Insurers can leverage these existing standards and procedures to meet the requirements of this amendment. Accordingly, any costs incurred by producers and insurers, including those located in a rural area, that currently sell annuities should be minimal. While the costs to implement this amendment may vary by size and business of the insurer and producer, and thus difficult to estimate, the Department of Financial Services ("Department") does not anticipate that the costs should be significant. Likewise, many insurers had already been preparing to implement the rule recently issued by the U.S. Department of Labor ("DOL") under 29 C.F.R. 2510 ("DOL Rule") by making changes to processes, procedures and technology. Although, recent conflicting court decisions have left uncertainty about the implementation of the DOL rule, much of the work has already been done in anticipation of having to comply with the DOL Rule. Some producers have indicated an intention to move forward with implementing a best interest standard regardless of what happens with the DOL Rule. The Department anticipates that many insurers have already incurred up-front costs in anticipation of the DOL Rule so these insurers can leverage the systems that are already in place to include additional requirements under the Proposed Amendment which would have a de minimum impact on what's already been done. The Department believes that there will eventually be a cost savings to insurers and producers that are able to apply the same standards across all product types and avoid maintaining separate systems for separate product lines. Documentation benefits the insurer, the producer, the consumer, and is a prudent business practice.

Indeed, the Department anticipates that future costs may decrease over time by establishing one consistent best interest standard that will apply to all recommendations made for all product transactions. Additionally, costs borne by insurers, producers and consumers related to improper sales are anticipated to decrease over time as better-trained and supervised producers come into compliance with the regulation and the number of improper or conflicted sales decrease.

The costs associated with establishing procedures designed to prevent financial exploitation and abuse are expected to be minimal, because, as the Department understands it, many insurers have already developed procedures to prevent financial exploitation and abuse.

There are currently over 160 licensed life insurance and annuity providers in New York State and approximately 143,000 insurance agents and 15,000 insurance brokers with the life insurance line of authority, each of which have different business models that may be impacted by the proposed amendment differently who may be located in rural areas. These firms are also subject in various respects to the DOL Rule and, despite the uncertainty created by recent court cases, are at different levels of readiness for compliance with that regulation. The Department went to great lengths to ensure that the proposed amendment was consistent with the core requirements of the DOL Rule but significantly less onerous in terms of supervision and compliance requirements. The Departments believes that firms that have already brought themselves into compliance with the DOL Rule would have minimal additional costs to comply with the proposed amendment, regardless of whether or not the DOL Rule ultimately takes full effect. The Department further held multiple meetings with regulated entities and interested parties to ascertain which, if any, components of the proposed amendment might increase costs for particular firms; those provisions were then removed or significantly reduced in scope.

Importantly, the benefits of the regulation are expected to be substantial. Consumers often are unaware they have received conflicted recommendations from producers or insurers and the harm caused by such conflicts are not readily apparent, materialize over the many years of a life insurance policy or annuity contract or take the form of an "opportunity cost," i.e., the lost benefits from not having taken the option in the best interest of the consumer at the time. The elimination of conflicted recommendations to consumers is expected to yield cost savings to consumers in the form of lower cost and better suited product recommendations, lower transactions costs to remedy improper recommendations, fewer replacements of insurance policies and fewer complaints to producers and insurers over time.

This amendment does not impose additional costs on the Department or state or local governments.

4. Minimizing adverse impact: This amendment applies to insurers and producers that do business in New York State, including those located in a rural area. The standards and procedures required by this amendment clarify the duties and obligations of producers under the standards of conduct established by Insurance Law §§ 2103, 2110, 2123 and 2208. The standards and procedures required by this amendment also clarify the duties and obligations of insurers under the standards of conduct established by Insurance Law § 4226 and Article 24. Due to standards of conduct already established by the Insurance Law, many insurers and producers, including those located in rural areas, already comply with the standards established in this amendment. This amendment applies uniformly to insurers and producers that do business in both rural and non-rural areas of New York State. The Department finds that this amendment does not impose any additional burden on insurers or producers located in rural areas.

5. Rural area participation: Insurers and producers in rural areas will have an opportunity to participate in the rulemaking process once the proposed amendment is published in the State Register and posted on the Department's website.

Revised Job Impact Statement

A Revised Statement Setting Forth the Basis for the Finding that the First Amendment to 11 NYCRR 224 (Insurance Regulation 187) Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities is not required because the revisions to the proposed regulation do not change the statement regarding the need for a Job Impact Statement that was previously published.

Assessment of Public Comment

The New York State Department of Financial Services (the "Department") proposed the First Amendment to Part 224 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 187) in December 2017 and received more than 35 sets of comments to the proposed amendment (including one set of comments structured as a form letter that was emailed to the Department over 200 times by individual producers). The Department received comments from individuals and entities including insurers, producers, industry trade associations, consumer groups, and others. The Department also met with several commenters before and after the close of the comment period to discuss the proposal and to obtain clarification of the comments that were submitted.

Many commenters commended the Department for its efforts and most commenters expressed support for a best interest standard for life insurance and annuity transactions. Many commenters addressed more than one provision of the proposed amendment, and many requested specific changes. Generally, comments were made with respect to harmonization and other regulatory bodies; the scope of the regulation; proposed exemptions; definitions; the best interest standard; disclosure and documentation; producer certifications, designations and titles; multiple producer sales; producer compensation; proprietary products; financial exploitation; product comparison disclosure; insurer requirements and supervision; revision to the regulatory impact statement; and the effective date and enforcement. The Department has processed and carefully considered every comment and has made several revisions and clarifications to the proposal. However, the Department did not make all of the recommended revisions because the Department determined, based on its experience and knowledge, that certain revisions were unnecessary within the context of the proposal, were inconsistent with the standards or the purpose of the proposal, or were better addressed with an explanation in this assessment.

The Department addresses each of the comments in full in the complete version of the assessment of public comments, which will be posted on the Department's website.

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Electronic Transfer of Funds to the Gaming Commission from Special Bell Jar Accounts

I.D. No. SGC-20-18-00005-P

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

Proposed Action: Amendment of section 4624.9 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(1) and (19); General Municipal Law, section 188-a(1)

Subject: Electronic transfer of funds to the Gaming Commission from special bell jar accounts.

Purpose: To allow charitable gaming organizations to pay their license fees to the Gaming Commission via electronic transfer.

Text of proposed rule: Section 4624.9 of 9 NYCRR is amended to read as follows:

§ 4624.9. Method of withdrawal.

[All] *With the exception of the transfer of funds to the Commission as may be required by section 4624.3 of this Part, which may be accomplished by approved electronic means pursuant to instructions, directions and procedures that the Commission may establish and modify from time to time, all* monies withdrawn from the "special games of chance account," "special raffle account" or "special bell jar account" shall be only by checks having preprinted consecutive numbers, signed by at least two duly authorized officers of the licensee and made payable to a specific person, firm, partnership or corporation with the purpose specified on the check stub[; and at no time shall a]. *No* check *from any of the accounts described in this section is permitted to* be made payable to cash. All checks must be accounted for in the appropriate part of the financial statement of games of chance operations (form GC-7), financial statement of raffle operations (form GC-7R) or financial statement of bell jar operations (form GC-7Q), including voided checks.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen Buckley, Acting Secretary, New York State Gaming Commission, P.O. Box 7500, Schenectady, New York 12301-7500, (518) 388-3332, email: gamingrules@gaming.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.

Regulatory Impact Statement

Statutory authority: The New York State Gaming Commission is authorized to promulgate these rules pursuant to Racing, Pari-Mutuel Wagering and Breeding Law §§ 104(1), 104(19) and 188-a(1) of the General Municipal Law. Section 104(1) of the Racing, Pari-Mutuel Wagering and Breeding Law (RPMWBL) vests the Commission with general jurisdiction over all gaming activities within New York State and over the corporations, associations and persons engaged therein. Section 104(19) of the RPMWBL authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities. General Municipal Law § 188-a(1) authorizes the Commission to supervise the administration of games of chance and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses and the conducting of games under such licenses.

Legislative objectives: To maintain the public confidence and trust in the credibility and integrity of legalized gaming activities, the conduct of games of chance and all attendant activities should be so regulated and adequate controls so instituted. All phases of the supervision, licensing and regulation of games of chance should be closely controlled and the laws and regulations pertaining thereto should be strictly construed and rigidly enforced.

Needs and benefits: This amendment is necessary to allow charitable organizations to make electronic transfer of funds to pay their additional license fees to the New York State Gaming Commission.

Currently, any disbursement from a special bell jar account by a charitable organization (including payment of license fees to the Commission) can be made only by check having pre-printed consecutive numbers. This method of payment is archaic in light of the development of secure online payment methods.

Charitable organizations licensed to conduct bell jar games are required to submit to the Commission a quarterly report of the sale of bell jar tickets pursuant to 9 NYCRR § 4624.1. Each report must be accompanied by an additional license fee in the amount of five percent of the specific organization's net proceeds from its sale of bell jar tickets pursuant to 9 NYCRR § 4624.3. This is the only license fee paid to the Commission by organizations licensed to conduct charitable gaming. The Commission's Division of Charitable Gaming processes approximately 1,500 such reports and accompanying license fees each calendar quarter. Receipt of funds by electronic transfer would improve administrative efficiency for both the Commission and for charitable organizations without sacrificing security or accountability.

Currently, the Commission accepts only checks. Electronic transfers will allow charitable organizations to submit license funds and reduce paperwork for both the organizations and the Commission. Online payment systems automatically generate a record of payments which can be readily accessed if an audit is needed. Like checks, online payment systems ensure accountability for disbursements through access codes and passwords so that only authorized persons may disburse funds. Electronic payment will also reduce the amount of time required for Commission staff to process more than 1,000 payments that are received every quarter.

Costs: (a) There may be some minimal costs imposed through the use of electronic payment, but because electronic payment is optional and not required by this rule, the charitable organization still has the ability to pay by check if the costs of electronic transfer are burdensome. The minimal costs will be offset through savings of no longer requiring envelopes, postage and copy paper as part of each submission.

(b) There are no additional costs imposed upon the Commission, New York State or local governments for the implementation of, and continuing compliance with, this rule. The Commission will see a cost savings of expenses associated with copying checks, filing and processing checks for deposit.

(c) The determination that there are no costs imposed upon any of the parties listed above is based upon a review of the common procedures used by both the Commission and charitable organizations, with which Commission staff is highly familiar as a result of audits and reviews of charitable organization procedures.

(d) Because there are no costs associated with this rulemaking as determined by the limited nature and statutory scope of the amendments, a statement setting forth a best estimate and methodology of costs is not attached.

Paperwork: There is no additional paperwork required by or associated with this rule amendment.

Local government mandates: This rule would impose no local government mandates.

Duplication: There are no other state or federal requirements similar to the provisions contained in the rule amendment.

Alternative approaches: There are no other significant alternatives to this rule. The rule still allows organizations to pay by check.

Federal standards: Charitable gaming within New York State are activities that are exclusively regulated by the Commission, and there are no applicable federal rules for the conduct of such activities. Therefore, the rule does not exceed any minimum standards of the federal government because there are no applicable federal rules.

Compliance schedule: This rulemaking would be effective immediately upon the date of publication in the New York State Register as a Notice of Adoption.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as it merely permits the use of a new method for charitable organizations to pay bell jar license fees to the Commission. These proposals do not impact upon "Small business" under State Administrative Procedure Act section 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities.

Department of Health

EMERGENCY RULE MAKING

Medical Use of Marihuana

I.D. No. HLT-43-17-00001-E

Filing No. 396

Filing Date: 2018-04-30

Effective Date: 2018-04-30

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

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

Statutory authority: Public Health Law, section 3369-a

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

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

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

Subject: Medical Use of Marihuana.

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

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

(k) A certified patient may designate up to two designated caregivers either on the application for issuance or renewal of a registry identification card or in another manner determined by the department. *A designated caregiver may be either a natural person or a facility. For purposes of this section, a "facility" shall mean: a general hospital or residential health care facility operating pursuant to Article 28 of the Public Health Law; an adult care facility operating pursuant to Title 2 of Article 7 of the Social Services Law; a community mental health residence established pursuant to section 41.44 of the Mental Hygiene Law; a hospital operating pursuant to section 7.17 of the Mental Hygiene Law; a mental hygiene facility operating pursuant to Article 31 of the Mental Hygiene Law; an inpatient or residential treatment program certified pursuant to Article 32 of the Mental Hygiene Law; a residential facility for the care and treatment of persons with developmental disabilities operating pursuant to Article 16 of the Mental Hygiene Law; a residential treatment facility for children and youth operating pursuant to Article 31 of the Mental Hygiene Law; or a private or public school. Further, within each of the facilities listed above, each division, department, component, floor or other unit of such facility shall be entitled to be considered to be a "facility" for purposes of this section.* The application *for issuance or renewal of a registry identification card* shall include the following information:

* * *

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 1004.23 is amended as follows:

§ 1004.23 Designated Caregiver Prohibitions *and Protections*

* * *

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-43-17-00001-P, Issue of October 25, 2017. The emergency rule will expire June 28, 2018.

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: regsqna@health.ny.gov

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

Costs:

Costs to the Regulated Entity:

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

Costs to Local Government:

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

Costs to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

There is no compliance schedule imposed by these amendments, which shall be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

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

Cure Period:

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

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent

from the nature of the proposed regulation that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

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

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

NOTICE OF ADOPTION

Trauma Centers

I.D. No. HLT-38-17-00001-A
Filing No. 405
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

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

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

Subject: Trauma Centers.

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

Substance of final rule: These regulations establish a new regulatory framework for the operation of trauma centers at hospitals in New York State, by adding a new 10 NYCRR section 405.45. Subdivision (a) defines terms relating to trauma centers, including but not limited to trauma patient, trauma care, Levels I-IV trauma centers, pediatric trauma center, and Regional Trauma Center. Subdivision (a) also defines the transfer agreements that must exist between hospitals, and the trauma affiliation agreement that each hospital must have with the Regional Trauma Center.

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

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

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

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

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

Final rule as compared with last published rule: Nonsubstantive changes were made in section 405.45(a)(7).

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: regsqna@health.ny.gov

Revised Regulatory Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Effect of Rule:

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

Compliance Requirements:

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

Professional Services:

Most currently designated trauma centers already employ an adequate number of trauma surgeons, a trauma program manager and a registrar, and several hospitals already employ an injury prevention coordinator.

Compliance Costs:

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

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

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

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

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

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

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

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

In May 2012, the Department advised currently designated trauma centers that it intended to make compliance with ACS-COT standards a requirement of designation and advised those hospitals to contact the ACS-

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

Small Business and Local Government Participation:

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

Cure Period:

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

Revised Rural Area Flexibility Analysis and Job Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published 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 (Department) in response the proposed addition to Title 10 NYCRR Part 405.45. These comments and the Department's responses are summarized below:

Multiple commenters submitted the following comments:

COMMENT: Multiple comments indicated concern that the proposed regulations refer to the 2014 edition of the American College of Surgeon's Committee on Trauma (ACS-COT) Resources for the Optimal Care of the Injured Patient. The comments recommend that the proposed regulations refer to "the most current ACS-COT standard" without citing the specific version of the Resources for the Optimal Care of the Injured Patient.

RESPONSE: The Department will review the latest edition of the Resources for the Optimal Care of the Injured Patient once it has been produced and will determine at that time if a regulation change is necessary. Procedural rules do not allow for "most current version" language as it is required that the Department of State have a copy of any document being incorporated by reference into regulation.

Multiple commenters submitted the following comments:

COMMENT: Multiple comments were submitted regarding the proposed amendment to Part 405.45(g)(2)(iii), regarding Performance Improvement, as follows:

a) The comments expressed concern that the requirement to submit quarterly reports to the Department is a new "deliverable" for the regional trauma centers and requested that the Department develop specific instructions on how to submit reports.

RESPONSE: The Department will provide specific guidance regarding the quarterly reporting requirements.

b) The comments requested that the Department provide a specific deadline for the quarterly report be submitted.

RESPONSE: The Department will publish all deadlines through guidance, in a manner that ensures that all trauma centers receive the information.

c) The comments ask how the Regional Trauma Center will obtain data regarding all pediatric trauma deaths and delayed patients transported or admitted to non-trauma centers.

RESPONSE: 405.45(f) of the proposed regulation grants the authority for a representative or representatives of the Regional Trauma Center to participate in and receive information from the affiliate hospital's quality assurance committee, participate in other reviews of the quality of trauma care provided by the affiliate, and provide recommendations for quality improvement of trauma care. These sections enable the trauma centers to obtain the data necessary to comply with the reporting requirements.

d) The comments request that the age range for a pediatric patient be provided to ensure uniform data.

RESPONSE: Chapter 10 of the Resources for the Optimal Care of the Injured Patient (2014) divides the pediatric population into several groups, and provides detailed age ranges for each. Specifically, the Resources for Optimal Care of the Injured Patient indicates that infants means birth to 12 months old; toddlers means children 1 to 2 years old; preschoolers means children 3 to 5 years old; school-aged children means children 6-12 years old, and adolescents means children and adults 13-19 years old.

e) The comments assert that the requirement to report a delay of three hours or more in transferring trauma patients to a higher level of trauma care seems arbitrary, given the diversity of geography and resources throughout the state.

RESPONSE: The "delay" referred to is delay in the referring hospital transferring the patient to the trauma center – the time from patient arrival at the referring hospital to the time the patient left the referring hospital en-route to the trauma center – regardless of any inter-hospital transportation issues. Three hours is a performance improvement benchmark based on data from the New York State Trauma Registry showing that for 2010-2013 the statewide median (50th percentile) of Time at Referring Hospital across all Injury Severity Scores ranged from 2 hours 14 minutes to 3 hours 41 minutes; and for 2014-2015, ranged from 2 hours 5 minutes to 4 hours 39 minutes.

f) Commenters requested a definition of "delay" in transport.

RESPONSE: The term "delay" is used throughout the Resources for the Optimal Care of the Injured Patient (2014). Regulated parties should refer to that resource as guidance for interpreting the term, which includes several examples of different situations.

g) Commenters suggested that rather than establishing criteria in regulation, a list of standardized quality improvement recommendations should be generated at the regional level.

RESPONSE: Regions and Centers are not prohibited from and will be encouraged to establish quality improvement indexes and benchmarks specific to the Region and Center.

COMMENT: The Department received multiple comments regarding the requirement that the American College of Surgeons, Committee on Trauma's (ACS-COT) verification review team include a nurse reviewer on the team. Each of the comments state that this is not a requirement of the ACS-COT and that it adds additional cost to the trauma center verification process.

RESPONSE: The proposed regulation states that a hospital seeking Level I, Level II, or Level III trauma center designation shall require that any verification review team, as provided by ACS-COT, or other entity determined by the Department, include a nurse reviewer. However, the proposed regulation does not require that a nurse be a third member of the review team, but rather that one of the reviewers on the team be a nurse with expertise in trauma care.

COMMENT: A representative of a trauma center expressed concern that the definition of a "trauma patient" was not clear.

RESPONSE: The definition used in the proposed regulations is taken directly from the definition of a trauma patient published in New York State Public Health Law, Article 30-B, § 3062(8). The Department believes that ''trauma patient'' defined as a patient at high risk of death or disability from multiple and severe injuries is sufficiently clear.

COMMENT: The Department received several comments indicating a belief that the proposed regulations require trauma centers to have a specific ratio of trauma registrars to trauma patients admitted to the trauma center.

RESPONSE: The proposed regulations do not set such ratios. To eliminate any confusion, the Department has revised the Regulatory Flexibility Analysis for Small Business and Local Governments documents to make clear that the proposed regulations do not set ratios.

COMMENT: A representative of a trauma center submitted a comment regarding section 405.45(c)(1)(i) of the proposed regulations, which requires a hospital to undergo a consultative visit prior to a final verification visit for their initial application to the ACS. The commenter asserted that current ACS-COT guidelines from which the proposed regulations are derived recommend, but do not require, a consultative visit prior to the verification site survey and they would prefer that the decision to invite a consultative visit should be the decision of the applicant trauma center.

RESPONSE: Based on the Resources for Optimal Care of The Injured Patient (2014), the ACS-COT will provide a hospital consultation visit at the request of a hospital, community, or regulatory authority to assess trauma care and prepare for a subsequent verification review. The focus is on providing recommendations and assistance to the facility in preparation for future verification. The Department believes that the consultative visit

is essential prior to a verification visit to provide both positive and deficient aspects of a trauma program. The benefits of the consultative visit afford the applicant the opportunity to make the corrections and changes necessary to insure their successful verification.

COMMENT: A representative of a trauma center submitted a comment regarding the requirement in the proposed regulations that trauma centers be re-verified every three years. The comment asserts that the ACS-COT has been discussing changing the review process and cycle, potentially using facilities' Trauma Quality Improvement Process (TQIP) data to identify those needing site visit reviews, with only paper or electronic reviews of centers.

RESPONSE: The Department believes that a three-year verification cycle is appropriate. The verifying entity may independently establish its own verification cycle.

A representative from a trauma center submitted written comments as follows:

COMMENT: A comment stated that the salary figures quoted in the Regulatory Impact Statement are understated for the New York State healthcare market and, in particular, the NYC healthcare market.

RESPONSE: The Department believes that the salary figures provided are a fair representation, as they were provided by trauma centers throughout New York State.

COMMENT: A comment states that there needs to be a population-based registry that includes all significant trauma cases within the region from both trauma and non-trauma hospitals. The data from non-trauma centers should needs to include enough data points to allow for comparable risk adjusted mortality analysis for all hospitals. In addition to the hospital data, EMS reports for all trauma cases are needed to evaluate trauma triage criteria.

RESPONSE: The Department maintains an extensive trauma patient registry called the New York State Trauma Registry (NYSTR). The NYSTR is a well-established system and is populated by all NYS trauma centers submitting trauma data based on the Department's data dictionary, which may be found at: https://www.health.ny.gov/professionals/ems/state_trauma/docs/trauma_data_dictionary_v9_01-2016.pdf

This NYSTR is population-based and compliant with national standards. The NYSTR data set is currently used for research, and the Department publishes reports at regular intervals that include risk adjusted mortality. These reports, dating back to 2000, may be found at: https://www.health.ny.gov/professionals/ems/state_trauma/trauma_system_reports.htm

COMMENT: A trauma center emergency department submitted a comment stating that, with respect to the proposed 405.45(b)(2), which governs transfer of severely injured patients from non-trauma centers, it should be recognized that on occasion the transferring hospital may have the capability to address time sensitive life-saving procedures. The commenter requested that the regulation be changed so that hospitals that are not trauma centers can also provide trauma care.

RESPONSE: The Department recognizes that trauma patients will arrive at or be brought to non-trauma centers for stabilization and treatment from time to time. However, the purpose of these proposed regulations is to ensure that critically injured patients are taken to hospitals that have the resources and capabilities to treat their injuries. Studies indicate that the overall risk of death is significantly lower when care is provided in a trauma center than when it is provided in a non-trauma center.

COMMENT: The Department received two (2) letters in support of the proposed regulations from State Trauma Advisory Committee members.

RESPONSE: The Department acknowledges the letters of support.

NOTICE OF ADOPTION

Public Water Systems–Revised Total Coliform Rule

I.D. No. HLT-06-18-00005-A

Filing No. 393

Filing Date: 2018-04-26

Effective Date: 2018-05-16

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

Action taken: Amendment of Subpart 5-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Public Water Systems–Revised Total Coliform Rule.

Purpose: To increase public health protection by reducing exposure to contaminants in drinking water.

Substance of final rule: These amendments are necessary for the Department to maintain primacy for delivery, oversight and management of New York State's public drinking water supply program and to ensure consistency with the Revised Total Coliform Rule (RTCR) promulgated by the United States Environmental Protection Agency (EPA).

The RTCR builds on the Total Coliform Rule (TCR) by requiring all public water systems (PWS) to assess indicators of coliform contamination, and to take corrective action when necessary. Under these amendments, there is no longer a Maximum Contaminant Level (MCL) for total coliform, and follow up sampling requirements for total coliform-positive (TC+) samples have been reduced. Three repeat samples following a routine TC+ sample are now required, instead of four. These amendments also require a PWS that is vulnerable to microbial contamination to conduct an assessment to determine why it is vulnerable, and to take corrective action. There are two levels of assessments (designated Level 1 and Level 2) relating to the severity or frequency of the vulnerability to contamination. These assessments must be conducted within 30 days by the PWS or by the Local Health Department (LHD), depending on the level of assessment.

A technical change is also being made to Subpart 7-5 of the State Sanitary Code to make Subpart 7-5 consistent with the changes regarding the RTCR.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 5-1.1(j), 5-1.52 Table 6, Footnote 2, 5-1.52 Table 11, Footnote 7.

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: regsqna@health.ny.gov

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

Changes made to the last published rules 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

The agency received no public comment.

Long Island Power Authority

NOTICE OF ADOPTION

Undergrounding Provisions of the Authority's Tariff for Electric Service

I.D. No. LPA-41-17-00010-A

Filing Date: 2018-05-01

Effective Date: 2018-05-01

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 offer a financing mechanism that allows local communities to pay the additional cost of undergrounding projects not otherwise eligible for undergrounding.

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

Subject: Undergrounding provisions of the Authority's Tariff for Electric Service.

Purpose: To offer local communities a mechanism for financing the additional cost of undergrounding projects.

Text or summary was published in the October 11, 2017 issue of the Register, I.D. No. LPA-41-17-00010-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.

NOTICE OF ADOPTION

Remote Meter Reading Provisions of the Authority's Tariff for Electric Service

I.D. No. LPA-41-17-00011-A
Filing Date: 2018-05-01
Effective Date: 2018-05-01

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 eliminate charges for remote meter reading.

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

Subject: Remote meter reading provisions of the Authority's Tariff for Electric Service.

Purpose: To eliminate charges for remote meter reading.

Text or summary was published in the October 11, 2017 issue of the Register, I.D. No. LPA-41-17-00011-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.

NOTICE OF ADOPTION

Net Energy Metering Provisions of the Authority's Tariff for Electric Service

I.D. No. LPA-41-17-00012-A
Filing Date: 2018-05-01
Effective Date: 2018-05-01

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 the Public Service Commission's Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters.

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

Subject: Net energy metering provisions of the Authority's Tariff for Electric Service.

Purpose: To update the Authority's Tariff to implement Phase One of the Value of Distributed Energy Resources.

Final rule as compared with last published rule: Substantial revisions were made in the following Parts, sections, subdivisions or paragraphs: Leaf 34 et seq.

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.

Office for People with Developmental Disabilities

EMERGENCY RULE MAKING

Site Based and Community Based Prevocational Services

I.D. No. PDD-51-17-00006-E
Filing No. 395
Filing Date: 2018-04-27
Effective Date: 2018-04-27

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

Action taken: Amendment of Subpart 635-10 of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The emergency adoption of amendments that identify what site-based and community-based services are and clarify reimbursement requirements are necessary to protect the health, safety, and welfare of individuals receiving services in the OPWDD system. Prevocational services are provided to individuals with developmental disabilities to prepare individuals for paid employment or unpaid meaningful community activities.

The emergency amendments amend existing regulations for Prevocational services to establish guidelines for when an individual can be paid less than federal/state minimum wage, provide an exception to the group size available under community-based prevocational services, and require providers to conduct an annual assessment. The regulations must be filed

on an emergency basis to ensure individuals receive services that constitute a prevocational service and that adequately prepare individuals for competitive employment. Additionally, the emergency filing is necessary to update reimbursement requirements for providers.

Subject: Site Based and Community Based Prevocational Services.

Purpose: To clarify site-based and community-based services and clarify reimbursement requirements.

Substance of emergency rule (Full text is posted at the following State website: https://opwdd.ny.gov/regulations_guidance/opwdd_regulations/emergency): OPWDD's emergency/proposed regulations clarify what site based prevocational services are, describes the skills that site based prevocational services are intended to teach, and provide examples of what site based prevocational services can include.

The regulations specify that to participate in paid site based prevocational services the individual must have a demonstrated or assessed earning capacity relative to the prevocational task(s) involved, of less than 50 percent of the current state minimum wage, federal minimum wage or prevailing wage, and be expected to have such an earning capacity while participating in prevocational services.

The regulations specify that a provider must have a valid Department of Labor 14c Certificate and comply with all applicable Federal laws and regulations to pay less than minimum wage.

The regulations specify that effective one year from effective date of this regulation, site based prevocational services may only be provided at a site that is certified by OPWDD as a site based prevocational services site.

The regulations specify that there must be no new enrollments into site based prevocational services located within day training programs that are sheltered workshops and specify that site based prevocational services may be provided in an agency-owned business or former day training/sheltered workshop program if the business or former program is in a setting that is certified as a site-based prevocational services site.

The regulations specify that if the integration standard as determined in the provider's original workshop transformation plan is not being met, or a change has been approved by OPWDD, there must be no new enrollments into site-based prevocational services.

The regulations specify that service providers must conduct an annual assessment to determine if site based prevocational services are consistent with the individual's habilitation plan, and prevocational services are needed to prepare the individual for competitive employment. The annual assessment must be done in a form and format prescribed by OPWDD.

The regulations clarify what community based prevocational services are, describes the skills that community based prevocational services are intended to teach, and provide examples of what community based prevocational services can include.

The regulations specify that to participate in paid community based prevocational services, the individual must have a demonstrated or assessed earning capacity relative to the prevocational task(s) involved of less than 50 percent of the current state minimum wage, federal minimum wage, or prevailing wage and be expected to have such an earning capacity while participating in prevocational services.

The regulations specify that community based prevocational services must be provided in the most integrated setting appropriate to the needs of the individual receiving such services.

The regulations specify that community based prevocational services may not be provided in OPWDD certified space. However, certified settings may be used for any combination of activities that provide time limited job readiness training and/or identify prevocational activities for the day. Activities must not exceed 2 hours per day.

The regulations specify that certified settings may be used for any combination of activities that provide services at the site when there is a significant circumstance in which service delivery in the community may jeopardize the health and safety of individuals as determined and documented by the provider agency administration or with prior approval from OPWDD based on the best interests of the individual(s).

The regulations specify that groups of individuals receiving community prevocational services are limited to a maximum of 8 individuals per group. However, group size may be increased to a maximum of 15 individuals if granted OPWDD approval and are businesses that were previously work centers or sheltered workshops that have an OPWDD approved workshop transformation plan and meet the integration standards as outlined in the transformation plan, or are businesses that were not previously work centers or sheltered workshops.

The regulations specify that OPWDD approval of an increased group size will expire within 24 months of issuance. Requests for renewals must be submitted in a format prescribed by OPWDD. The renewal request must include an assessment of the individual's continued need to receive prevocational services in a group size greater than eight individuals.

The regulations require the service provider to maintain documentation of OPWDD's approval (and renewal) to increase group size to more than 8 individuals.

The regulations require the service provider to conduct an annual assessment to determine whether community based prevocational services are consistent with the individual's habilitation plan and are needed to prepare the individual for competitive employment. The annual assessment must be done in a form and format prescribed by OPWDD.

The regulations specify that the four-hour program day must include at least two face-to-face services, and may also include non-face-to-face services.

The regulations specify that the two-hour program day must consist of least one face-to-face service, and may also include non-face-to-face services.

The regulations specify that when there is a break in the service delivery during a single day the service provider must combine, for billing purposes, the duration of periods or sessions of service. Rounding up is permitted for services 10 minutes or more when billing for reimbursements.

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. PDD-51-17-00006-EP, Issue of December 20, 2017. The emergency rule will expire June 25, 2018.

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.

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives: The proposed regulations further legislative objectives embodied in sections 13.07, 13.09(b), 16.00 and 16.05 of the Mental Hygiene Law. The proposed regulations specify what site-based and community-based services are, establishes guidelines for when an individual can be paid less than federal/state minimum wage, provides an exception to the group size available under community-based prevocational services, and requires providers to conduct an annual assessment.

3. Needs and benefits: The proposed regulations amend 14 NYCRR Part 635-10.4 by identifying what site-based and community-based services are and by providing examples for the type of activities included under each service, and amends 14 NYCRR Part 635-10.5 by clarifying reimbursement requirements.

The proposed regulations in 635-10.4 establish guidelines for when an individual can be paid less than minimum wage for site-based and community-based services.

The proposed regulations in 633-10.4 requires providers to conduct an annual assessment to determine if the prevocational service is consistent with the individual's habilitation plan and is needed to prepare the individual for competitive employment.

The proposed regulations provide a timeframe for when site-based prevocational services must be provided at a site-based prevocational services site.

In addition, the proposed regulations provide an exception to the number of individuals allowed in a group for community-based prevocational services.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There is no anticipated impact on Medicaid expenditures as a result of the proposed regulations. The proposed regulations specify what site-based and community-based services are, establishes guidelines for when an individual can be paid less than federal/state minimum wage, provides an exception to the group size available under community-based prevocational services, and requires providers to conduct an annual assessment. Consequently, there are no anticipated costs for the State in its role of paying for Medicaid costs.

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

There are no anticipated costs to OPWDD in its role as a provider of services to comply with the new requirements.

b. Costs to private regulated parties: OPWDD expects that the costs to ensure compliance with the regulation will be minimal and absorbed with the site-based and community-based services reimbursement.

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

6. Paperwork: Providers will experience a minimal increase in paperwork as a result of the proposed regulations. The regulations will require providers to conduct an annual assessment to determine if the prevocational service is consistent with the individual's habilitation plan and is needed to prepare the individual for competitive employment.

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

8. Alternatives: OPWDD did not consider any other alternatives to the proposed regulations. The regulations are necessary to specify what site-based and community-based services are and to clarify reimbursement requirements.

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

10. Compliance schedule: OPWDD is planning to adopt the proposed amendments as soon as possible within the timeframes mandated by the State Administrative Procedure Act. Providers will have one year from the effective date of this regulation to have site-based prevocational services at a site-based prevocational services site. The proposed regulations were discussed with and reviewed by representatives of providers in advance of this proposal. Additionally, OPWDD will be mailing a notice of the proposed amendments to providers in advance of the effective date.

Regulatory Flexibility Analysis

1. Effect on Small Business: OPWDD has determined, through a review of the certified cost reports, that many OPWDD-funded services are provided by not-for-profit agencies which employ more than 100 people. Smaller agencies that employ fewer than 100 employees are classified as small businesses. OPWDD is unable to estimate the number of agencies that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed regulations specify what site-based and community-based services are, establishes guidelines for when an individual can be paid less than federal/state minimum wage, provides an exception to the group size available under community-based prevocational services, and requires providers to conduct an annual assessment.

2. Compliance Requirements: The proposed amendments will impose some additional compliance requirements on providers. OPWDD requires providers to conduct an annual assessment to determine if the prevocational service is consistent with the individual's habilitation plan and is needed to prepare the individual for competitive employment.

The amendments will have no effect on local governments.

3. Professional Services: The proposed amendments will have no effect on professional services.

4. Compliance Costs: OPWDD expects the compliance costs to conduct an annual assessment will be minimal because it is conducted once a year and can be satisfied with existing staff.

5. Economic and Technological Feasibility: The proposed amendments do not impose the use of any new technological processes on regulated parties.

6. Minimizing Adverse Impact: The purpose of these proposed amendments is to specify what site-based and community-based services are, establish guidelines for when an individual can be paid less than federal/state minimum wage, provide an exception to the group size available under community-based prevocational services, and require providers to conduct an annual assessment. The amendments will result in costs to providers, including providers that are small businesses. However, OPWDD does not expect that such costs will result in an adverse impact to providers because costs will be minimal.

OPWDD has reviewed and considered the approaches for minimizing adverse impacts as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act (SAPA). However, since the annual assessment is needed to ensure prevocational services are consistent with individual's habilitation plans and prepares individuals for competitive employment, OPWDD did not establish different compliance, reporting requirements or timetables from these requirements and timetables on small businesses or exempt providers that are small businesses.

7. Small Business Participation: The proposed regulations were discussed with and reviewed by representatives of providers, some being small businesses, in advance of this proposal. OPWDD also plans to inform all providers, including small business providers, of the proposed amendments in advance of their scheduled effective date.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: 44 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed regulations specify what site-based and community based services are, establishes guidelines for when an individual can be paid less than federal/state minimum wage, provides an exception to the group size available under community based prevocational services, and requires providers to conduct an annual assessment.

2. Compliance Requirements: The proposed amendments will impose some additional compliance requirements on providers. OPWDD requires providers to conduct an annual assessment to determine if the prevocational service is consistent with the individual's habilitation plan and is needed to prepare the individual for competitive employment.

The amendments will have no effect on local governments.

3. Professional Services: The proposed amendments will have no effect on professional services.

4. Compliance Costs: OPWDD expects the compliance costs to conduct an annual assessment will be minimal because it is conducted once a year and can be satisfied with existing staff.

5. Minimizing Adverse Impact: The purpose of these proposed amendments is to specify what site-based and community-based services are, establish guidelines for when an individual can be paid less than federal/state minimum wage, provide an exception to the group size available under community-based prevocational services, and require providers to conduct an annual assessment. The amendments will result in costs to providers, including providers in rural areas. However, OPWDD does not expect that such costs will result in an adverse impact to providers as the costs will be minimal.

OPWDD has reviewed and considered the approaches for minimizing adverse impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act (SAPA). However, since the annual assessment is needed to ensure prevocational services are consistent with individual's habilitation plans and prepares the individuals for competitive employment, OPWDD did not establish different compliance, reporting requirements, or timetables on providers in rural areas or local governments or exempt providers in rural areas or local governments from these requirements and timetables.

6. Rural Area Participation: The proposed regulations were discussed with and reviewed by representatives of providers, including some in rural areas, in advance of this proposal. OPWDD also plans to inform all providers, including providers in rural areas, of the proposed amendments in advance of their scheduled effective date.

Job Impact Statement

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

The purpose of these proposed amendments is to specify what site-based and community-based services are, establish guidelines for when an individual can be paid less than federal/state minimum wage, provide an exception to the group size available under community-based prevocational services, and require providers to conduct an annual assessment. The amendments will not result in staffing costs, and compliance requirements for providers are minimal. Consequently, the amendments will not have a substantial impact on jobs or employment opportunities in New York State.

Assessment of Public Comment

Comment: A commenter is concerned with the impact that the location of observation requirement will have on staffing contracts.

Response: Prevocational funding is available through the HCBS Waiver for services to an individual.

Comment: A commenter stated that prevocational services should be designed to create a path to integrated community based employment.

Response: In keeping with the philosophy of Person-Centered Services, the regulations are designed to allow the individual to make an informed choice when determining how the service will be delivered to the individual. The regulations also require, at least once per year, an assessment of the individual in another environment to ensure the individual is learning skills necessary for community based employment.

Comment: A commenter stated that the regulation is not clear as to when site-based prevocational services are allowable.

Response: Allowable site-based prevocational services are clarified in the site-based and community-based prevocational services administrative directive memorandum.

Comment: A commenter stated that the term ISP should be changed to Life Plan.

Response: The regulations must not reflect terminology that is not yet in effect.

Comment: A commenter questioned whether providers must provide an hour of service to bill for community- based prevocational series.

Response: OPWDD has considered these concerns and will make edits to the regulations for clarification.

Comment: A commenter stated that prevocational services should allow the opportunity for prevocational services to be delivered simultaneously while the individual is in another service.

Response: OPWDD has considered these concerns and will determine if changes should be made.

Comment: A commenter stated that the earning capacity language needs clarification.

Response: OPWDD has considered these concerns and will make edits to the regulations for clarification.

Comment: A commenter stated that language use for site-based and community-based prevocational services must be consistent.

Response: OPWDD has considered these concerns and will make changes to the regulation for consistency.

Comment: A commenter stated that there should be a grace period for the requirement to develop a service delivery plan in the form and format specified by OPWDD that guides the delivery of the service for each individual receiving services.

Response: This requirement is not new and would not warrant a grace period.

Comment: A commenter questioned how "most integrated setting" is defined in relation to where an individual may be paid if the individual meets subminimum wage requirements.

Response: OPWDD has considered these concerns and will make changes to the regulations for clarification.

Comment: A commenter stated that changing the word shall to may, in 635-10.4(k)(2), changed the accountability requirement.

Response: OPWDD has considered these concerns and will make changes to the regulation accordingly.

Comment: A commenter is concerned that 635-10.5(ag)(4)(iii) will allow providers to count non-prevocational related services or down time as part of the program day duration.

Response: Program day is defined in the site-based and community-based prevocational services administrative directive memorandum. There is no intent for the regulations to allow services without the individual in site-based prevocational services.

Comment: A commenter is concerned that the regulations will return prevocational services back to segregated prevocational services.

Response: The regulations require site-based prevocational services to have an approved plan to meet both the HCBS settings requirements and the NY Business Model requirements by 2020.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Appointment of a Temporary Operator of a Water System

I.D. No. PSC-20-18-00004-EP
Filing Date: 2018-04-26
Effective Date: 2018-04-26

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

Proposed Action: An order was adopted on April 26, 2018 denying the request of Willsboro Bay Water Company, by petition dated February 22, 2018, to abandon its water system pursuant to PSL § 89-c(2). The denial was made without prejudice to a future petition once a new entity is prepared to assume ownership of the water company or its assets. The order also appointed the Town of Willsboro as temporary operator of the Company's water system pursuant to PSL § 112-a, and authorized the Town to file a Temporary Cost Recovery Surcharge Statement which would allow the Town to separately surcharge the Company's customers up to $200 per year to ensure that the Town recovers the reasonable costs it incurs that exceed the revenues generated by the Company's current base rates during the period the Town is serving as the temporary operator.

Statutory authority: Public Service Law, sections 89-b, 89-c and 112-a

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

Specific reasons underlying the finding of necessity: The Willsboro Bay Water Company operates a seasonal water system in the Town of Willsboro. The Company stated that its owners are unable to continue operation of the water system and meet the Department of Health (DOH) requirements regarding system oversight and water quality monitoring. DOH has requested that the Town of Willsboro be appointed temporary operator of the system, and the Town has consented. Access to water is an essential element of human life. Interruption of water service would make the effected residences uninhabitable as a practical matter. Therefore, action was necessary to protect the health, safety, and welfare of the Company's customers. Appointment of the temporary operator needed to be taken on an emergency basis because of the need to ensure the water system is activated without delay to avoid interruption of water service.

Subject: Appointment of a temporary operator of a water system.

Purpose: To ensure activation and availability of a safe water supply to existing residences.

Substance of emergency/proposed rule: The Public Service Commission is considering, in response to a Petition filed on February 22, 2018 by Willsboro Bay Water Company, whether to appoint the Town of Willsboro as temporary operator of the Company's water system pursuant to PSL § 112-a, and whether to authorize the Town to file a Temporary Cost Recovery Surcharge Statement which would allow the Town to separately surcharge the Company's customers up to $200 per year to ensure that the Town recovers the reasonable costs it incurs that exceed the revenues generated by the Company's current base rates during the period the Town is serving as the temporary operator. The full text of the Petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

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 July 24, 2018.

Text of rule may be obtained from: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

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

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

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

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

(18-W-0128EP2)

NOTICE OF ADOPTION

Revenue Assurance Calculation Review

I.D. No. PSC-41-15-00005-A
Filing Date: 2018-04-25
Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order resolving Intergrow Greenhouses, Inc.'s (Intergrow) petition requesting revenue assurance calculation review.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Revenue assurance calculation review.

Purpose: To resolve Intergrow's request to review revenue assurance calculation.

Substance of final rule: The Commission, on April 19, 2018, adopted an order resolving Intergrow Greenhouses, Inc.'s (Intergrow) petition requesting review of the revenue assurance calculation performed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). National Grid is directed to re-calculate the Contribution in Aid of Construction contributions and Letter of Credit requirements, and provide refunds to Intergrow, including interest at the Other Customer Provided Capital Rate, within 30 days of the issuance of this order, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(15-E-0500SA1)

NOTICE OF ADOPTION

Revenue Assurance Calculation Review

I.D. No. PSC-01-16-00002-A

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order resolving Tiashoke Farm's (Tiashoke) petition requesting revenue assurance calculation review.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Revenue assurance calculation review.

Purpose: To resolve Tiashoke's request to review revenue assurance calculation.

Substance of final rule: The Commission, on April 19, 2018, adopted an order resolving Tiashoke Farm's (Tiashoke) petition requesting review of the revenue assurance calculation performed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). National Grid is directed to re-calculate the Contribution in Aid of Construction contributions and Letter of Credit requirements, and provide refunds to Tiashoke, including interest at the Other Customer Provided Capital Rate, within 30 days of the issuance of this order, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(15-E-0700SA1)

NOTICE OF ADOPTION

Revenue Assurance Calculation Review

I.D. No. PSC-06-16-00010-A

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order resolving Lakewood Products, Inc.'s (Lakewood) petition requesting revenue assurance calculation review.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Revenue assurance calculation review.

Purpose: To resolve Lakewood's request to review revenue assurance calculation.

Substance of final rule: The Commission, on April 19, 2018, adopted an order resolving Lakewood Products, Inc.'s (Lakewood) petition requesting review of the revenue assurance calculation performed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). National Grid is directed to re-calculate the Contribution in Aid of Construction contributions and Letter of Credit requirements, and provide refunds to Lakewood, including interest at the Other Customer Provided Capital Rate, within 30 days of the issuance of this order, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(15-E-0500SA2)

NOTICE OF ADOPTION

Corporate Reorganization

I.D. No. PSC-23-17-00021-A

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order approving Nicholville Telephone Company, Inc. et al.'s (Nicholville) petition to implement its corporate restructuring, including related financing and operational transactions, subject to conditions.

Statutory authority: Public Service Law, section 222

Subject: Corporate reorganization.

Purpose: To approve Nicholville et al.'s petition for corporate reorganization, subject to conditions.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving Nicholville Telephone Company, Inc. (Nicholville) and its affiliates, Atlas Connectivity, LLC, Slic Network Solutions, Inc., Nicholville Communications, Inc., Nicholville Network, Inc. and Nicholville Cellular, Inc.'s (Nicholville et al.) petition to implement its corporate restructuring of Nicholville Telephone and its subsidiaries, including related financing and operational transactions, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(16-C-0532SA1)

NOTICE OF ADOPTION

Submetering of Electricity and Waiver Request

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

Filing Date: 2018-04-26

Effective Date: 2018-04-26

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

Action taken: On 4/19/18, the PSC adopted an order approving Midtown

Tower LLC's (Midtown Tower) notice of intent to submeter electricity at 280 East Broad Street, Rochester, New York and request for waiver of 16 NYCRR section 96.5(k)(3).

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

Subject: Submetering of electricity and waiver request.

Purpose: To approve Midtown Tower's notice of intent to submeter electricity and request for waiver of 16 NYCRR section 96.5(k)(3).

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving Midtown Tower LLC's notice of intent to submeter electricity at 280 East Broad Street, Rochester, New York, located in the service territory of Rochester Gas and Electric Corporation, and request for waiver of the energy audit and energy efficiency plan requirements in 16 NYCRR § 96.5(k)(3), subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0431SA1)

NOTICE OF ADOPTION

Phase One NEM Compensation Term

I.D. No. PSC-48-17-00012-A

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order approving Dynamic Energy Solutions, LLC's (Dynamic Energy) petition for an extension of the Phase One Net Energy Metering (NEM) Compensation Term to 25 years, for certain projects.

Statutory authority: Public Service Law, sections 5(1)(b), (2), 65(1), (2), (3), 66(2) and (5)

Subject: Phase One NEM Compensation Term.

Purpose: To approve Dynamic Energy's petition for an extension of the Phase One NEM Compensation Term.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving Dynamic Energy Solutions, LLC's (Dynamic Energy) petition, requiring Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) to provide an extension of the Phase One Net Energy Metering (NEM) Compensation Term to 25 years, for two Community Distributed Generation (CDG) projects, Nos. NY-17918 and NY-19285, under development by Dynamic Energy in National Grid's service territory based on existing lease agreements related to those projects, from each CDG project's in-service date, unless and until the Commission approves a change in compensation methodologies for projects receiving Phase One NEM or the project owner elects to opt into a different compensation methodology, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0656SA1)

NOTICE OF ADOPTION

Submetering of Electricity

I.D. No. PSC-51-17-00008-A

Filing Date: 2018-04-26

Effective Date: 2018-04-26

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

Action taken: On 4/19/18, the PSC adopted an order approving 305 East 24th Owners Corporation's (305 East 24th) petition to submeter electricity at 305 East 24th Street, New York, New York.

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

Subject: Submetering of electricity.

Purpose: To approve 305 East 24th's petition to submeter electricity.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving 305 East 24th Owners Corporation's petition to submeter electricity at 305 East 24th Street, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0657SA1)

NOTICE OF ADOPTION

Transfer of Street Lighting Facilities

I.D. No. PSC-02-18-00007-A

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Action taken: On 4/19/18, the PSC adopted an order approving New York State Electric and Gas Corporation's (NYSEG) petition to transfer street lighting facilities located in the City of Geneva to the City of Geneva (Geneva).

Statutory authority: Public Service Law, section 70

Subject: Transfer of street lighting facilities.

Purpose: To approve NYSEG's petition to transfer street lighting facilities to Geneva.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving New York State Electric and Gas Corporation's (NYSEG) petition to transfer street lighting facilities located in the City of Geneva to the City of Geneva, subject to the requirement that the proceeds recorded to the depreciation reserve shall be net of the federal and state tax liabilities. NYSEG is also directed to file with the Secretary, within sixty days of the final transfer of the street lighting facilities to the City of Geneva, a copy of the actual journal entries recorded, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0737SA1)

NOTICE OF ADOPTION

Submetering of Electricity

I.D. No. PSC-04-18-00004-A
Filing Date: 2018-04-26
Effective Date: 2018-04-26

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

Action taken: On 4/19/18, the PSC adopted an order approving Murray Hill Marquis LLC's (Murray Hill) notice of intent to submeter electricity at 140 and 150 East 34th Street, New York, New York.

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

Subject: Submetering of electricity.

Purpose: To approve Murray Hill's notice of intent to submeter electricity.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving Murray Hill Marquis LLC's notice of intent to submeter electricity at 140 and 150 East 34th Street, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0347SA2)

NOTICE OF ADOPTION

Submetering of Electricity

I.D. No. PSC-04-18-00009-A
Filing Date: 2018-04-26
Effective Date: 2018-04-26

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

Action taken: On 4/19/18, the PSC adopted an order approving 20 Broad Street Owner LLC's (20 Broad Street) notice of intent to submeter electricity at 20 Broad Street, New York, New York.

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

Subject: Submetering of electricity.

Purpose: To approve 20 Broad Street's notice of intent to submeter electricity.

Substance of final rule: The Commission, on April 19, 2018, adopted an order approving 20 Broad Street Owner LLC's notice of intent to submeter electricity at 20 Broad Street, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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.

(17-E-0703SA1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Proposed Major Rate Increase in O&R's Gas Delivery Revenues of Approximately $4.5 Million (or 1.5 Percent in Total Revenues)

I.D. No. PSC-20-18-00008-P

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

Proposed Action: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R) to make various changes in the rates, charges, rules and regulations contained in its Schedule P.S.C. No. 4—Gas.

Statutory authority: Public Service Law, sections 5, 65 and 66

Subject: Proposed major rate increase in O&R's gas delivery revenues of approximately $4.5 million (or 1.5 percent in total revenues).

Purpose: To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

Public hearing(s) will be held at: 10:00 a.m., July 16, 2018, and continuing daily as needed (Evidentiary Hearing*), at Department of Public Service, Agency Bldg. 3, 3rd Fl. Hearing Rm., Albany, NY.

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Case 18-G-0068.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R or the Company) on January 26, 2018, to increase its gas delivery revenues for the rate year ending December 31, 2019, by approximately $4.5 million (2.8% increase in delivery revenues, or 1.5% increase in total revenues). O&R's requested increase in gas delivery revenue increase, as well as rate design changes, results in an average residential monthly bill increase of $4.13 (3.1% increase on the total bill) for a 100 ccf per month customer. The major cost drivers of this rate filing include: return on infrastructure costs; and, increases to operational and maintenance expenses associated with labor, as well as increased program spending for damage prevention and other safety programs. The initial suspension period for the proposed filing runs through June 24, 2018. The full text of the filing and the full case record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

Public comment will be received until: Five days after the last scheduled public hearing.

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

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

(18-G-0068SP1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Proposed Major Rate Increase in O&R's Electric Delivery Revenues of Approximately $20.3 Million (or 2.3 Percent in Total Revenues)

I.D. No. PSC-20-18-00009-P

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

Proposed Action: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R) to make various changes in the rates, charges, rules and regulations contained in its Schedule P.S.C. No. 3—Electricity.

Statutory authority: Public Service Law, sections 5, 65 and 66

Subject: Proposed major rate increase in O&R's electric delivery revenues of approximately $20.3 million (or 2.3 percent in total revenues).

Purpose: To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

Public hearing(s) will be held at: 10:00 a.m., July 16, 2018, and continuing daily as needed (Evidentiary Hearing)* at Department of Public Service, Agency Bldg. Three, 3rd Fl. Hearing Rm., Albany, NY.

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Case 18-E-0067.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R or the Company) on January 26, 2018, to increase its electric delivery revenues for the rate year ending December 31, 2019, by approximately $20.3 million (6.7% increase in delivery revenues, or 2.3% increase in total revenues). O&R's requested electric revenue increase, as well as rate design changes, results in an average residential monthly total bill increase of $6.18 (5.1% increase on the total bill) for a customer using 600 kWh per month. The major cost drivers of this rate filing include: return on infrastructure costs; increased depreciation expense; reduced sales; and, increases to labor expense. The initial suspension period for the proposed filing runs through June 24, 2018. The full text of the filing and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

Public comment will be received until: Five days after the last scheduled public hearing.

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

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

(18-E-0067SP1)

Department of State

EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

Suspension and Revocation of Certifications of Code Enforcement Personnel

I.D. No. DOS-20-18-00002-EP

Filing No. 392

Filing Date: 2018-04-25

Effective Date: 2018-04-25

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

Proposed Action: Amendment of section 1208-3.5(b); and addition of Subpart 1208-6 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 376-a and 381(1)

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

Specific reasons underlying the finding of necessity: The Department of State and the Secretary of State have determined that immediate adoption of this rule on an emergency basis, as authorized by Section 202 of the State Administrative Procedure Act, is necessary to protect public safety and general welfare, and that compliance with the requirements of subdivision one of section 202 of the State Administrative Procedure Act prior to the adoption of this rule would be contrary to the public interest, for the following reasons:

(1) Section 376-a of the Executive Law authorizes the Secretary of State to promulgate rules and regulations relating to training of personnel charged with enforcement of the Uniform Fire Prevention and Building Code (the Uniform Code) and the State Energy Conservation Construction Code (the Energy Code). Those rules and regulations are currently set forth in 19 NYCRR Part 1208.

(2) Section 376-a of the Executive Law was amended by Chapter 468 of the Laws of 2017. The amendment provides that the rules and regulations relating to training of code enforcement personnel must include provisions that (1) establish minimum training and examination requirements to qualify for code enforcement officer certification; (2) provide for issuance of a code enforcement officer certification when an applicant satisfies such training and examination requirements; and (3) provide for revocation or suspension of the certification of any code enforcement personnel found after a hearing "to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

(3) The Sponsor's Memorandum in Support of the bill that became Chapter 468 of the Laws of 2017 noted that "(a)lthough the Department of State issues the certifications, the Department only has the authority to revoke the certification if the official failed to complete the training." The Memorandum cited an incident in which "a fire inspector was cited by the State Education Department for failing to note serious violations at several non-public schools during the course of an annual fire inspection" and noted that "(t)he alleged misconduct by the fire inspector is not grounds for revocation of [his or her] code enforcement certification. Unfortunately, the Department of State does not have the authority to revoke an individual's certificates even if allegations of serious misconduct are proven. This bill empowers the Secretary of State to develop a process to revoke a code enforcement official's certification if, after a hearing, they are found to have failed to uphold the duties of a code enforcement officer including but not limited to making material errors or omissions on an inspection report. This will provide the Department with the necessary authority to ensure that the integrity of the code enforcement certification is upheld."

(4) Chapter 468 of the laws of 2017 was signed on December 18, 2017 and took effect 90 days thereafter, on Sunday, March 18, 2018. The process of adopting a rule on a non-emergency basis (including developing the rule, filing and publishing the Notice of Proposed Rule Making, waiting for the expiration of the public comment period, preparing an analysis of the public comments, and filing and publishing the Notice of Adoption) takes considerably longer than 90 days. Therefore, it was not possible to propose and adopt a rule on a non-emergency basis prior to the effective date of Chapter 468 of the Laws of 2017.

(5) Adopting this rule on an emergency basis is necessary to assure the earliest possible implementation of the measures necessary to achieve the Legislative objectives described in the Sponsor's Memorandum in Support.

Subject: Suspension and revocation of certifications of code enforcement personnel.

Purpose: The purpose of this rule is to add provisions to 19 NYCRR Part 1208 that authorize the Secretary of State to suspend or revoke the certification of a building safety inspector or code enforcement official who is found, after a hearing, to have materially failed to uphold his or her code enforcement duties.

Public hearing(s) will be held at: 10:00 a.m., July 24, 2018 at Department of State, 99 Washington Ave., Rm. 505, Albany, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of emergency/proposed rule (Full text is posted at the following State website: www.dos.ny.gov/DCEA/pdf/Text-1208-6%202018-04-24.pdf): The rule adds a new Subpart 1208-6, entitled Suspension or Revocation of Certifications, to 19 NYCRR Part 1208.

Section 1208-6.1(a) provides that the purpose of Subpart 1208-6 is to implement Chapter 468 of the Laws of 2017, which authorizes the Secretary to promulgate rules and regulations with respect to the revocation or suspension of the certification of any code enforcement personnel found after a hearing to have "materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

Section 1208-6.1(b) defines the term "authority having jurisdiction" (AHJ) as any city, town, village, county, State agency, or other governmental unit or agency charged with or otherwise accountable or responsible for administration and enforcement of the Uniform Code and/or Energy Code.

Section 1208-6.2(a) provides that the Secretary of State may suspend or revoke the certification of a building safety inspector or code enforcement official if the administrative law judge conducting a hearing finds, after such hearing, that such building safety inspector or code enforcement official has materially failed to uphold his or her code enforcement duties.

Section 1208-6.2(b) provides that a Building Safety Inspector (BSI) shall be deemed to have materially failed to uphold his or her code enforcement duties if he or she: (1) fails to note one or more serious violations of the Uniform Code on an inspection report relating to a fire safety and/or property maintenance inspection, provided that such violations are of a type that should have been observed by a certified building safety inspector exercising reasonable care in the performance of the inspection; (2) makes any other material error or omission on an inspection report relating to a fire safety and/or property maintenance inspection, provided that such error or omission is of a type that should not have been made by a certified building safety inspector exercising reasonable care in the performance of the inspection; (3) demonstrates, by act or omission, willful misconduct, gross negligence, or gross incompetence in the performance of his or her code enforcement activities; (4) performs any code enforcement activity other than fire safety and/or property maintenance inspections of existing buildings; or (5) performs any code enforcement activity at a time when his or her certification is inactive or suspended.

Section 1208-6.2(c) provides that Code Enforcement Official (CEO) shall be deemed to have materially failed to uphold his or her code enforcement duties if he or she: (1) fails to note one or more serious violations of the Uniform Code and/or Energy Code on an inspection report relating to any type of inspection, provided that such serious violations are of a type that should have been observed by a certified code enforcement official exercising reasonable care in the performance of the inspection; (2) makes any other material error or omission on an inspection report relating to any type of inspection, provided that such error or omission is of a type that should not have been made by a certified code enforcement official exercising reasonable care in the performance of the inspection; (3) demonstrates, by act or omission, willful misconduct, gross negligence, or gross incompetence in the performance of his or her code enforcement activities; or (4) performs any code enforcement activity at a time when his or her certification is inactive or suspended.

Section 1208-6.2(d) provides that personnel-related matters, such as tardiness, absenteeism, insubordination, rude behavior, and the like, shall not be deemed to be a material failure to uphold code enforcement duties.

Section 1208-6.2(e) provides that (1) the suspension of a person's certification pursuant to Subpart 1208-6 shall result in such person being deemed not to be certified during the period of such suspension; (2) the revocation of a person's certification pursuant to Subpart 1208-6 shall result in such person being deemed not to be certified at any time on or after the date of such revocation; (3) such suspension or revocation shall not be shortened or terminated by reason of such person taking or re-taking any basic training, in-service training, advanced in-service training, or other training; and (4) unless otherwise provided in the order suspending or revoking such certification, such person shall not receive any new or additional certification as either a BSI or a CEO, and such person shall not be permitted to increase or decrease the level of his or her certification pursuant to section 1208-3.1(c) or (d), at any time during the period of such suspension or after such revocation.

Section 1208-6.3(a) provides that a complaint alleging that a BSI or CEO has materially failed to uphold his or her code enforcement duties may be submitted to the Department of State (DOS), and must (1) be in writing; (2) identify the BSI or CEO who is alleged to have materially failed to uphold his or her duties (the "subject person"); (3) identify the AHJ that employs or otherwise uses the services of the subject person; (4) include a statement of the acts or omissions of the subject person that are alleged by the complainant to constitute a material failure to uphold the subject person's code enforcement duties; (5) include the complainant's agreement to cooperate with any investigation conducted by the department and/or by any AHJ; (6) include the complainant's name, address, and contact information; and (7) be signed by the complainant.

Section 1208-6.3(b) provides that DOS will review the complaint to determine if the complaint states, on its face, an allegation that the subject person has materially failed to uphold his or her code enforcement duties.

Section 1208-6.3(c) provides that if DOS determines that the complaint, on its face, does not state an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS will notify the complainant of that determination, and DOS will take no further action with respect to the complaint. If DOS determines that the complaint, on its face, does state an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS shall investigate the complaint and/or refer the complaint to the appropriate AHJ, as provided in section 1208-6.4.

Section 1208-6.3(d) provides that DOS shall be permitted, but not required, to submit a copy of such complaint and any supporting information and documentation provided to DOS by the complainant to each AHJ that employs or otherwise uses the services of the subject person. In addition, if the complaint relates to an inspection performed pursuant to section 807-a of the Education Law, DOS shall be permitted, but not required, to submit a copy of such complaint and any supporting information and documentation provided to DOS by the complainant to the school authorities in charge of the subject school and to the New York State Department of Education. To the extent required by the Personal Privacy Protection Law, DOS shall redact the complainant's name, address, and contact information, and any other "personal information" from copies submitted to an AHJ or to any other person or entity pursuant this subdivision.

Section 1208-6.3(e) provides that DOS may take action with respect to information indicating that a BSI or CEO has materially failed to uphold his or her enforcement duties even if that information comes to DOS's attention by means other than a formal complaint.

Section 1208-6.4(a) provides that if DOS determines that a complaint states, on its face, an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS shall: (1) investigate such complaint in such manner as the department deems appropriate, and/or (2) refer such complaint to the AHJ that employs or otherwise uses the services of the subject person; require such AHJ to investigate the complaint and to submit a written report of such investigation to the department; and provide such AHJ with instructions regarding the conduct of such investigation and the submission of such report.

Section 1208-6.4(a) also provides that the complainant, the subject person named in the complaint, and each AHJ that employs or otherwise uses the services of the subject person shall cooperate fully with any investigation conducted pursuant to this subdivision.

Section 1208-6.4(b) provides that if information indicating that a BSI or CEO may have materially failed to uphold his or her code enforcement duties comes to the attention of DOS by any means other than a formal complaint submitted pursuant to section 1208-6.3, DOS may: (1) investigate such matter in such manner as the department deems appropriate, and/or (2) refer such matter to the AHJ that employs or otherwise uses the services of such building safety inspector or code enforcement official; require such AHJ to investigate the complaint and to submit a written report of such investigation to the department; and provide such AHJ with instructions regarding the conduct of such investigation and the submission of such report.

Section 1208-6.4(b) also provides that the BSI or CEO and each AHJ that employs or otherwise uses the services of such BSI or CEO shall cooperate fully with any investigation conducted pursuant to section 1208-6.4(b).

Section 1208-6.5(a) provides that DOS may refer the question of whether a BSI or CEO did or did not materially fail to uphold his or her code enforcement duties to DOS's Office of Administrative Hearings. Upon such referral, an administrative law judge in the Office of Administrative Hearings shall conduct a hearing and shall render a decision in writing.

Section 1208-6.5(b) provides that the hearing shall be conducted in accordance with the provisions of Article 3 of the State Administrative Procedure Act and 19 NYCRR Part 400.

Section 1208-6.5(c) provides that the decision shall include findings of fact and conclusions of law or reasons for the decision, determination, or order. If the administrative law judge finds that the BSI or CEO did materially fail to uphold his or her code enforcement duties, the administrative law judge shall: (1) suspend the certification of such building safety inspector or code enforcement official for such period of time, and subject to such terms and conditions, as the administrative law judge may deem to be appropriate, or (2) revoke the certification of such building safety inspector or code enforcement official.

Section 1208-6.6 provides that each person who has performed or hereafter performs any enforcement activity on behalf of any AHJ shall be deemed to have consented to: (a) the jurisdiction of DOS and the DOS's Office of Administrative Hearings for the purpose of proceedings to suspend or revoke certifications pursuant to this Subpart, and (b) service of notices of hearing, determinations, and other papers in such proceedings by certified mail, return receipt requested, or regular first-class mail directed to such person at the address of such person last known to the

department, or in any manner authorized by the Civil Practice Law and Rules or any other applicable law.

Section 1208-6.7 provides for the purposes of Subpart 1208-6, any authority to perform enforcement activities given to a person under section 1208-2.2(b)(1), section 1208-2.2(b)(2), or section 1208-2.2(b)(4) of Part 1208 shall be deemed to be a certification, and such authority shall be subject to suspension or revocation pursuant to Subpart 1208-6.

Section 1208-6.8 provides that if a person whose certification has been designated as inactive pursuant to section 1208-3.5 of Part 1208 materially fails to uphold his or her code enforcement duties, whether before or after such designation, such person's certification shall be subject to suspension or revocation pursuant to Subpart 1208-6.

Section 1208-6.9 provides that the provisions of Subpart 1208-6 are in addition to, and not in substitution for or limitation of, the provisions of 19 NYCRR section 1208-3.5(b).

The rule also amends 19 NYCRR section 1208-3.5(b) to provide that the revocations contemplated by that provision are in addition to, and not in substitution for or limitation of, the provisions of Subpart 1208-6.

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 July 23, 2018.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, email: joseph.ball@dos.ny.gov

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

Public comment will be received until: Five days after the last scheduled public hearing.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 376-a of the Executive Law authorizes the Secretary of State to promulgate rules and regulations relating to training of personnel charged with enforcement of the Uniform Fire Prevention and Building Code (the Uniform Code) and the State Energy Conservation Construction Code (the Energy Code). Those rules and regulations are currently set forth in 19 NYCRR Part 1208.

Section 376-a of the Executive Law was amended by Chapter 468 of the Laws of 2017. The amendment provides that the rules and regulations relating to training of code enforcement personnel must include provisions that (1) establish minimum training and examination requirements to qualify for code enforcement officer certification; (2) provide for issuance of a code enforcement officer certification when an applicant satisfies such training and examination requirements; and (3) provide for revocation or suspension of the certification of any code enforcement personnel found after a hearing "to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

19 NYCRR Part 1208 already establishes basic training and examination requirements for code enforcement personnel, and provides for certification of persons who satisfy those requirements. This rule adds a new Subpart 1208-6 to 19 NYCRR Part 1208. New Subpart 1208-6 implements the amendments to section 376-a of the Executive Law made by Chapter 468 of the Laws of 2017 by adding provisions relating to the revocation or suspension of certifications of code enforcement personnel who are found to have materially failed to uphold their code enforcement duties.

2. LEGISLATIVE OBJECTIVES:

This rule will provide a means for the Secretary of State to revoke or suspend the certification of code enforcement personnel who are found to have materially failed to uphold their code enforcement duties. This will help assure that only code enforcement personnel who perform their duties properly are actually administering and enforcing the Uniform Code in this State. This will further the legislative objective of ensuring that administration and enforcement of the Uniform Code be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law section 381 and section 376-a.

3. NEEDS AND BENEFITS:

Prior to the enactment of Chapter 468 of the Laws of 2017, section 376-a of Executive Law and 19 NYCRR Part 1208 authorized revocation of the certification of a code enforcement official (CEO) or building safety inspector (BSI) only if such CEO or BSI failed to complete the required training. Chapter 468 of the Laws of 2017 amends section 376-a of the Executive Law to provide for revocation or suspension of the certification of code enforcement personnel who are found to have materially failed to uphold their code enforcement duties. This rule implements that amendment. This rule will authorize the Secretary of State to revoke or suspend the certification of a CEO or BSI who has materially failed to fulfill his or her duties. This, in turn, will help assure that only CEOs and BSIs who perform their duties properly are actually administering and enforcing the Uniform Code in this State.

4. COSTS:

(a) Costs to Regulated Parties. This rule does not change the existing training requirements. Therefore, this rule will not impose any new or additional costs on persons wishing to take the basic training required for initial certification or on certified persons wishing to take the in-service and advanced in-service training required to maintain certification in "active" status.

(b) Costs to the Department of State and the State of New York. This rule will require the Department of State (DOS) to investigate complaints alleging that a CEO or BSI has materially failed to uphold his or her code enforcement duties and, if warranted, to conduct a hearing to determine if his or her certification should be revoked or suspended. The costs of conducting these investigations and conducting these hearings will depend on the number of complaints received, the nature of the allegations made, and the complexity of the investigations to be conducted. DOS cannot reasonably estimate these costs at this time.

(c) Costs to local governments. This rule will require a local government to cooperate with any investigation conducted by DOS in relation to a complaint against a CEO or BSI who performs code enforcement activities for such local government. This rule will also authorize DOS to refer a complaint to the local government that employs the CEO or BSI named in the complaint, and to require that local government to conduct an investigation and to report back to DOS. The costs incurred by a local government in cooperating with investigations conducted by DOS, and in conducting investigations of complaints referred by DOS, will depend on the number of complaints received by DOS, the number of such complaints referred by DOS to local governments, the nature of the allegations made, and the complexity of the investigations to be conducted. DOS cannot reasonably estimate these costs at this time.

5. PAPERWORK:

This rule will require a complaint alleging that a CEO or BSI has materially failed to uphold his or her code enforcement duties to be in writing. DOS will prescribe a form that can be used for that purpose.

The rule will require local governments to investigate complaints referred to them by DOS, and to submit written reports of the results of such investigations to DOS.

6. LOCAL GOVERNMENT MANDATES:

Any county, city, town, or village that is responsible for administration and enforcement of the Uniform Code will be required to cooperate with any investigation conducted by DOS of a complaint involving a CEO or BSI who performs code enforcement activities for such county, city, town, or village.

If DOS refers a complaint involving a CEO or BSI to the county, city, town, or village for which such CEO or BSI performs code enforcement activities, such county, city, town, or village will be required to conduct an investigation and to submit a written report of the results of such investigation to DOS.

Counties, cities, towns, and villages that are responsible for administration and enforcement of the Uniform Code are already required by existing law to do so "in due and proper manner so as to extend to the public protection from the hazards of fire and inadequate building construction." See 19 NYCRR section 1203.2(d). In the opinion of DOS, the obligation to administer and enforce the Uniform Code in a "due and proper manner" already includes the obligation to monitor the performance of code enforcement personnel, the obligation to investigate complaints involving the performance of code enforcement personnel, and the obligation to take appropriate action in a case where a CEO or BSI is found not to be performing his or her duties properly. Accordingly, the requirements expressly imposed on counties, cities, towns, and villages by this rule are not entirely new, but represent a codification and formalization of a portion of the existing "due and proper manner" requirements.

This rule will impose no requirement on any school district, fire district, or other special district.

7. DUPLICATION:

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES:

The alternative of making more extensive changes to existing Part 1208 was considered, but rejected because DOS did not believe that more extensive changes could be fully developed and considered by DOS, and by other interested parties, prior to the effective date of Chapter 468 of the Laws of 2017.

9. FEDERAL STANDARDS:

There are no standards of the Federal Government which address the subject matter of the rule.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated persons will be able to achieve compliance with this rule immediately.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

Section 376-a of the Executive Law authorizes the Secretary of State to promulgate rules and regulations relating to training of personnel charged with enforcement of the Uniform Fire Prevention and Building Code (the Uniform Code) and the State Energy Conservation Construction Code (the Energy Code). Those rules and regulations are currently set forth in 19 NYCRR Part 1208.

Section 376-a of the Executive Law was amended by Chapter 468 of the Laws of 2017. The amendment provides that the rules and regulations relating to training of code enforcement personnel must include provisions that (1) establish minimum training and examination requirements to qualify for code enforcement officer certification; (2) provide for issuance of a code enforcement officer certification when an applicant satisfies such training and examination requirements; and (3) provide for revocation or suspension of the certification of any code enforcement personnel found after a hearing "to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

19 NYCRR Part 1208 already establishes minimum training and examination requirements for code enforcement personnel, and already provides for certification of code enforcement personnel who satisfy those requirements.

This rule adds a new Subpart 1208-6 to 19 NYCRR Part 1208. New Subpart 1208-6 implements the amendments to section 376-a of the Executive Law made by Chapter 468 of the Laws of 2017 by adding provisions relating to the revocation or suspension of certifications of code enforcement personnel who are found to have materially failed to uphold their code enforcement duties.

This rule will not impose any reporting or recordkeeping requirements on small businesses, and this rule will not require small businesses to undertake any other affirmative acts. This rule will have no effect on small businesses.

This rule contemplates that the Department of State (DOS) will receive complaints involving code enforcement personnel, and will investigate those complaints. Counties, cities, towns, and villages (hereinafter referred to collectively as "local governments") that are responsible for administration and enforcement of the Uniform Code and Energy Code will be required to cooperate with such investigations.

This rule also provides that DOS may refer a complaint involving code enforcement personnel to the local government for which such code enforcement personnel performs code enforcement activities. Local governments receiving such referrals will be required to investigate such complaints and to submit written reports of the results of such investigations to DOS.

DOS estimates that approximately 1,500 to 1,600 local governments are responsible for administration and enforcement of the Uniform Code and Energy Code.

2. COMPLIANCE REQUIREMENTS:

This rule will not impose any reporting or recordkeeping requirements on small businesses, and this rule will not require small businesses to undertake any other affirmative acts.

This rule contemplates that DOS will receive complaints involving code enforcement personnel, and will investigate those complaints. Local governments that are responsible for administration and enforcement of the Uniform Code and Energy Code will be required to cooperate with such investigations.

This rule also provides that DOS may refer a complaint involving code enforcement personnel to the local government for which such code enforcement personnel performs code enforcement activities. Local governments receiving such referrals will be required to investigate such complaints and to submit written reports of the results of such investigations to DOS.

3. PROFESSIONAL SERVICES:

This rule will not impose any reporting or recordkeeping requirements on small businesses, and this rule will not require small businesses to undertake any other affirmative acts. Therefore, small businesses will not be required to use any professional services to comply with this rule.

If DOS conducts an investigation of a complaint involving a code enforcement personnel who performs enforcement activities for a local government, that local government will be required to cooperate with the investigation. The local government may elect to seek legal advice relating to the investigation.

If DOS refers a complaint involving a code enforcement personnel to a local government, such local government will be required to investigate such complaint and to prepare a written report and to submit that report to DOS. The local government may elect to seek legal advice relating to the investigation and the preparation and submission of the report.

4. COMPLIANCE COSTS:

This rule will not impose any reporting or recordkeeping requirements on small businesses, and this rule will not require small businesses to undertake any other affirmative acts. Therefore, small businesses will not incur any compliance costs.

DOS does not anticipate that local governments will incur any initial capital costs to comply with this rule. Costs will be incurred by a local government only if and when DOS receives a complaint involving code enforcement personnel who performs enforcement activities for the local government and (1) DOS investigates such complaint and requires the local government to cooperate in such investigation or (2) DOS refers such complaint to the local government and requires the local government to investigate and prepare a written report for submission to DOS. The costs incurred by a local government in cooperating with investigations conducted by DOS, and in conducting investigations of complaints referred by DOS, will depend on the number of complaints received by DOS, the number of such complaints referred by DOS to local governments, the nature of the allegations made, and the complexity of the investigations to be conducted. DOS cannot reasonably estimate these costs at this time.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

As small businesses are not regulated by the rule, the economic and technical feasibility of their compliance with the rule is not a factor.

Local governments will be required to comply with this rule. However, this rule imposes no initial capital costs on local governments, and no new technology need be developed for compliance with this rule. Consequently, it is economically and technologically feasible for local governments to comply with the rule.

6. MINIMIZING ADVERSE IMPACT:

As small businesses are not subject to provisions of this rule, it will have no adverse economic impact on small businesses.

The need to investigate a complaint alleging that a code enforcement official (CEO) or building safety inspector (BSI) has materially failed to uphold his or her codes enforcement duties, and the need to suspend or revoke the certification of a CEO or BSI who is found to have materially failed to uphold his or her code enforcement duties, applies to all local governments, regardless of size. The objectives of the authorizing statute cannot be achieved by exempting local governments of any size or type from this rule, or by imposing lower standards on local governments of any size or type. Consequently, the rule cannot be designed to further minimize any economic impact on local governments of any size or type, and the approaches for minimizing adverse economic impact suggested in SAPA § 202-b(1) were not considered as such alternatives would not be appropriate.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

DOS provided interested parties throughout the State with an early opportunity to participate in the development of this proposed rule by posting a notice on DOS's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry, which is prepared by DOS and currently distributed to over 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry in all areas of the State.

DOS has posted the full text of this rule on DOS's website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

Section 376-a of the Executive Law authorizes the Secretary of State to promulgate rules and regulations relating to training of personnel charged with enforcement of the Uniform Fire Prevention and Building Code (the Uniform Code) and the State Energy Conservation Construction Code (the Energy Code). Those rules and regulations are currently set forth in 19 NYCRR Part 1208.

Section 376-a of the Executive Law was amended by Chapter 468 of the Laws of 2017. The amendment provides that the rules and regulations relating to training of code enforcement personnel must include provisions that (1) establish minimum training and examination requirements to qualify for code enforcement officer certification; (2) provide for issuance of a code enforcement officer certification when an applicant satisfies such training and examination requirements; and (3) provide for revocation or suspension of the certification of any code enforcement personnel found after a hearing "to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

19 NYCRR Part 1208 already establishes minimum training and examination requirements for code enforcement personnel, and already provides for certification of code enforcement personnel who satisfy those requirements.

This rule adds a new Subpart 1208-6 to 19 NYCRR Part 1208. New Subpart 1208-6 implements the amendments to section 376-a of the Executive Law made by Chapter 468 of the Laws of 2017 by adding provisions relating to the revocation or suspension of certifications of code enforce-

ment personnel who are found to have materially failed to uphold their code enforcement duties.

This rule contemplates that the Department of State (DOS) will receive complaints involving code enforcement personnel, and will investigate those complaints. Counties, cities, towns, and villages (hereinafter referred to collectively as "local governments") that are responsible for administration and enforcement of the Uniform Code and Energy Code will be required to cooperate with such investigations.

This rule also provides that DOS may refer a complaint involving code enforcement personnel to the local government for which such code enforcement personnel performs code enforcement activities. Local governments receiving such referrals will be required to investigate such complaints and to submit written reports of the results of such investigations to DOS.

DOS estimates that approximately 1,500 to 1,600 local governments are responsible for administration and enforcement of the Uniform Code and Energy Code. This rule will apply to all local governments located in rural areas of the State.

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

This rule contemplates that DOS will receive complaints involving code enforcement personnel, and will investigate those complaints. Local governments, including but not limited to local governments located in rural areas of the State, that are responsible for administration and enforcement of the Uniform Code and Energy Code will be required to cooperate with such investigations. The local government may elect to seek legal advice relating to the investigation.

This rule also provides that DOS may refer a complaint involving code enforcement personnel to the local government for which such code enforcement personnel performs code enforcement activities. Local governments, including but not limited to local governments located in rural areas of the State, receiving such referrals will be required to investigate such complaints and to submit written reports of the results of such investigations to DOS. The local government may elect to seek legal advice relating to the investigation and the preparation and submission of the report.

3. COMPLIANCE COSTS.

DOS does not anticipate that local governments will incur any initial capital costs to comply with this rule. Costs will be incurred by a local government only if and when DOS receives a complaint involving code enforcement personnel who performs enforcement activities for the local government. This rule will require a local government to cooperate with any investigation conducted by DOS in relation to a complaint against a code enforcement official (CEO) or building safety inspector (BSI) who performs code enforcement activities for such local government. This rule will also authorize DOS to refer a complaint to the local government that employs the CEO or BSI named in the complaint, and to require that local government to conduct an investigation and to report back to DOS.

The costs incurred by a local government in cooperating with investigations conducted by DOS, and in conducting investigations of complaints referred by DOS, will depend on the number of complaints received by DOS, the number of such complaints referred by DOS to local governments, the nature of the allegations made, and the complexity of the investigations to be conducted. DOS cannot reasonably estimate these costs at this time.

The costs to be incurred by a local government in a rural area in cooperating with an investigation conducted by DOS, or in investigating a complaint referred by DOS, are not likely to vary significantly from the costs incurred by a local government in a non-rural area. To the extent that local governments in rural areas may be involved in fewer investigations than local governments in non-rural areas, the cumulative costs incurred by local governments in rural areas may be less than the cumulative costs incurred by local governments in non-rural areas.

4. MINIMIZING ADVERSE IMPACT.

As stated in the "Compliance Costs" section of this Rural Area Flexibility Analysis, the economic impact of this rule on local governments in rural areas will be no greater than the economic impact of this rule on local governments in non-rural areas.

The need to investigate a complaint alleging that a code enforcement official (CEO) or building safety inspector (BSI) has materially failed to uphold his or her codes enforcement duties, and the need to suspend or revoke the certification of a CEO or BSI who is found to have materially failed to uphold his or her code enforcement duties, applies to all local governments, including but not limited to local governments located in rural areas. The objectives of the authorizing statute cannot be achieved by imposing lower standards on local governments located in rural areas. Consequently, the rule cannot be designed to further minimize any economic impact on local governments in rural areas, and the approaches for minimizing adverse economic impact suggested in SAPA § 202-bb(2)(b) were not considered as such alternatives would not be appropriate.

5. RURAL AREA PARTICIPATION.

DOS notified interested parties throughout the State, including interested parties in rural areas, of the proposed adoption of this rule by means of a notice published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code, the Energy Code, and the construction industry which is prepared by DOS and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry in all areas of the State.

DOS has posted the full text of this rule on the Department's website.

Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities.

19 NYCRR Part 1208 already establishes basic training and examination requirements for code enforcement personnel, and provides for certification of persons who satisfy those requirements. This rule adds a new Subpart 1208-6 to 19 NYCRR Part 1208. New Subpart 1208-6 implements the amendments to section 376-a of the Executive Law made by Chapter 468 of the Laws of 2017 by adding provisions relating to the revocation or suspension of certifications of code enforcement personnel who are found to have materially failed to uphold their code enforcement duties.

This rule will require the Department of State (DOS) to investigate complaints alleging that a code enforcement official (CEO) or building safety inspector (BSI) has materially failed to uphold his or her code enforcement duties and, if warranted, to conduct a hearing to determine if his or her certification should be revoked or suspended. Whether one or more additional employees will need to be hired to conduct these investigations and conduct these hearings will depend on the number of complaints received, the nature of the allegations made, and the complexity of the investigations to be conducted.

This rule will require a local government to cooperate with any investigation conducted by DOS in relation to a complaint against a CEO or BSI who performs code enforcement activities for such local government. This rule will also authorize DOS to refer a complaint to the local government that employs the CEO or BSI named in the complaint, and to require that local government to conduct an investigation and to report back to DOS. Local governments that are responsible for administration and enforcement of the Uniform Code are already required by existing law to do so "in due and proper manner so as to extend to the public protection from the hazards of fire and inadequate building construction." See 19 NYCRR section 1203.2(d). In the opinion of DOS, the obligation to administer and enforce the Uniform Code in a "due and proper manner" already includes the obligation to monitor the performance of code enforcement personnel, the obligation to investigate complaints involving the performance of code enforcement personnel, and the obligation to take appropriate action in a case where a CEO or BSI is found not to be performing his or her duties properly. Accordingly, the requirements expressly imposed on counties, cities, towns, and villages by this rule are not entirely new, but represent a codification and formalization of a portion of the existing "due and proper manner" requirements.

As a consequence, the Department of State concludes that this rule will not have a substantial adverse impact on jobs and employment opportunities but it is anticipated that this rule may have a positive impact on jobs and employment opportunities in New York State.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Minimum Standards for Administration and Enforcement of the Uniform Code and Energy Code

I.D. No. DOS-20-18-00001-P

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

Proposed Action: Amendment of sections 1203.2(b), 1203.3(g), (j), (k); renumbering of section 1203.3(j) to section 1203.3(k); and addition of sections 1202.4(c) and 1204.12(e) to Title 19 NYCRR.

Statutory authority: Executive Law, section 381(1)

Subject: Minimum standards for administration and enforcement of the Uniform Code and Energy Code.

Purpose: The purpose of this rule is to amend Part 1203 of Title 19 NYCRR by providing that the minimum standards will require code enforcement programs for local governments administering and enforcing the Uniform Code and Energy Code to (1) include provisions requiring condition assessments of parking garages and (2) require operating permits for the use of parking garages; and making certain technical corrections to

Part 1203. The purpose of this rule is to also amend Part 1202, which establishes the procedures applicable in circumstances where the Secretary of State must administer and enforce the Uniform Code in the place and stead of a local government or county, and to amend Part 1204, which establishes the procedures for the administration and enforcement of the Uniform Code by State agencies, to also include provisions requiring condition assessments of parking garages.

Public hearing(s) will be held at: 10:00 a.m., July 17, 2018 at Department of State, 99 Washington Ave., Rm. 505, Albany, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Text of proposed rule: Section 1202.4 of Title 19 NYCRR is amended to add a new subdivision (c) to read as follows:

(c) Parking garages (as that term is defined in section 1203.3(j)(2)(iv) of Part 1203 of this Title) shall be subject to condition assessments in accordance with section 1203.3(j) of Part 1203 of this Title. It shall be the responsibility of the owner or operator of the parking garage to provide the Department of State with the condition assessment reports for any parking garages and to otherwise comply with section 1203.3(j) of Part 1203 of this Title. For the purposes of section 1203.3(j)(5), the period fixed by the Department of State's code enforcement program as the interval between periodic condition assessements shall be deemed to be three (3) years.

Subdivision (b) of section 1203.2 of Title 19 NYCRR is amended to read as follows:

(b) Every state agency accountable under section 1201.2(d) of this Title for administration and enforcement of the Uniform Code shall provide for such administration and enforcement in accordance with Part 1204 of this Title *and section 1203.3(j) of this Part. For the purposes of section 1203.3(j)(5), the period fixed by the code enforcement program of each such state agencty as the interval between periodic condition assessements shall be deemed to be three (3) years.*

Paragraph (1) of subdivision (g) of section 1203.3 of Title 19 NYCRR is amended to read as follows:

(g) Operating permits.

(1) Operating permits shall be required for conducting [the activities or using the categories of buildings listed below] *any activity listed in subparagraph (i), (ii), or (iii) below or operating any type of building or structure listed in subparagraphs (iv), (v), or (vi) below*:

(i) manufacturing, storing or handling hazardous materials in quantities exceeding those listed in tables [2703.1.1(1), 2703.1.1(2), 2703.1.1(3) or 2703.1.1(4), of the Fire Code of New York State (see Part 1225 of this Title)] *5003.1.1(1), 5003.1.1(2), 5003.1.1(3) or 5003.1.1(4) of the 2015 edition of the International Fire Code (a publication currently incorporated by reference in Part 1225 of this Title)*;

(ii) hazardous processes and activities, including but not limited to, commercial and industrial operations which produce combustible dust as a byproduct, fruit and crop ripening, and waste handling;

(iii) use of pyrotechnic devices in assembly occupancies;

(iv) buildings containing one or more areas of public assembly with an occupant load of 100 persons or more; [and]

(v) parking garages as defined in subdivision (j) of this section; and

[(v)] *(vi)* buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, as determined by the government or agency charged with or accountable for administration and enforcement of the Uniform Code.

Subdivision (j) of section 1203.3 of Title 19 NYCRR is renumbered subdivision (k) and a new subdivision (j) is added to read as follows:

(j) Condition assessments of parking garages.

(1) General. Each authority having jurisdiction shall include in its code enforcement program provisions requiring condition assessments of parking garages. Such provisions shall include, at a minimum, the requirements and features described in this subdivision.

(2) Definitions. For the purposes of this subdivision:

(i) the term "authority having jurisdiction" means the city, town, village, county, State agency, or other governmental unit or agency responsible for administration and enforcement of the Uniform Code with respect to a parking garage;

(ii) the term "condition assessment" means an on-site inspection and evaluation of a parking garage for evidence of deterioration of any structural element or building component of such parking garage, evidence of the existence of any unsafe condition in such parking garage, and evidence indicating that such parking garage is an unsafe structure;

(iii) the term "deterioration" means the weakening, disintegration, corrosion, rust, or decay of any structural element or building component, or any other loss of effectiveness of a structural element or building component;

(iv) the term "parking garage" means any building or structure, or part thereof, in which all or any part of any structural level or levels is used for parking or storage of motor vehicles, excluding:

(a) buildings in which the only level used for parking or storage of motor vehicles is on grade;

(b) an attached or accessory structure providing parking exclusively for a detached one- or two-family dwelling; and

(c) a townhouse unit with attached parking exclusively for such unit;

(v) the term "professional engineer" means an individual who is licensed or otherwise authorized under Article 145 of the Education Law to practice the profession of engineering in the State of New York and who has at least three years of experience performing structural evaluations;

(vi) the term "responsible professional engineer" means the professional engineer who performs a condition assessment, or under whose supervision a condition assessment is performed, and who seals and signs the condition assessment report.

(vii) the term "unsafe condition" includes the conditions identified as "unsafe" in section 304.1.1, section 305.1.1, and section 306.1.1 of the 2015 edition of the International Property Maintenance Code (a publication currently incorporated by reference in Part 1226 of this Title); and

(viii) the term "unsafe structure" means a structure that is so damaged, decayed, dilapidated, or structurally unsafe, or is of such faulty construction or unstable foundation, that partial or complete collapse is possible.

(3) Condition assessments – general requirements. The owner or operator of each parking garage shall cause such parking garage to undergo an initial condition assessment as described in paragraph (4) of this subdivision, periodic condition assessments as described in paragraph (5) of this subdivision, and such additional condition assessments as may be required under paragraph (6) of this subdivision. Each condition assessment shall be conducted by or under the direct supervision of a professional engineer. A written report of each condition assessment shall be prepared, and provided to the authority having jurisdiction, in accordance with the requirements of paragraph (7) of this subdivision. Before performing a condition assessment (other than the initial condition assessment) of a parking garage, the responsible professional engineer for such condition assessment shall review all available previous condition assessment reports for such parking garage.

(4) Initial condition assessment. Each parking garage shall undergo an initial condition assessment as follows:

(i) New parking garages shall undergo an initial condition assessment following construction and prior to a certificate of occupancy or certificate of compliance being issued for the structure,

(ii) Existing parking garages shall undergo an initial condition assessment no later than one year after the effective date of the rule adding this subdivision to 19 NYCRR section 1203.3.

(5) Periodic condition assessments. Following the initial condition assessment of a parking garage, such parking garage shall undergo periodic condition assessments at intervals not to exceed the lesser of:

(i) three (3) years, or

(ii) at such shorter period as may be fixed by the authority having jurisdiction in its code enforcement program.

(6) Additional condition assessments.

(i) If the latest condition assessment report for a parking garage includes a recommendation by the responsible professional engineer that an additional condition assessment of such parking garage, or any portion of such parking garage, be performed before the date by which the next periodic condition assessment would be required under paragraph (5) of this subdivision, the authority having jurisdiction shall require the owner or operator of such parking garage to cause such parking garage (or, if applicable, the portion of such parking garage identified by the responsible professional engineer) to undergo an additional condition assessment no later than the date recommended in such condition assessment report.

(ii) If the authority having jurisdiction becomes aware of any new or increased deterioration which, in the judgment of the authority having jurisdiction, indicates that an additional condition assessment of the entire parking garage, or of the portion of the parking garage affected by such new or increased deterioration, should be performed before the date by which the next periodic condition assessment would be required under paragraph (5) of this subdivision, the authority having jurisdiction shall require the owner or operator of such parking garage to cause such parking garage (or, if applicable, the portion of the parking garage affected by such new or increased deterioration) to undergo an additional condition assessment no later than the date determined by the authority having jurisdiction to be appropriate.

(7) Condition assessment reports. The responsible professional engineer shall prepare, or directly supervise the preparation of, a written report of each condition assessment, and shall submit such condition assessment report to the authority having jurisdiction within such time period as fixed by the authority having jurisdiction. Such condition assessment report shall be sealed and signed by the responsible professional engineer, and shall include:

(i) an evaluation and description of the extent of deterioration and conditions that cause deterioration that could result in an unsafe condition or unsafe structure;

(ii) an evaluation and description of the extent of deterioration and conditions that cause deterioration that, in the opinion of the responsible professional engineer, should be remedied immediately to prevent an unsafe condition or unsafe structure;

(iii) an evaluation and description of the unsafe conditions;

(iv) an evaluation and description of the problems associated with the deterioration, conditions that cause deterioration, and unsafe conditions;

(v) an evaluation and description of the corrective options available, including the recommended timeframe for remedying the deterioration, conditions that cause deterioration, and unsafe conditions;

(vi) an evaluation and description of the risks associated with not addressing the deterioration, conditions that cause deterioration, and unsafe conditions;

(vii) the responsible professional engineer's recommendation regarding preventative maintenance;

(viii) except in the case of the report of the initial condition assessment, the responsible professional engineer's attestation that he or she reviewed all previously prepared condition assessment reports available for such parking garage, and considered the information in the previously prepared reports while performing the current condition assessment and while preparing the current report; and

(ix) the responsible professional engineer's recommendation regarding the time within which the next condition assessment of the parking garage or portion thereof should be performed. In making the recommendation regarding the time within which the next condition assessment of the parking garage or portion thereof should be performed, the responsible professional engineer shall consider the parking garage's age, maintenance history, structural condition, construction materials, frequency and intensity of use, location, exposure to the elements, and any other factors deemed relevant by the responsible professional engineer in his or her professional judgment.

(8) The authority having jurisdiction shall review each condition assessment report. The authority having jurisdiction shall take such enforcement action or actions in response to the information in such condition assessment report as may be necessary or appropriate to protect the public from the hazards that may result from the conditions described in such report. In particular, but not by way of limitation, the authority having jurisdiction shall, by Order to Remedy or such other means of enforcement as the authority having jurisdiction may deem appropriate, require the owner or operator of the parking garage to repair or otherwise remedy all deterioration, all conditions that cause deterioration, and all unsafe conditions identified in such condition assessment report pursuant to subparagraphs (ii) and (iii) of paragraph (7). All repairs and remedies shall comply with the applicable provisions of the Uniform Code. Neither this paragraph nor the provisions of the code enforcement program of the authority having jurisdiction that implement this paragraph shall limit or impair the right of the authority having jurisdiction to take any other enforcement action, including but not limited to suspension or revocation of a parking garage's operating permit, as may be necessary or appropriate in response to the information in a condition assessment report.

(9) The authority having jurisdiction shall retain all condition assessment reports for the life of the parking garage. Upon request by a professional engineer who has been engaged to perform a condition assessment of a parking garage, and who provides the authority having jurisdiction with a written statement attesting to the fact that he or she has been so engaged, the authority having jurisdiction shall make the previously prepared condition assessment reports for such parking garage (or copies of such reports) available to such professional engineer. The authority having jurisdiction shall be permitted to require the owner or operator of the subject parking garage to pay all costs and expenses associated with making such previously prepared condition assessment reports (or copies thereof) available to the professional engineer.

(10) Neither this subdivision nor the provisions of the code enforcement program of the authority having jurisdiction that implement this subdivision shall limit or impair the right or the obligation of the authority having jurisdiction:

(i) to perform such construction inspections as are required by the stricter of subdivision (b) of this section or the code enforcement program of the authority having jurisdiction;

(ii) to perform such periodic fire safety and property maintenance inspections as are required by the stricter of subdivision (h) of this section or the code enforcement program of the authority having jurisdiction; and/or

(iii) to take such enforcement action or actions as may be necessary or appropriate to respond to any condition that comes to the attention of the authority having jurisdiction by means of its own inspections or observations, by means of a complaint, or by any other means other than a condition assessment or a report of a condition assessment.

(11) The use of the term "responsible professional engineer" in this subdivision shall not be construed as limiting the professional responsibility or liability of any professional engineer, or of any other licensed professional, who participates in the preparation of a condition assessment without being the responsible professional engineer for such condition assessment.

Newly renumbered (k) of section 1203.3 of Title 19 NYCRR is amended to read as follows:

[(j)]*(k)* Recordkeeping.

A system of records of the features and activities specified in subdivisions (a) through [(i)] *(j)* of this section and of fees charges and collected, if any, shall be established and maintained.

Section 1204.12 of Title 19 NYCRR is amended by adding a new subdivision (e) to read as follows:

(e) In addition to the periodic fire safety inspections of buildings within its custody required by subdivision (a), each State agency shall commence a program of having condition assessments conducted of parking garages within its custody in accordance with section 1203.3(j) of Part 1203 of this Title.

Text of proposed rule and any required statements and analyses may be obtained from: Gerard Hathaway, Department of State, 99 Washington Ave., Suite 1160, Albany, NY 12231, (518) 486-6990, email: gerard.hathaway@dos.ny.gov

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

Public comment will be received until: Five days after the last scheduled public hearing.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY AND LEGISLATIVE OBJECTIVES

19 NYCRR Part 1203 ("Part 1203") implements Executive Law § 381(1) by establishing minimum standards for administration and enforcement of the State Uniform Fire Prevention and Building Code ("Uniform Code"), and by setting the time for compliance with an order to remedy.

This rule is intended to amend Part 1203 of Title 19 NYCRR by providing that the minimum standards require code enforcement programs for local governments administering and enforcing the Uniform Code to (1) include provisions requiring condition assessments of parking garages and (2) require operating permits for the use of parking garages; and by making certain technical corrections to Part 1203, such as amending Section 1203.3(g), relating to operating permits, by changing references to provisions in the 2010 Fire Code of New York State to references to provisions in the 2015 International Fire Code.[1] This rule will also amend Part 1202, which establishes the procedures applicable in circumstances where the Secretary of State must administer and enforce the Uniform Code in the place and stead of a local government or county, and to amend Part 1204, which establishes the procedures for the administration and enforcement of the Uniform Code by State agencies, to also include provisions requiring condition assessments of parking garages.

2. NEEDS AND BENEFITS

The minimum standards contained in Part 1203 include requirements for fire safety and property maintenance inspections of commercial buildings. Unfortunately, these inspections are not adequate for ensuring the ongoing structural integrity of aging parking garages.

Parking garages are fundamentally different from most other commercial buildings. For example, the structural elements (beams, slabs, columns, etc.) of most parking garages are normally exposed to the elements, whereas in most other buildings they are not. This exposure allows the freeze-thaw cycle to create micro-cracks in the concrete matrix, resulting in a deterioration of the concrete surface known as scaling. Scaling allows deicing salts and chemicals to penetrate the concrete which could deteriorate the reinforcing steel. Steel reinforcement is a critical component of all structural concrete and provides the concrete member with its tensile strength. Absent this strength, an abrupt structural failure can occur. Impact loading due to vehicle traffic places additional stress on deteriorated members which compounds the problem. Without a routine inspection and maintenance program, parking garages eventually succumb to deterioration and, in some instances, collapse.

There have been many parking garage collapses in New York within

recent years and many more across the nation. On September 20, 2017, a parking garage in New Rochelle was closed due to a section of the deck collapsing. In February 2017, a two-level parking garage in Bronx collapsed, damaging dozens of cars. On July 16, 2015 in Johnson City, NY, a "large swath of concrete" landed on vehicles located on the bottom level of a garage. A 200-foot by 200-foot section of parking garage in Poughkeepsie collapsed onto the lower level on February 15, 2007. This massive collapse was a result of snow piled on the upper deck following snow removal operations. On April 21, 2006, a helix-shaped parking garage ramp collapsed in Rochester, imposing $18.4 million in repairs. Aside from collapses, many more parking garages close because of concerns of a possible collapse.

The intent of this rule is to prevent these catastrophic collapses, ensure public safety, and extend the useful life of these structures. The proposed rule will require authorities having jurisdiction to amend their local laws to require owners of parking garages to hire a professional engineer with the proper experience to conduct condition assessments of parking garages for conditions that could render them structurally unsafe. An experienced engineer will not only be able to identify the conditions that are causing the deterioration and the remedy, but will also be able to certify that these structures are safe to occupy. This rule will require all deterioration and unsafe conditions as identified by the engineer to be remedied in the manner specified by the engineer, as directed by the authority having jurisdiction.

If adopted, the proposed rule will prove to be very beneficial to New Yorkers. Building occupants will benefit from this rule by ensuring that parking garages are safe to occupy. The public will benefit from this rule through the reduced likelihood that debris from partial or complete collapses will strike them or their property. Small scale deterioration is easier and cheaper to correct than major deterioration, and substantially cheaper to remedy than a collapsed building. This rule will establish a routine condition assessment program that will identify small scale deterioration and cause it to be corrected prior to it compounding into a larger problem. Correcting structural problems early will increase the lifespan of these structures and benefit parking garage owners by increasing the number of years that these buildings will provide a source of income. Correcting small scale deterioration on a regular basis will provide additional benefits to parking garage owners by allowing them to better estimate for these repair costs when budgeting the annual operating cost of the garage. This is in contrast to major deterioration or unsafe conditions which may suddenly and significantly affect a garage's annual operating cost. Lawsuits associated with collapses will be minimized, which will also prove beneficial to garage owners. It should be noted that many parking garages are owned by local governments and State agencies. Local governments and State agencies will therefore benefit from this rule as much as private owners. The condition assessments and repairs required by this rule will provide a more consistent source of income for engineers, material testing companies, contractors, material suppliers, and equipment suppliers who are regularly engaged in identifying and correcting deterioration.

Many parking garage owners realize the importance of an inspection and maintenance program and currently have such a program in place. Some local governments, such as the City of Syracuse, presently require parking garage structural evaluations. This rule is not expected to substantially affect these entities who are actively pursuing the ongoing maintenance of parking garages.

3. COSTS

The "regulated parties" affected by this rule are the cities, towns, villages, counties, and State agencies that administer and enforce the Uniform Code (the "Authorities Having Jurisdiction" or "AHJs"). Therefore, the costs to "regulated parties" and the costs to the State and local governments can be discussed in a single section in this Regulatory Impact Statement.

Part 1203 currently requires each AHJ to establish a code enforcement program that includes the features described in Part 1203. This rule will require AHJs to include provisions requiring condition assessments of parking garages.

Part 1203 currently requires each code enforcement program to include provisions for recordkeeping. This rule will require AHJs to keep records relating to condition assessments of parking garages.

Each AHJ will be required to review its existing code enforcement program, and if such program does not now include the provisions described in Part 1203, as amended by this rule, such AHJ will be required to amend its program by local law, ordinance, or other appropriate regulation. The Department of State (DOS) anticipates that any AHJ that has established a code enforcement program that included the features described in the current version of Part 1203 will need to make only minor changes to that program to bring it into compliance with Part 1203 and amended by this rule. To assist local governments, DOS will post on its website a model local law establishing a code enforcement program that includes the features required by Part 1203, as amended by this rule.

Each AHJ that has a parking garage in its jurisdiction may incur additional administrative costs resulting from the collection and review of condition assessment reports, taking such enforcement action or actions in response to the information in such reports (if necessary), and maintaining such reports for the life of the parking garage. The proposed rule requires AHJs to require garage owners to obtain an operating permit from the AHJ prior to operating a parking garage, which could result in additional administrative fees. However, requiring an operating permit will not only provide AHJs with the necessary leverage to ensure that the condition assessments are completed, but will also allow AHJs to charge fees for these permits. DOS anticipates that these fees could offset the cost of the additional administrative duties that AHJs may incur as a result of this rule.

While this rule will not apply directly to owners of parking garages, this rule will have an impact on parking garage owners. Specifically, this rule will require AHJs to include provisions requiring periodic condition assessments of parking garages to their code enforcement programs, and owners of parking garages will be required to comply with those provisions. The ultimate cost to parking garage owners will depend on the administrative fees charged by the local government for the operating permit, the fee charged by the licensed professional engineer for the condition assessment, and the cost of ongoing maintenance. As an example, the City of Syracuse currently has an ordinance in place for parking garage inspections. The City charges a $100 registration fee for a parking garage and an annual operating certificate fee of $300. DOS estimates that engineering costs will range from $2,000-$3,000 for a less intensive visual inspection to $5,000-$15,000 for a full structural assessment. This cost will ultimately vary depending upon the size, condition, and type of parking garage. Similar to the additional administrative cost, the engineering fees could also be passed down to parking garage users. Assuming a $300 annual administrative fee (similar to the City of Syracuse) and a $15,000 triennial assessment fee, the average annual cost to be passed down to parking garage users is $5,300. In this example, the cost to parking garage users in a 600-car garage would be: ($5,300/year ÷ 600 cars) = $8.83/year per car, or about $0.74/month per car. Assuming the same average annual fee, those who park in a smaller 200-car garage would experience an increase in their monthly parking fee of: ($5,300/year ÷ 200 cars) × (1 year/12 months) = $2.21/month per car. These fees are for comparison purposes only. It is assumed that an assessment for a smaller garage will generally cost less than that for a larger garage. However, the assessment cost for a larger garage that was better maintained could be less than that for a smaller garage that was never maintained.

DOS contacted numerous garage owners and operators during the development of this rule and determined that many State, local government, and private garage owners currently are having periodic structural evaluations performed absent any State or local requirement. Some of these garages undergo intense annual inspections, whereas the proposed rule requires inspections to not exceed three years or a lesser period as required by the AHJ. The proposed rule may therefore not substantially affect many garage owners that are currently having routine structural evaluations performed; the cost of such evaluations being passed to garage users in the form of operational overhead. Conversely, garages that infrequently undergo or have never undergone structural evaluations may result in a higher operational cost which could be passed, in whole or in part, to garage users.

The cost to repair a garage cannot be estimated since it is a function of the type and extent of repair that is required, the level of use that the garage undergoes, the urgency of the repair, and many other factors. For well-maintained garages that have a structural evaluation and preventative maintenance program in place, this cost is likely to have already been absorbed into the normal operating cost of the garage and passed down to garage users. For unmaintained garages, the initial repair cost will most likely be absorbed by the owner and subsequently passed down to parking garage users through increased parking fees.

It could be argued that this rule will not actually require repairs to parking garages; rather, this rule will require periodic condition assessments intended to point out situations where repairs are necessary. DOS anticipates that by identifying the need to make repairs before that need becomes critical, the overall costs of repairs over the lifespan of the structure will actually be reduced.

4. PAPERWORK

As more fully discussed in Part 3 ("Costs") of this Regulatory Impact Statement, this rule will require AHJs to collect condition assessment reports, review such reports, taking such enforcement action or actions in response to the information in such reports (if necessary), and maintain such reports for the life of the parking garage. The proposed rule also requires AHJs to require garage owners to obtain an operating permit from the AHJ prior to operating a parking garage.

5. LOCAL GOVERNMENT MANDATES

As more fully discussed in Part 3 ("Costs") of this Regulatory Impact Statement, this rule will require AHJs to review their code enforcement

programs; to amend those programs to include the additional provisions required by this rule; to collect condition assessment reports, review such reports, take such enforcement action or actions in response to the information in such reports (if necessary), and maintain such reports for the life of the parking garage; and to require garage owners to obtain an operating permit from the AHJ prior to operating a parking garage.

6. DUPLICATION

This rule does not duplicate any rule or other legal requirement of the State or Federal government known to DOS.

7. ALTERNATIVES

DOS issued a notice of rule in development to solicit public comments prior to issuing this rulemaking. These comments provided many practical suggestions to modify the draft rule, many of which were incorporated into this rulemaking. Comments that were not incorporated include: requiring annual inspections, deleting the word "rust" from the definition of "deterioration", and requiring the results of each assessment to be posted. One major alternative to this rulemaking would be to continue to do nothing, which would allow the negligent maintenance of parking garages to continue and cause accelerated deterioration and collapses. For this reason, DOS rejected this alternative.

8. FEDERAL STANDARDS

This rule does not exceed any minimum standards of the Federal government for the same or similar subject areas known to DOS.

9. COMPLIANCE SCHEDULE

DOS notified the "regulated parties" (i.e., cities, towns, villages, counties, and State agencies that administer and enforce the Uniform Code) of its intent to develop and propose this rule by means of a notice that was posted on the DOS website and contained in Building New York, an e-bulletin sent by DOS to local governments and other persons and entities interested in the construction industry. The notice was posted, and issued in the Building New York e-bulletin, prior to the filing of the Notice of Proposed Rule Making for this rule. Cities, towns, villages, counties, and State agencies that administer and enforce the Uniform Code have been able to review their code enforcement programs, and begin to prepare any necessary revisions to those programs, since that time. Therefore, DOS anticipates that the regulated parties will be able to comply with this rule immediately upon its effective date or within a reasonable time after the effective date.

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[1] The 2010 Fire Code of New York State was previously incorporated by reference into 19 NYCRR Part 1225. Effective October 3, 2016, Part 1225 was amended to incorporate by reference the 2015 International Fire Code.

Regulatory Flexibility Analysis

1. TYPES AND NUMBER OF SMALL BUSINESSES AND LOCAL GOVERNMENTS TO WHICH THE RULE WILL APPLY:

19 NYCRR Part 1203 ("Part 1203") implements Executive Law § 381(1) by establishing minimum standards for administration and enforcement of the State Uniform Fire Prevention and Building Code (the "Uniform Code") and the State Energy Conservation Construction Code (the "Energy Code").

Executive Law § 381(1) provides that the minimum standards should address several specified issues, including "adequacy of inspections" and "procedures for inspection of certain classes of buildings based upon design, construction, ownership, occupancy or use, including, but not limited to, mobile homes, factory manufactured homes and state-owned buildings." See Executive Law § 381(1)(d) and (g).

This rule is intended to address Executive Law § 381(1)(d) and (g) by adding new provisions relating to condition assessments of parking garages and operating permits for using parking garages as part of the minimum standards for administration and enforcement of the Uniform Code and Energy Code.

This rule will apply to all local governments (cities, towns, villages, and counties) that administer and enforce the Uniform Code and Energy Code. The Department of State (DOS) estimates that approximately 1,500 local governments currently administer and enforce the Uniform Code and Energy Code.

A small business or local government that constructs a new parking garage or alters an existing parking garage will be required to comply with the Uniform Code and Energy Code, and with the provisions of the code enforcement program of the governmental unit or agency responsible for administration and enforcement of the Uniform Code and Energy Code. All code enforcement programs will be required to include the features described in Part 1203, as amended by this rule.

DOS contacted numerous garage owners and operators during the development of this rule and determined that many State, local government, and private garage owners currently are having periodic structural evaluations performed absent any State or local requirement. Some of these garages undergo intense annual inspections, whereas the proposed rule requires inspections to not exceed three years or a lesser period as required by the AHJ. The proposed rule may therefore not substantially affect many garage owners that are currently having routine structural evaluations performed; the cost of such evaluations being passed to garage users in the form of operational overhead.

Conversely, garages that infrequently undergo or have never undergone structural evaluations may result in a higher operational cost which could be passed, in whole or in part, to garage users. These small businesses and local governments will be most affected by the rule. It is assumed that the cost of compliance will be wrapped into the small business's or local government's overhead, and passed down to parking garage users, similar to those businesses and local governments that are currently having periodic structural evaluations performed of their garages.

It should be noted that parking garages are currently required to be maintained in a structurally sound condition. This requirement is found in Sections 304.1.1, 305.1.1, and 306.1.1 of the 2015 edition of the International Property Maintenance Code (a publication currently incorporated by reference in 19 NYCRR Part 1226). The proposed rule is intended to ensure compliance with the Uniform Code.

2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS:

Part 1203 currently requires local governments that administer and enforce the Uniform Code and Energy Code to establish code enforcement programs that include the features described in Part 1203. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to update their code enforcement programs to include the features described in Part 1203, as amended by this rule. A code enforcement program that is in substantial compliance with the current version of Part 1203 should require only minor changes, summarized as follows:

1. Part 1203 currently provides that local governments' code enforcement programs must require operating permits for certain activities and categories of buildings. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to add provisions to their code enforcement programs that require operating permits for the use of parking garages.

2. Part 1203 currently provides that code enforcement programs must include all of the features set forth in Section 1203.3. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to add provisions to their code enforcement program that require condition assessments of parking garages.

3. Part 1203 currently provides that code enforcement programs must include provisions for recordkeeping. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to keep specific records relating to condition assessments of parking garages.

3. PROFESSIONAL SERVICES:

Local governments that administer and enforce the Uniform Code and Energy Code are currently required to use personnel who have received the training required by 19 NYCRR Part 1208 to perform code enforcement-related services. Those local governments will continue to be required to use personnel who have received such training.

The proposed rule will require parking garage inspections to be performed by a professional engineer who has at least three years of experience performing structural evaluations. All parking garage owners, including local governments and small businesses, will be required to hire such an engineer to perform the evaluations if one is not currently employed by the local government.

4. COMPLIANCE COSTS:

This rule will not substantially affect local governments and small businesses that are currently having routine structural evaluations performed of their garages. Local governments and small businesses that are not having, or infrequently having, structural evaluations performed of their garages will incur a compliance cost which is expected to be passed down to parking garage users.

The cost to parking garage owners, including small businesses and local governments, will depend on the fee charged by the local government for the operating permit, the fee charged by the licensed professional engineer for the condition assessments, and the cost of ongoing maintenance. As an example, the City of Syracuse currently has an ordinance in place for parking garage inspections. The City charges a $100 registration fee for a parking garage and an annual operating certificate fee of $300. DOS estimates that engineering costs will range from $2,000-$3,000 for a less intensive visual inspection to $5,000-$15,000 for a full structural assessment. This cost will ultimately vary depending upon the size, condition, and type of parking garage. The above costs could be passed down to those who pay to park in these structures. Assuming a $300 annual fee and a $15,000 triennial assessment fee, the average annual cost to be passed down to parking garage users is $5,300. In this example, the cost to parking garage users in a 600-car garage would be: ($5,300/year ÷ 600 cars) = $8.83/year per car, or about $0.74/month per car. Assuming the same average annual fee, those who park in a smaller

200-car garage would experience an increase in their monthly parking fee of: ($5,300/year ÷ 200 cars) × (1 year/12 months) = $2.21/month per car. These fees are for comparison purposes only. It is assumed that an assessment for a smaller garage will generally cost less than that for a larger garage. However, the assessment cost for a larger garage that was better maintained could be less than that for a smaller garage that was never maintained.

Local governments that administer and enforce the Uniform Code and Energy Code will incur the initial costs associated with updating their code enforcement programs to include the features described in Part 1203, as amended by this rule. DOS anticipates that these costs will vary based on the degree to which a local government's existing code enforcement program complies with the current version of Part 1203, as well as the degree by which a local government wishes to exceed the minimum standards established by this rule. A code enforcement program that is in substantial compliance with the current version of Part 1203 should require only minor changes, as summarized in Part 2 (Reporting, Recordkeeping, and other Compliance Requirements) of this Regulatory Flexibility Analysis.

This rule will also add to Part 1203 additional provisions that may increase local governments' on-going costs of compliance. Part 1203 currently provides that code enforcement programs must include provisions for recordkeeping. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to keep specific records relating to condition assessments of parking garages. Each local government that administers and enforces the Uniform Code and Energy Code and that has a parking garage in its jurisdiction may incur additional administrative costs resulting from the collection and review of condition assessment reports, taking such enforcement action or actions in response to the information in such reports (if necessary), and maintaining such reports for the life of the parking garage. The proposed rule requires local governments to require garage owners to obtain an operating permit from the local government prior to operating a parking garage, which could result in additional administrative fees. However, requiring an operating permit will not only provide local governments with the necessary leverage to ensure that the condition assessments are completed, but will also allow local governments to charge fees for these permits. DOS anticipates that these fees could offset the cost of the additional administrative duties that local governments may incur as a result of this rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

Each local government that administers and enforces the Uniform Code and Energy Code is already required by existing Part 1203 to establish a code enforcement program that includes the features described in existing Part 1203. Prior to the filing of the Notice of Proposed Rule Making for this rule, DOS gave notice of its intent to develop and propose this rule by means of a notice in Building New York, an e-bulletin sent by DOS to approximately 10,000 subscribers, including local governments and other persons and entities interested in the construction industry. This provided local governments that administer and enforce the Uniform Code and Energy Code with additional time to review their code enforcement programs and to begin to prepare any necessary revisions to those programs. DOS anticipates that local governments (the regulated parties directly affected by this rule) will be able to comply with this rule immediately upon its effective date or within a reasonable time after the effective date.

DOS believes that it will be economically and technologically feasible for local governments that administer and enforce the Uniform Code and Energy Code to comply with Part 1203, as amended by this rule.

DOS anticipates that it will not be necessary to develop new technology for compliance with Part 1203, as amended by this rule.

6. MINIMIZING ADVERSE IMPACT:

DOS attempted to limit the amendments that will be made to Part 1203 by this rule to those amendments that would be the minimum standards required to implement Executive Law § 381(1)(d) and (g) as related to parking garages.

Approaches such as establishing differing standards or requirements that consider the resources available to small businesses and local governments and/or providing exemptions from coverage by the rule, or by any part thereof, for small businesses and local governments were not considered because doing so would be inconsistent with the provisions of Executive Law § 381(1)(d) and (g).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

DOS gave small business and local governments an opportunity to participate in this rule making by publishing a notice regarding this rule in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. In response to comments received from local code enforcement officials, organizations, and private companies, the Department of State revised this rule as appropriate.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

19 NYCRR Part 1203 ("Part 1203") implements Executive Law § 381(1) by establishing minimum standards for administration and enforcement of the State Uniform Fire Prevention and Building Code (the "Uniform Code") and the State Energy Conservation Construction Code (the "Energy Code").

Executive Law § 381(1) provides that the minimum standards should address several specified issues, including "adequacy of inspections" and "procedures for inspection of certain classes of buildings based upon design, construction, ownership, occupancy or use, including, but not limited to, mobile homes, factory manufactured homes and state-owned buildings." See Executive Law § 381(1)(d) and (g).

This rule is intended to address Executive Law § 381(1)(d) and (g) by adding new provisions relating to condition assessments of parking garages and operating permits for using parking garages as part of the minimum standards for administration and enforcement of the Uniform Code and Energy Code.

This rule will apply to all local governments (cities, towns, villages, and counties) and State agencies that administer and enforce the Uniform Code and Energy Code. The Uniform Code applies in all parts of the State except New York City and the Energy Code applies in all parts of the State. Therefore, this rule will apply in all rural areas of the State. However, it is anticipated that this rule will have minimal impact in rural areas in light of the fact that parking garages subject to this rule are scarce in such areas. If there are no parking garages in a jurisdiction, then there will be no impact on such local government.

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

Part 1203 currently requires local governments that administer and enforce the Uniform Code and Energy Code to establish code enforcement programs that include the features described in Part 1203. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to update their code enforcement programs to include the features described in Part 1203, as amended by this rule. A code enforcement program that is in substantial compliance with the current version of Part 1203 should require only minor changes, summarized as follows:

1. Part 1203 currently provides that local governments' code enforcement programs must require operating permits for certain activities and categories of buildings. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to add provisions to their code enforcement programs that require operating permits for the use of parking garages.

2. Part 1203 currently provides that code enforcement programs must include all of the features set forth in Section 1203.3. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to add provisions to their code enforcement program that require condition assessments of parking garages.

3. Part 1203 currently provides that code enforcement programs must include provisions for recordkeeping. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to keep specific records relating to condition assessments of parking garages.

Local governments that administer and enforce the Uniform Code and Energy Code are currently required to use personnel who have received the training required by 19 NYCRR Part 1208 to perform code enforcement-related services. Those local governments will continue to be required to use personnel who have received such training.

The proposed rule will require parking garage inspections to be performed by a professional engineer who has at least three years of experience performing structural evaluations. All parking garage owners, including local governments and small businesses in rural areas, who own parking garages will be required to hire such an engineer to perform the evaluations if one is not currently employed by the local government.

3. COMPLIANCE COSTS.

Local governments that administer and enforce the Uniform Code and Energy Code will incur the initial costs associated with updating their code enforcement programs to include the features described in Part 1203, as amended by this rule. DOS anticipates that these costs will vary based on the degree to which a local government's existing code enforcement program complies with the current version of Part 1203, as well as the degree by which a local government wishes to exceed the minimum standards established by this rule. A code enforcement program that is in substantial compliance with the current version of Part 1203 should require only minor changes, as summarized in Part 2 (Reporting, Recordkeeping, and other Compliance Requirements; and Professional Services) of this Rural Area Flexibility Analysis.

This rule will also add to Part 1203 additional provisions that may

increase local governments' on-going costs of compliance, summarized as follows:

Part 1203 currently provides that code enforcement programs must include provisions for recordkeeping. This rule will require local governments that administer and enforce the Uniform Code and Energy Code to keep specific records relating to condition assessments of parking garages.

Each local government that administers and enforces the Uniform Code and Energy Code will be required to review condition assessment reports for parking garages. However, DOS anticipates that local governments will be able to accomplish such increased level of review using current code enforcement staff, at no significant increased cost. In addition, the Executive Law § 381(2) provides that cities, towns, villages, and counties may charge fees to defray the costs of administration and enforcement.

Local governments that own parking garages that are routinely undergoing a structural inspection and maintenance program will not be substantially affected by this rule. Local governments that are not regularly inspecting and maintaining their garages will incur a compliance cost which is expected to be passed down to parking garage users. It is anticipated that this rule will have minimal impact in rural areas in light of the fact that parking garages subject to this rule are scarce in such areas. If there are no parking garages in a jurisdiction, then there will be no impact on such local government.

4. MINIMIZING ADVERSE IMPACT.

DOS attempted to limit the amendments that will be made to Part 1203 by this rule to those amendments that would be the minimum standards required to implement Executive Law § 381(1)(d) and (g) as related to parking garages.

Approaches such as establishing differing standards or requirements that take into account the resources available to rural areas were not considered because doing so would be inconsistent with the provisions of Executive Law § 381(1)(d) and (g).

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State, including interested parties in rural areas, of the proposed adoption of this rule by means of a notice posted on the DOS website and published in Building New York, an electronic news bulletin distributed by the DOS which covers topics related to the Uniform Code, the Energy Code, and the construction industry which is prepared and distributed by the Department of State to approximately 10,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. In response to comments received from local code enforcement officials, organizations, and private companies, the Department of State revised this rule as appropriate.

Job Impact Statement

The Department of State has determined that, given the nature and purpose of this rule, it will not have a substantial adverse impact on jobs and employment opportunities.

The rule will amend Part 1203 of Title 19 NYCRR ("Part 1203"). Part 1203 establishes minimum standards for local governments that administer and enforce the State Uniform Fire Prevention and Building Code (the "Uniform Code") and the State Energy Conservation Construction Code (the "Energy Code"). Part 1203, as amended by this rule, will require local governments that administer and enforce the Uniform Code and Energy Code to amend their code enforcement programs to include provisions requiring condition assessments of parking garages and operating permits for the use of parking garages. This rule will also amend Part 1202, which establishes the procedures applicable in circumstances where the Secretary of State must administer and enforce the Uniform Code in the place and stead of a local government or county, and to amend Part 1204, which establishes the procedures for the administration and enforcement of the Uniform Code by State agencies, to also include provisions requiring condition assessments of parking garages.

This rule will directly have a positive impact on jobs and employment opportunities for professional engineers licensed under Article 145 of the Education Law who will be performing the condition assessments of parking garages required by code enforcement programs of local governments administering and enforcing the Uniform Code pursuant to the minimum standards set forth in the amended Part 1203 or as required by the amended Part 1202 in circumstances where the Secretary must administer and enforce the Uniform Code in the place and stead of a local government or county. It is also anticipated that this rule will indirectly have a positive impact on jobs and employment opportunities for contractors retained by parking garage owners to remedy or repair any deterioration or unsafe conditions revealed through a condition assessment of a parking garage.

As a consequence, the Department of State concludes that this rule will not have a substantial adverse impact on jobs and employment opportunities but it is anticipated that this rule will have a positive impact on jobs and employment opportunities in New York State.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Application Process for the Supplemental Nutrition Assistance Program (SNAP)

I.D. No. TDA-35-17-00005-A
Filing No. 404
Filing Date: 2018-05-01
Effective Date: 2018-05-16

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

Action taken: Amendment of section 387.8 of Title 18 NYCRR.

Statutory authority: United States Code, ch. 51 of Title 7 (generally), 7 U.S.C. sections 2011, 2013, 2020(e)(9); 7 Code of Federal Regulations, section 273.2(e), (j)(2); Social Services Law, sections 17(a)-(b), (j), 20(3)(d), 95; L. 2012, ch. 41

Subject: Application process for the Supplemental Nutrition Assistance Program (SNAP).

Purpose: To align State regulations for SNAP application process with federal statutory and regulatory requirements and SNAP policy.

Text of final rule: The Office of Temporary and Disability Assistance (OTDA) amends the State regulations governing the application process for the Supplemental Nutrition Assistance Program (SNAP). The amendments to the State regulations update Title 18 NYCRR § 387.8 to align State regulations with federal requirements regarding the expedited process for applying for SNAP benefits in New York State. The full text of the rule is posted at the following OTDA website: http://otda.ny.gov/legal/regulatory-activities.asp.

Amend § 387.8(a)(1) to make technical updates clarifying those households entitled to expedited service relative to their applications for SNAP.

Amend § 387.8(a)(2)(i) to make conforming changes by amending the timeframe for issuing benefits under expedited processing guidelines to as soon as practicable but no later than the seventh calendar day following the day the application was filed; to make technical updates changing the reference from "food stamp" to "SNAP."

Amend § 387.8(a)(2)(ii) to make technical updates to processing standards for the issuance of SNAP benefits to households eligible for expedited service.

Amend § 387.8(a)(3)(i) to make technical updates to language describing the verification of an applicant's identity under the expedited verification process.

Amend § 387.8(a)(3)(ii) to make technical updates changing references from "local department" to "social services district" and to bring language regarding furnishing or applying for a social security number (SSN) when a household applies for SNAP into conformity with federal requirements and current SNAP policy.

Amend § 387.8(b) to make technical updates and conforming changes by adding that the social services district must give households at least 10 calendar days following the date of the application interview and notification of outstanding documentation to provide required verification.

Amend § 387.8(b)(1)(i) to add clarifying language and to make conforming changes regarding mandatory verification requirements for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(a) to add clarifying language and to make conforming changes regarding mandatory verification requirements of gross non-exempt income for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(b) to add clarifying language and to make conforming changes regarding mandatory verification of alien eligibility requirements for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(c) to add clarifying language and to make conforming changes regarding mandatory verification requirements of medical expenses for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(d) to add clarifying language and to make conforming changes regarding mandatory verification requirements of SSNs for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(e) to add clarifying language and to make conforming changes regarding mandatory verification requirements of residency for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(f) to add clarifying language and to make conforming changes regarding mandatory verification requirements of identity for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(g) to add clarifying language and to make conforming changes regarding mandatory verification requirements of disability for households initially applying for SNAP.

Add new § 387.8(b)(1)(i)(h) to make conforming changes regarding mandatory verification requirements for households applying for SNAP which have been terminated for refusal to cooperate with a State quality control review.

Add new § 387.8(b)(1)(i)(i) to add clarifying language and to make conforming changes regarding mandatory verification requirements of household composition for households initially applying for SNAP.

Amend § 387.8(b)(1)(ii) to add clarifying language regarding the verification of questionable information that may have an effect on a household's eligibility for SNAP and SNAP benefit level.

Amend § 387.8(b)(2) to make technical updates changing the reference from "local department" to "social services district."

Amend § 387.8(b)(3) to make technical updates changing the reference from "local department" to "social services district."

Amend § 387.8(b)(4) to make a technical update to language to change the reference from "folder" to "record," from "photocopied" to "electronically-imaged," and from "food stamp" to "SNAP."

Amend § 387.8(b)(5) to make a clarifying revision.

Amend § 387.8(b)(5)(i) to make technical updates and add conforming language regarding the verification of income reported by the household during the certification period.

Amend § 387.8(b)(5)(ii) to make technical updates and add conforming language regarding the verification of medical expenses reported by the household during the certification period.

Amend § 387.8(b)(6) to make a clarifying revision.

Add new § 387.8(b)(6)(i) to make conforming changes regarding verification requirements for income changes reported at recertification.

Add new § 387.8(b)(6)(ii) to make conforming changes regarding verification requirements of medical expenses reported at recertification.

Add new § 387.8(b)(6)(iii) to make conforming changes regarding verification requirements of utility expenses reported at recertification.

Add new § 387.8(b)(6)(iv) to make a clarifying revision.

Add new § 387.8(b)(6)(v) to add conforming language regarding the verification of certain expenses reported at recertification.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 387.8(a)(2)(i) and (3)(ii).

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

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

The Office of Temporary and Disability Assistance has determined that 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

The Office of Temporary and Disability Assistance (OTDA) received comments relative to the regulatory amendments. These comments have been reviewed and duly considered in this Assessment of Public Comments.

One comment suggested that OTDA forego amending 18 NYCRR § 387.8(a)(2)(i) to increase the current timeframe for issuing expedited Supplemental Nutrition Assistance Program (SNAP) benefits to SNAP-eligible households from five calendar days to seven calendar days, in favor of leaving the current regulatory language unchanged.

OTDA Response:

Given the rapidly-changing ways in which households now apply for and obtain SNAP benefits – most notably online and via mail – OTDA believes that it is critically important to align the State regulations regarding expedited processing with the federal timeframe as soon as possible. The current five-day expedited processing timeframe was originally implemented when almost all SNAP applications were filed in-person. Today, in New York City, in any given month, between 70 percent and 80 percent of SNAP applications are submitted online; in the rest of the State, the percentage exceeds 40 percent and is increasing. As a practical matter, in cases where a household is not applying for SNAP in-person, the five-day requirement by which to notify the household of a specific date and time for an application interview, complete the interview, process the case and issue benefits has become increasingly difficult to meet, thereby justifying the proposed regulatory amendments. Moreover, OTDA notes that the proposed regulatory amendments would not preclude expedited benefits from issuing on the day of application, or any day thereafter, within the seven days following filing of the application for SNAP benefits. However, in consideration of this comment, OTDA made a non-substantive revision to 18 NYCRR § 387.8(a)(2)(i) by adding language clarifying that SNAP benefits are to be made available to the household "as soon as practicable" but no later than the seventh calendar day following the day the SNAP application was filed.

One comment suggested that OTDA forego modifying existing language in 18 NYCRR § 387.8(a)(3)(ii) that "carves out" from SNAP work requirements those households that are exempt from SNAP work requirements or households that have designated an authorized representative, in favor of leaving the current regulatory language unchanged.

OTDA Response:

OTDA agrees with this comment and will keep the existing language in the regulation, with a non-substantial clarification conforming the current regulation with federal SNAP regulations at 7 Code of Federal Regulations (CFR) § 273.2(i)(4)(B), which require the applicant to register for work "(unless [the applicant is] exempt or unless the household has designated an authorized representative to apply on its behalf in accordance with [7 CFR] § 273.1(f))."

One comment suggested that the proposed regulatory amendments to 18 NYCRR § 387.8(b)(1)(i)(d) be revised to add language stating that "[t]he state agency shall explain to applicants and participants that refusal or failure without good cause to provide [a social security number] will result in disqualification of the individual for whom [a social security number] is not obtained."

OTDA Response:

The proposed regulatory amendments are intended to conform 18 NYCRR § 387.8(b)(1)(i)(d) with the federal SNAP language contained at 7 CFR § 273.2(f)(1)(v), and therefore, OTDA believes that the suggested revision to the proposed regulatory amendments is unnecessary.

One comment suggested that the proposed regulatory amendments at 18 NYCRR § 387.8(b)(1)(i)(g) be revised to add language referencing a State option to verify disability benefits and supplemental security income benefits via the State Data Exchange (SDX) and the Beneficiary Data Exchange (BENDEX) systems.

OTDA Response:

OTDA presently utilizes the SDX and BENDEX systems to verify disability benefits and supplemental security income benefits (see Informational Letter 06-INF-10, Computer Matching Clarification for Food Stamps). However, the Social Security Administration is presently working with the states to deliver similar information via other methods, which are not currently reflected in the federal statutory language in 7 CFR § 273.2(f)(7). To ensure that the proposed regulatory amendments reflect the most current methods of delivery of information to the states, OTDA believes that the suggested revision to the proposed regulatory amendments is unnecessary.