

# RULE MAKING ACTIVITIES

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

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

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

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## Education Department

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### ERRATUM

I.D. No. EDU-19-18-00006-RP, pertaining to To Implement New York State's Every Student Succeeds Act (ESSA) Plan, published in the December 26, 2018 issue of the *State Register*, indicated that public comment would be received until 30 days after publication of the Notice.

The public comment period for this Notice has been extended until February 11, 2018.

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## New York State Gaming Commission

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

#### Licensing and Registration of Gaming Facility Employees and Vendors

I.D. No. SGC-09-18-00005-RP

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

**Proposed Action:** Amendment of Parts 5303 through 5307 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(19), 1307(1), (2), 1322, 1323, 1324, 1325, 1326 and 1327

**Subject:** Licensing and registration of gaming facility employees and vendors.

**Purpose:** To govern the licensing and registration of gaming facility employees and vendors.

**Text of revised rule:** Sections 5303.14, 5304.1, 5304.2, 5305.1, 5305.2, 5305.3, 5305.4, 5306.2, 5306.3, 5306.4, 5307.3 and 5307.5 of title 9 of NYCRR would be amended to read as follows:

§ 5303.14. Application and employment after denial or revocation.

(a) Any natural person whose license, registration or application was denied, suspended or revoked by the commission on the basis of any of the following provisions may reapply at any time after the failure or disqualification is cured:

(1) failure to demonstrate financial stability, after which reapplication is permitted only upon achieving financial stability;

(2) failure to satisfy the age requirement, after which reapplication is permitted only upon attaining the requisite age;

(3) if the commission has determined to deny a license or registration application or suspend or revoke a license or registration based upon a pending disposition of a criminal offense, reapplication is permitted upon disposition of the pending charge;

(4) if the commission has determined to deny a license or registration application or suspend or revoke a license or registration based upon the relation of the criminal history of the applicant and the employment position sought with the gaming facility, reapplication is permitted if a different employment position is sought to which the applicant's criminal history might not provide a basis for denial of the application; and

[(4)] (5) any statutory or regulatory provision that is subsequently repealed or modified, after which reapplication is permitted only upon a showing that the subsequent repeal or modification of the statutory or regulatory provision obviates the grounds for denial or revocation and justifies the conclusion that the prior determination should not be a basis for denying a license or registration application;

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### PART 5304

#### Casino Key Employee Licensing

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§ 5304.1. Standards for issuance of a casino key employee license.

(a) The specific criteria and standards for casino key employee licensing are set forth in Racing, Pari-Mutuel Wagering and Breeding Law sections 1301(8) and 1323(1) through (6).

(b) All applicants for a casino key employee license have to prove, by clear and convincing evidence, his or her financial stability, integrity and responsibility as well as the applicant's good character, honesty and integrity.

[(b)] (c) Pursuant to Racing, Pari-Mutuel Wagering and Breeding Law section 1318(1)(c), a casino key employee is disqualified on the basis of any prior felony conviction.

§ 5304.2. Casino key employee license application and disclosure forms.

(a) An applicant for a casino key employee license shall file a multi-jurisdictional personal history disclosure form and other disclosure forms as required by the commission.

(b) Pursuant to the license application form, each applicant for a casino key employee license is required to provide a complete and accurate criminal history, including disclosing all prior arrests and convictions of the applicant.

(c) Subsequent to receiving a completed casino key employee license application, the commission shall provide the applicant with a copy of his or her criminal history information, if any, as required by Racing, Pari-Mutuel Wagering and Breeding Law section 1323(4).

(d) Each applicant for a casino key employee license is required to fill out the license form completely and accurately. Incomplete or misleading information supplied on the license form may result in denial of the application.

## PART 5305

## Gaming Employee Registration

## Section

[5305.1 Persons required to register as a gaming employee.]

[5305.2] 5305.1 Standards for issuance of a gaming employee registration

[5305.3] 5305.2 Gaming employee registration forms

[5305.4] 5305.3 Duration of registration

[§ 5305.1. Persons required to register as a gaming employee.]

[A person, as defined in Racing, Pari-Mutuel Wagering and Breeding Law section 1301(22), is required to obtain a gaming employee registration prior to being involved in any gaming licensed activities.]

[§ 5305.2] § 5305.1. Standards for issuance of a gaming employee registration.

(a) [Each applicant for a gaming employee registration shall produce such information, documentation and assurances as requested by the commission concerning the qualification criteria set forth in sections 5303.1 through 5303.6 of this Subchapter.] *The specific criteria and standards for gaming employee registration are set forth in Racing, Pari-Mutuel Wagering and Breeding Law sections 1301(22) and 1324(1) through (5).*

(b) *Each applicant for a gaming employee registration is required to prove, by clear and convincing evidence, that the applicant is qualified to hold a gaming employee registration.*

[The] (c) *Subsequent to receiving a completed gaming employee registrant application, the commission shall provide [an] the applicant [for a gaming employee registration] with a copy of his or her criminal history information, if any, as required by Racing, Pari-Mutuel Wagering and Breeding Law section 1324(5).*

(c) Subsequent to the registration of a gaming employee, the executive director of the commission may revoke, suspend, limit or otherwise restrict the registration upon a finding that the registrant is disqualified on the basis of criteria set forth in Racing, Pari-Mutuel Wagering and Breeding Law section 1318. Notwithstanding, a gaming employee registration shall not be denied or revoked on the basis of a misdemeanor conviction provided that the registrant has affirmatively demonstrated registrant's rehabilitation, pursuant to article 23-A of the Correction Law.]

(d) *Pursuant to Racing, Pari-Mutuel Wagering and Breeding Law section 1324(3), a gaming employee registration shall not be denied or revoked on the basis of a misdemeanor conviction or the commission of any act or acts that would constitute any offense described in Racing, Pari-Mutuel Wagering and Breeding Law section 1318 if the applicant has, in the judgment of the commission, affirmatively demonstrated the applicant's rehabilitation pursuant to article 23-A of the Correction Law.*

[§ 5305.3.] § 5305.2. Gaming Employee Registration form.

(a) A gaming employee registrant shall file a gaming employee registration form the commission supplies and may amend from time to time.

(b) *Pursuant to the registration form, each gaming employee registrant is required to provide a complete and accurate criminal history, including disclosing any prior arrests and convictions of the applicant.*

(c) *Each gaming employee registrant is required to fill out the registration form completely and accurately. Incomplete or misleading information supplied on the registration form may result in the denial of the application.*

[§ 5305.4.] § 5305.3. Duration of registration.

(a) Gaming employee registrations shall remain valid as set forth in Racing, Pari-Mutuel Wagering and Breeding Law section 1325(6).

(b) Each gaming employee registration shall indicate an expiration date.

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## PART 5306

## Non-Gaming Employee Registration

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§ 5306.2. Standards for issuance of a non-gaming employee registration.

(a) Each applicant for a non-gaming employee registration shall produce such information, documentation and assurances as requested by the commission concerning the qualification criteria set forth in sections 5303.1 through 5303.6 of this Subchapter.

(b) Subsequent to the registration of a non-gaming employee[, the executive director of] the commission may revoke, suspend, limit or otherwise restrict the registration upon a finding that the registrant is disqualified on the basis of the criteria contained in Racing, Pari-Mutuel Wagering and Breeding Law section 1318. [Notwithstanding, a non-gaming employee registration shall not be denied or revoked on the basis of a misdemeanor conviction provided that the registrant has affirmatively demonstrated registrant's rehabilitation, pursuant to article 23-A of the Correction Law.]

(c) Notwithstanding *subdivision (b) of this section*, a non-gaming employee registration shall not be denied or revoked on the basis of a misdemeanor conviction [provided that the registrant has] *or the commission of any act or acts that would constitute any offense described in Racing, Pari-Mutuel Wagering and Breeding Law section 1318 if the applicant has, in the judgment of the commission, affirmatively demonstrated [registrant's] the applicant's rehabilitation[.] pursuant to article 23-A of the Correction Law.*

§ 5306.3. Non-gaming employee registration forms.

(a) A non-gaming employee registration applicant shall be required to file a non-gaming employee registration form that the commission supplies and may amend from time to time.

(b) *Pursuant to the registration form, each non-gaming employee registrant is required to provide a complete and accurate criminal history, including disclosing any prior arrests and convictions of the applicant.*

(c) *Each non-gaming employee registrant is required to fill out the registration form completely and accurately. Incomplete or misleading information supplied on the registration form may result in the denial of the application.*

(d) *In the discretion of the commission, a background investigation of a non-gaming employee need not be conducted if the review of the application, including the criminal history fingerprint results, indicates that a further background investigation is not necessary.*

§ 5306.4. Duration of registration.

(a) Non-gaming registrations shall remain valid [as set forth in Racing, Pari-Mutuel Wagering and Breeding Law section 1325(6)] *for five years unless suspended or revoked. If a non-gaming registrant has not been employed in any position within a gaming facility for a period of three years, the registration of that non-gaming registrant shall lapse.*

## PART 5307

## Vendor Licensing and Registration

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§ 5307.3. Registration of other vendors.

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(b) Notwithstanding the requirements set forth in this Part, entities engaged in the following fields of commerce that provide goods or services to a gaming facility applicant or licensee, shall not be required to be licensed or registered as a vendor:

- (1) insurance companies and insurance agencies;
- (2) television, radio newspaper, internet or other similar media outlets used for advertising purposes;
- (3) governmental entities performing traditional governmental functions;
- (4) *providers of professional [legal, accounting and financial services] services including accountants, attorneys, engineers and architects, when acting in their respective professional capacities;*
- (5) *physicians, nurses, emergency medical technicians, hospitals and other medical providers;*
- (6) utility companies;
- (7) telecommunication companies;
- (8) training seminars, publication subscriptions, conference registration or membership dues for professional associations intended to directly contribute to the work performance or professional development of an employee;
- (9) non-profit charitable corporations or organizations, provided that no consideration is received for the contribution;
- (10) professional *sports teams, sports figures, entertainers and/or celebrity appearances;*
- (11) *mail carriers, shipping services and delivery services;*
- (12) *online travel booking agents;*
- (13) *state and Federally chartered banks or savings and loan associations where funds are deposited by gaming facility licensees, notwithstanding those sources or transactions provided to a gaming facility licensee that require commission approval;*

(14) *any person not otherwise exempt under this subsection who or that is licensed by a Federal or state agency if the commission determines that such agency's licensing requirements are substantially similar to those of the commission;*

[(11)] (15) any other person who, by submission of a written petition, demonstrates to the commission that registration as a non-gaming vendor is not necessary to protect the public interest. *For the purposes of this paragraph, the gaming facility may submit a written petition on behalf of the person seeking exemption.*

(c) *The commission may request information or assurances from any person listed in subdivision (b) of this section to determine the validity of such person's exempt status.*

§ 5307.5. Vendor application and disclosure forms.

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(d) No owner, manager, supervisory personnel or employee of a casino vendor enterprise licensee or ancillary casino vendor enterprise licensee that provides services to the gaming facility is permitted to wager at any gaming facility to which such licensee provides services.

[(d) Employees] (e) Any employee of a vendor registrant [are] who will perform services at a gaming facility is required to [fill out] complete a non-gaming employee application form and [comply] undergo a criminal history check to determine compliance with the standards of a non-gaming employee as set forth in Part 5306 of this Subchapter.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 5306.3, 5307.3(b) and 5307.5.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Kristen Buckley, New York State Gaming Commission, PO Box 7500 Schenectady NY 12305, (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:** March 4, 2019.

#### **Revised Regulatory Impact Statement**

1. **STATUTORY AUTHORITY:** Racing, Pari-Mutuel Wagering and Breeding Law (“Racing Law”) section 104(19) grants authority to the Gaming Commission (“Commission”) to promulgate rules and regulations that it deems necessary to carry out its responsibilities. Racing Law section 1307(1) grants rule making authority to the Commission to implement, administer and enforce the provisions of Racing Law Article 13.

Racing Law section 1307(2) prescribes that the Commission regulate, among other things: the methods and forms of application and registration that any applicant or registrant shall follow and complete; the methods, procedures, and form for delivery of information concerning any person’s family, habits, character, associates, criminal record, business activities and financial affairs; the procedures for the fingerprinting of an employee of a licensee, or registrant; the manner and method of collection of payments of fees; and the grounds and procedures for the revocation or suspension of licenses and registrations.

Racing Law section 1322 requires the Commission to regulate the form by which applicants, licensees and registrants provide information pertaining to their qualifications for licensure or registration.

Racing Law section 1323 requires the Commission to regulate the procedures for photographing and fingerprinting applicants, licensees and registrants for identification and investigation purposes.

Racing Law section 1324 requires the Commission to regulate the method and form of registration that a gaming employee shall follow and complete, and the form for delivery of information pertaining to a gaming employee’s qualifications for registration.

Racing Law section 1325 requires the Commission to establish by regulation appropriate fees to be paid upon the filing of the required applications.

Racing Law section 1326 requires the Commission to establish by regulation the time period during which a casino vendor may conduct business transactions with a gaming facility applicant or licensee prior to the casino vendor receiving a license. Racing Law section 1326 also requires the Commission to regulate the method and form of vendor registration.

Racing Law section 1327 requires the Commission to establish by regulation appropriate fees to be imposed on vendor registrants.

2. **LEGISLATIVE OBJECTIVES:** The above referenced statutory provisions carry out the legislature’s stated goal “to tightly and strictly” regulate casinos “to guarantee public confidence and trust in the credibility and integrity of all casino gambling in the state and to prevent organized crime from any involvement in the casino industry” as set forth in Racing Law section 1300(10).

3. **NEEDS AND BENEFITS:** The revised proposal would continue to implement the above-listed statutory directives in regard to the establishment of licensing and registration requirements for gaming facility employees and vendors. The revised proposal would specify requirements for updating information contained in applications, specify the process of reapplication after a denial or revocation of a license or registration, clarify the categories of vendor licensing and designate additional groups of vendors who are not required to be licensed.

#### 4. **COSTS:**

(a) Costs to the regulated parties for the implementation of and continuing compliance with these rules: There are no new or additional costs associated with the proposed amendments. The amendments seek to clarify the existing licensing and registration process and, in certain circumstances, exempt specific vendors from the licensing or registration process, reducing overall costs to the gaming facilities and the vendors.

(b) Costs to the regulating agency, the State, and local governments for

the implementation of and continued administration of these rules: There are no new or additional costs associated with the revised proposed amendments. The revised amendments seek to clarify the existing process and, in certain cases, enumerate the specific vendors that would be exempt from the licensing or registration process, reducing overall costs to the division of the state police and the Commission. The revised proposed amendments will not impose any additional costs on local governments.

(c) The information, including the source or sources of such information, and methodology upon which the cost estimate is based: These revised proposed amendments are clarifying the process of licensing and registration of gaming facility employees and vendors. They impose no additional costs; no methods were used to determine the costs to the regulated parties or the Commission and the state.

5. **LOCAL GOVERNMENT MANDATES:** These revised proposed amendments do not impose any mandatory program, service, duty, or responsibility upon local government because the licensing and registration of gaming facility employees and vendors is strictly a matter of State law.

6. **PAPERWORK:** These revised proposed amendments are not expected to impose any significant paperwork requirements for gaming facility employees and vendor applicants other than the paperwork already required by the existing rules.

7. **DUPLICATION:** The proposed amendments do not duplicate, overlap or conflict with any existing State or federal requirements.

8. **ALTERNATIVES:** The Commission had consulted stakeholders and reviewed other gambling jurisdiction best practices and regulations. Alternatives were discussed and considered with stakeholders and compared to other jurisdiction regulations. These included the type of information required to be updated from an employee or vendor application; the appropriate vendors to be exempt from the licensing or registration process; and the types of vendors to be properly classified as ancillary vendor enterprises.

9. **FEDERAL STANDARDS:** There are no federal standards applicable to the licensing or registration of gaming employees and vendors in New York. It is purely a matter of New York State law.

10. **COMPLIANCE SCHEDULE:** The Commission anticipates that affected parties will be able to achieve compliance with these proposed amendments upon adoption.

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

This revised rulemaking proposal does not necessitate a revision to the previously published analyses and statement and does not have an adverse effect on small businesses, local governments, jobs or rural areas.

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

The Commission received a comment from Rivers Casino addressing several aspects of the proposed rulemaking.

The proposed rulemaking included a clarification of standards for licensure or registration, by incorporating statutory cross-references to important provisions or otherwise setting forth standards by regulation (9 NYCRR §§ 5304.1, 5305.2 and 5306.2). Rivers agreed with the language in the proposed 9 NYCRR § 5304.1(b). For the proposed 9 NYCRR § 5304.1(c), however, Rivers disagreed with the proposed clarification of the statutory language. Rivers interpreted the statute differently. Racing, Pari-Mutuel Wagering and Breeding Law § 1318(1) provides as a disqualifying criterion “any offense in any jurisdiction which is or would be a felony or any other crime involving public integrity, embezzlement, theft, fraud or perjury.” The Commission interprets the modifying phrase beginning with the word “involving” to limit the set of non-felony “other crimes” that would be disqualifying to those crimes that involve the listed subject matter. Rivers, on the other hand, interpreted the statutory phrase “involving public integrity, embezzlement, theft, fraud or perjury” to modify both “felony” and “other crime,” thereby limiting disqualifying felonies to only those that involve public integrity, embezzlement, theft fraud or perjury. The Commission believes that its interpretation is correct, because the interpretation advanced by Rivers would render the words “felony or” and “other” superfluous in the statute. If the legislature meant what Rivers asserts was meant, the statute could have read, “any offense...which is or would be any crime involving...” It is a canon of statutory construction that statutes should not be read to render words meaningless. Accordingly, the proposed 9 NYCRR § 5304.1(c) is unchanged.

Rivers suggested adding a subdivision (d) to the proposed 9 NYCRR § 5306.3 to state that the Commission has discretion not to perform a background check of a non-gaming employee if fingerprint results do not disclose any criminal history. While no statute or regulation requires a full background check of a non-gaming employee, the Commission agrees that the concept of the amendment Rivers suggested would be consistent with current Commission discretion and would make licensing of non-gaming employees more efficient and cost-effective, but proposes revised rule language that differs from the language Rivers suggested.

Rivers suggested adding to the list of providers that are not required to be licensed or registered as a vendor the following: nurses, EMTs, other medical providers, mail carriers, delivery services, online booking agents and non-gaming publicly traded companies. The Commission agrees with adding nurses, emergency medical technicians, other medical providers, mail carriers, delivery services and online booking agents to the list set forth in the regulation. The Commission does not agree with adding non-gaming publicly traded companies to the exempted list, because doing so might put small business, which would be required to undergo investigation costs, at a disadvantage to publicly traded companies. The Commission incorporates the Rivers suggestion for revision in part, with stylistic changes.

Rivers inquired about the interpretation of the revised proposed paragraph (14) and the interplay between paragraphs (14) and (15) of the revised proposed 9 NYCRR § 5306.3. Paragraph (14) concerns the Commission's ability to exempt a vendor from registration or licensing if the Commission determines that another regulator with substantially similar licensing requirements already regulates such vendor. The Commission may make this determination on its own initiative. Paragraph (15) provides a pathway for other vendors, not otherwise covered in the other paragraphs of the rule subdivision, to petition for an exemption. The revised proposed amendment to this paragraph does not change the Commission's ability to grant a waiver of licensing or registration requirements. The proposal (other than renumbering) only adds the option for the gaming facility, rather than the vendor, to petition for the vendor's exemption, a change that is intended to ease the ability of a vendor to seek an exemption. The exemption petition process is anticipated to remain the same, as an ad hoc process pursuant to which a vendor seeking exemption would need to petition for the exemption or have the gaming facility petition for the exemption on behalf of such vendor.

Rivers suggested that the proposed 9 NYCRR § 5307.5(e) be amended to require that an employee of a vendor registrant be required to complete only a service provider form, rather than a non-gaming employee registration application. The Commission agrees that a full background check may not be necessary for each non-gaming employee registration applicant, but believes that a fingerprint criminal history check should be required. Furthermore, there is no currently existing service provider form. The Commission revises the language of the proposed 9 NYCRR § 5307.5(e) accordingly.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Casino Fees and Payments

**I.D. No.** SGC-38-18-00003-RP

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

**Proposed Action:** Addition of Part 5302; and repeal of section 5315.3 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 103, 104, 1307(1), (2)(f), (m), (n), (o), 1348, 1349, 1350, 1351, 1352, 1353 and 1354

**Subject:** Casino fees and payments.

**Purpose:** Implementation of rules governing procedures for submission of fees and payments by gaming facilities to the Gaming Commission.

**Text of revised rule:** A new Part 5302 would be added to 9 NYCRR, to read as follows:

#### Part 5302

#### Fees and Payments

##### § 5302.1. Definition.

Unless the context indicates otherwise, gaming position means:

- (1) each player position at a slot machine;
- (2) each player position at an electronic table game; and
- (3) each table game.

##### § 5302.2. Annual license fee for machines and tables.

(a) The annual license fee set forth in Racing, Pari-Mutuel Wagering and Breeding Law section 1348 shall be paid for each gaming position by July 1st of each year for all approved slot machines and tables on that date.

(b) The annual license fee for any slot machine or table approved by the commission after July 1st shall be paid upon such approval and prorated by the number of days left in the year, with such year measured from July 1st through the following June 30th.

(c) No adjustment or credit shall be issued to a gaming facility for any machines or tables removed from use after a fee has been imposed.

(d) A fee shall not be imposed on a gaming position that replaces a

removed gaming position for which an annual license fee has been paid for the relevant year.

##### § 5302.3. Submission of payments.

(a) Payments for taxes, fees, interest and penalties shall be made to the commission within 30 days of obligation incurred, unless a different period is set forth for a type of payment by article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law or this Part. Any payment for taxes, fees, interest and penalties shall be made by electronic wire transfer, money order, certified check or any other manner designated by the commission.

(b) Forfeiture of winnings as set forth in Racing, Pari-Mutuel Wagering and Breeding Law section 1345 and gross gaming tax as prescribed in Racing, Pari-Mutuel Wagering and Breeding Law section 1351, including any applicable interest and penalties, shall be transmitted weekly by electronic funds transfer to the commission. Such transmissions are the responsibility of, and shall be made by, the gaming facility licensee.

(c) All weekly gross gaming revenue tax reports filed with the commission shall reflect all gross gaming revenue received by the gaming facility licensee for the period of the return.

(d) When the commission finds that the gaming facility licensee is required to pay additional taxes or finds that the gaming facility licensee is entitled to a refund of taxes, the commission shall report its findings to the licensee and set forth the basis upon which such findings are made.

##### § 5302.4. Overdue payments.

The commission may recover from a gaming facility:

(a) any unpaid amount including overdue payments from the gaming facility's employee or vendor applicants, registrants or licensees;

(b) revenues lost to the State of New York as a result of nonpayment or underpayment;

(c) attorney fees associated with recovery of funds; and

(d) any other payments, including any interest and penalties imposed, as prescribed by article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law and this Subchapter.

##### § 5302.5. Regulatory investigative fees and costs.

(a) Pursuant to Racing, Pari-Mutuel Wagering and Breeding Law section 1349, a gaming facility licensee shall pay for the costs of any investigation into a violation of article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law or regulation promulgated caused by such licensee. The costs of an investigation conducted pursuant to this section shall be assessed directly to such licensee upon completion of an investigation.

(b) Billable hours by commission staff shall be determined by using payroll costs for commission employees as obtained from the office of the State comptroller, including salaries and non-wage compensation and payroll taxes, as well as fringe benefit and indirect costs at rates established by the division of the budget.

(c) The commission shall charge the gaming facility licensee for actual costs of any consultant including, without limitation, attorneys, accountants, investigators and other designees of the commission related to such consultation.

##### § 5302.6. Regulatory cost assessment.

(a) Gaming facility licensees annually shall be assessed commercial gaming regulatory costs as authorized pursuant to Racing, Pari-Mutuel Wagering and Breeding Law section 1350. The commission shall determine the total assessment of regulatory costs for a forthcoming State fiscal year. Such total assessment shall include all commercial gaming costs reasonably anticipated by the commission in regard to all gaming facilities, including, without limitation, direct and indirect payroll, fringe benefits, non-personal service expenses and administrative overhead costs.

(b) The total assessment shall be allocated to each gaming facility licensee in proportion to the number of gaming positions at each gaming facility compared to the total number of gaming positions at all gaming facilities, all as determined by the commission; provided, however, that the commission may use intermediate allocation bases between opened gaming facilities and gaming facilities that have not opened, as the commission may determine.

(c) At the conclusion of a State fiscal year, the commission shall determine the actual costs of commercial gaming regulation for such concluded fiscal year, excluding investigatory fees assessed pursuant to Racing, Pari-Mutuel Wagering and Breeding Law section 1349. The commission shall apportion such actual costs according to the proportion of the number of gaming positions at each facility compared to the total number of gaming positions at all facilities and shall credit or debit the next annual assessment of each gaming facility according to the variance between the cost that had been assessed to such facility at the start of the year pursuant to subdivisions (a) and (b) of this section and the actual cost, as determined at the end of such year pursuant to this subdivision. If the number of gaming positions varies throughout the year, the commission may choose one date on which to measure gaming positions or may, in its sole discretion, determine an average number of gaming positions throughout the year.

(d) Regulatory costs of the commercial gaming program incurred prior to the opening of the first gaming facility shall be assessed to each gaming facility licensee in proportion to the number of gaming positions projected at each gaming facility.

§ 5302.7. Distribution of tax to counties.

Distributions to counties within a region, excluding the host county and host municipality, shall be made in proportion to the population of each such county as shown by the latest preceding decennial Federal census completed and published as a final population count by the United States census that precedes the commencement of the calendar year in which such distribution is made.

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Section 5315.3 of 9 NYCRR would be repealed.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 5302.1 and 5302.2.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Kristen Buckley, New York State Gaming Commission, PO Box 7500 Schenectady NY 12305, (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:** March 4, 2019.

**Revised Regulatory Impact Statement**

This revised rulemaking proposal does not necessitate a revision to the previously published regulatory impact statement. The revised text changes the definition of gaming position as it relates to table games. The revised text also provides that a fee shall not be imposed on a gaming position that replaces a removed gaming position for which an annual license fee has been paid for the relevant year. These revisions are not inconsistent with the previously published.

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

This revised rulemaking proposal does not necessitate a revision to the previously published analyses and statement and does not have an adverse effect on small businesses, local governments, jobs or rural areas.

**Assessment of Public Comment**

The Commission received timely public comments from two of the licensed commercial casinos in New York, Montreign Operating Company, LLC (“Montreign”), which operates the Resorts World Catskills casino, and Capital Region Gaming, LLC (“Rivers Casino”), which operates the Rivers Casino in Schenectady.

Proposed section 5302.1 provides a definition for “gaming position.” Montreign requested that the definition be modified to exclude positions at a table game that is not an electronic table game. The Commission agrees and revises the proposed text of section 5302.1 accordingly.

Proposed section 5302.2 concerns the annual license fee for machines and tables. Rivers Casino requested adding a subdivision to provide that an additional fee shall not be imposed on a new machine or table if such replaces a removed machine or table for which an annual license fee has already been paid. The Commission agrees that an additional fee should not be imposed if a machine or game is swapped out for another and revises the proposed text of section 5302.2 accordingly.

Proposed section 5302.3 concerns submission of payments. Subdivision (d) would provide for the Commission to set forth the basis for any refund of taxes. Rivers Casino requested adding a requirement that any refund due to a gaming facility licensee be paid within 30 days of such finding. The Commission disagrees with this request. While generally it is anticipated that refunds would be settled through weekly remittance adjustments well within the suggested refund timeframe, unanticipated and unforeseen obstacles may arise that would prevent meeting such a payment schedule.

Proposed section 5302.4 concerns overdue payments. Montreign suggested that application, investigatory and other license fees for individuals and vendors should be borne by such applicants and not the gaming facility. The Commission disagrees with this request. The Commission has made the policy judgment that application, investigatory and other license fees for individuals and vendors should be borne by the gaming facility and not the individual or vendor. Subdivision (c) of proposed section 5302.4 would reserve the right for the Commission to recover attorney fees associated with recovery of funds. Rivers Casino requested adding language to limit responsibility for attorney fees to “outside” attorney fees. Rivers Casino also suggested adding a new subdivision (e) to provide that no fees or penalties for underpayment shall be assessed if the Commission does not provide the gaming facility with a “fee schedule detailing the cost of licensing and registering its vendors and employees.” Montreign also suggested that a fee schedule should be established. The Commission disagrees with the requests. In the event attorney time is needed to collect overdue payments, it would be appropriate to charge

only the gaming facility concerned for staff attorney time or Attorney General fees in such recovery effort, rather than billing staff attorney time to casino regulation generally. No such “fee schedule” exists as is contemplated by the suggested language for a new subdivision (e). The regulatory assessment will include staff cost for all gaming facility regulatory activities, not only licensing cost. The Commission anticipates providing a budget with assumptions for the annual assessment, which will be based on the proposed commercial gaming state appropriation request that the Legislature will authorize annually.

Proposed section 5302.5 concerns regulatory investigative fees and costs. Rivers Casino suggested adding a new subdivision (d) to provide that a gaming facility licensee shall not be assessed any fees or costs for any investigation, consulting or other regulatory functions performed by Commission staff within ordinary business hours and for functions that are performed in their ordinary course of business. Rivers Casino explained that Commission staff time is already to be billed to the gaming facility licensees in proposed section 5302.6. Montreign also suggested that investigation, consulting or other regulatory functions performed by Commission staff within ordinary business hours and for functions that are performed in their ordinary course of business should not be assessed. The Commission disagrees with these requests. The Legislature, in Racing, Pari-Mutuel Wagering and Breeding Law section 1349, has authorized the Commission explicitly to recover investigatory costs from a gaming facility licensee. It is common policy for regulated parties to bear the costs of their regulation. No gaming facility licensee would be billed twice for the same service. Rather, any investigatory costs within the meaning of Racing, Pari-Mutuel Wagering and Breeding Law section 1349 (Regulatory investigative fees) would be billed only to the gaming facility to which the investigation relates, not to the general regulatory assessment of Commission costs.

Proposed section 5302.6 concerns the regulatory cost assessment. Rivers Casino suggested replacing language in subdivision (c) to eliminate reference to Commission discretion to determine a date upon which to measure gaming positions or to determine an average number of gaming positions throughout the year. Rivers Casino suggested adding a right for a gaming facility to audit a regulatory assessment prior to paying it. Rivers Casino suggested eliminating subdivision (d), which provides a mechanism to assess pre-opening regulatory costs. Rivers Casino asserted that the license fee it paid pursuant to Racing Pari-Mutuel Wagering and Breeding Law section 1306(4) and 9 NYCRR section 6001.1(a) was sufficient. The Commission disagrees with these requests. The Commission believes that the regulations need to provide flexibility for the Commission to calculate an average number of gaming positions in the event that gaming floor expansions or machine removals are approved within the fiscal year. Creating an audit right before payment would delay payments beyond the 30-day period required by Racing, Pari-Mutuel Wagering and Breeding Law section 1350(1). Subdivision (d) provides a mechanism to recover regulatory costs incurred prior to the opening of facilities, such as developing and ensuring compliance with gaming regulations. The casino license fee was collected for the privilege of conducting casino gaming and was distributed according to the requirements of State Finance Law section 97-nnnn. The regulatory costs contemplated by subdivision (d) are those not already covered by the \$1 million application fee required by Racing, Pari-Mutuel Wagering and Breeding Law section 1316(8), which statute imposed the application fee “to defray the costs associated with the processing of the application and investigation of the applicant.”

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## Long Island Power Authority

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### NOTICE OF ADOPTION

**Authority’s Tariff for Electric Service**

**I.D. No.** LPA-37-18-00009-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 an annual budget and rate update.

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

**Subject:** Authority’s tariff for electric service.

**Purpose:** To effectuate the Authority’s annual budget and rate update.

*Text or summary was published* in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00009-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: tariffchanges@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

#### **Authority's Tariff for Electric Service**

**I.D. No.** LPA-37-18-00010-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 clarify the purposes for which customers may consent to contact by wireless telephone.

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

**Subject:** Authority's tariff for electric service.

**Purpose:** To clarify the purposes for which customers may consent to contact by wireless telephone.

*Text or summary was published* in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00010-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: tariffchanges@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

#### **Authority's Tariff for Electric Service**

**I.D. No.** LPA-37-18-00011-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 expand eligibility for customer compensation under the value of distributed energy resources tariff.

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

**Subject:** Authority's tariff for electric service.

**Purpose:** To expand eligibility for customer compensation under the Authority's value of distributed energy resources tariff.

*Text or summary was published* in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00011-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: tariffchanges@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

#### **Authority's Tariff for Electric Service**

**I.D. No.** LPA-37-18-00012-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 add an option for efficient LED lighting for outdoor area lighting service customers.

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

**Subject:** Authority's tariff for electric service.

**Purpose:** To add an option for efficient LED lighting for outdoor area lighting service customers.

*Text or summary was published* in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00012-P.

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

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

**Authority’s Smart Grid Small Generator Standardized Interconnection Procedures**

**I.D. No.** LPA-37-18-00014-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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

**Action taken:** The Long Island Power Authority adopted modifications to its Tariff for Electric Service to update its appended Smart Grid Small Generator Standardized Interconnection Procedures.

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

**Subject:** Authority’s Smart Grid Small Generator Standardized Interconnection Procedures.

**Purpose:** To update the Authority’s Smart Grid Small Generator Standardized Interconnection Procedures.

**Text or summary was published** in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00014-P.

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

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

**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**

**Authority’s Tariff for Electric Service**

**I.D. No.** LPA-37-18-00015-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 clarify customer rights and responsibilities regarding opting out of smart metering.

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

**Subject:** Authority’s tariff for electric service.

**Purpose:** To clarify customer rights and responsibilities regarding opting out of smart metering.

**Text or summary was published** in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00015-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: [tariffchanges@lipower.org](mailto:tariffchanges@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**

**Authority’s Tariff for Electric Service**

**I.D. No.** LPA-37-18-00016-A

**Filing Date:** 2019-01-01

**Effective Date:** 2019-01-01

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 add uniform business practices for distributed energy resources suppliers.

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

**Subject:** Authority’s tariff for electric service.

**Purpose:** To add uniform business practices for distributed energy resources suppliers.

**Text or summary was published** in the September 12, 2018 issue of the Register, I.D. No. LPA-37-18-00016-P.

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

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

**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.

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## Public Service Commission

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

#### DPS Staff White Paper for Who Must be Trained in 16 NYCRR Part 753 Requirements and How the Commission Will Approve Trainings

I.D. No. PSC-03-19-00002-P

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

**Proposed Action:** The Commission is considering the adoption of a Department of Public Service (DPS) Staff White Paper to implement the requirements of chapter 333 of the Laws of 2018, Excavator Training Requirements.

**Statutory authority:** Public Service Law, section 119-b

**Subject:** DPS Staff White Paper for who must be trained in 16 NYCRR Part 753 requirements and how the Commission will approve trainings.

**Purpose:** To reduce damage to underground utility facilities by requiring certain training and approving training curricula.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering adoption of procedures to effectuate the recently-enacted statutory requirements contained in Chapter 333 of the Laws of 2018, which amends various provisions of the General Business Law pertaining to excavator training requirements. The statutory amendments (the Act) require that certain excavators be trained by either of the two One-Call Notification systems or other providers that may be authorized by the Commission.

Department of Public Service Staff have developed a White Paper, submitted in Case 18-M-0777 (White Paper), to identify various issues related to the implementation of the Act. Consistent with the Act's text, the White Paper, proposes that the term "excavators" include the owners of excavation companies. The White Paper proposes that (1) operators that perform excavation work and (2) excavators who contract with operators or local governments to perform excavation work must complete the training and education program.

With respect to grandfathering individuals who have already completed One-Call Notification training, the White Paper proposes the following:

1. Entities who submit their curriculum as part of their comments on the White Paper will be treated as having submitted a request for approval of that curriculum.
2. Entities who seek grandfathered status for their trained workers who have previously completed Part 753 training should submit their training curriculum in response to the White Paper by March 17, 2019.
3. Those individuals who have already been trained in One-Call practices will be grandfathered for five years provided that (a) the organization that trained them includes its Part 753 training curriculum in its comments on the White Paper and (b) the submitted training curriculum is not inconsistent with the criteria in the Appendix to the White Paper.
4. Those entities who submitted a training curriculum that is inconsistent with the criteria in the Appendix to the White Paper, shall have one year to retrain individuals, commencing from the date of a Commission order approving 16 NYCRR Part 753 training with any required modifications, which will specify the additions each deficient curriculum submitted must include.

Going forward, other groups that currently do not have a training curriculum, but would like to be approved to provide One-Call training, should adopt the Staff-proposed curriculum outline, which is included in the Appendix to the White Paper, and seek Commission approval to train in One-Call practices according to that curriculum either through the White Paper process described above or through individual petitions for training approval.

The Commission also seeks comments on recommendations concerning enforcement of the Act's directives on a prospective basis.

The full text of the White Paper may be reviewed online under Case No. 18-M-0777 at the Department of Public Service web page: [www.dps.ny.gov](http://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](mailto: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](mailto: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 proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(18-M-0777SP1)

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## Department of Transportation

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

#### Regulation of Commercial Motor Carriers in New York State

I.D. No. TRN-03-19-00001-EP

Filing No. 1206

Filing Date: 2018-12-26

Effective Date: 2018-12-26

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

**Proposed Action:** Repeal of sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13, 855.2; addition of sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13 and 855.2 to Title 17 NYCRR.

**Statutory authority:** Transportation Law, sections 14(12), (18), 14-f(1)(a), 138(2), 140(2), art. 9-A, 49 USC, sections 30103, 31102, 31136 and 31141

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

**Specific reasons underlying the finding of necessity:** This emergency rule is being promulgated on November 7, 2018 to assure the timely adoption and application of the current federal rules applicable to commercial motor vehicle safety; it will become applicable upon the publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on January 16, 2019.

New York is required by 49 USC Section 31141 to adopt and enforce the minimum safety standards on commercial motor vehicles and is generally preempted from applying either more stringent standards or more lax standards to motor carriers engaged in interstate commerce. In addition to the legislative mandate, New York is a participant in the Motor Carrier Safety Assistance Program (MCSAP) pursuant to an agreement most recently approved on January 9, 2017. Pursuant to this agreement, New York assumes the role and obligation of performing motor carrier enforcement for FMCSA in return for federal funding that amounts to \$14,775,210 for the current fiscal year. As a condition of this agreement, New York must annually certify that it has adopted and is enforcing the current version of the federal rules. New York, through its Department of Transportation (NYSDOT) has previously adopted the relevant federal regulations for the purpose of motor carrier operation, regulation and enforcement. The purpose of this update is to assure the application of the 2017 edition of the federal rules, rather than the application of the 2013 edition that was last adopted in 2015.

This emergency rule provides for the timely adoption of the 2017 edition of the federal rules and thus brings New York into compliance with the three-year MCSAP compatibility requirement prescribed by 49 CFR part 350.331(c).

**Subject:** Regulation of commercial motor carriers in New York State.

**Purpose:** The rule making updates title 49 CFR provisions incorporated by reference pursuant to regulation of commercial motor carriers.

**Text of emergency/proposed rule:** 17 NYCRR sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13, and 855.2 are REPEALED and REPLACED to read as follows:

*Section 154-1.1.*

(f) The provisions of the Code of Federal Regulations (CFR) that have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the books entitled: Title 49 CFR Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999 revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The incorporated regulations may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation and Office of Counsel, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

*17 NYCRR section 154-2.1.*

(e) Incorporation by reference. The provisions of the Code of Federal Regulations (CFR) that have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the books entitled: Title 49 CFR Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999 revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The incorporated regulations may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation, Office of Counsel or Motor Carrier Compliance Bureau, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

*17 NYCRR 720.12 Incorporation by reference.*

(a) Incorporation by reference. The provisions of the Code of Federal Regulations which have been incorporated in this Part have been filed in the Office of the Secretary of State of the State of New York, the publications so filed being the books entitled: Code of Federal Regulations, Title 49, Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400 to 571 and Parts 572 to 999 revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated by reference may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the Libraries of the New York Supreme Court, the Legislative Library, the New York State Department of Transportation, Office of Counsel, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

*17 NYCRR 721.3*

(f) FMCSR. Drivers of passenger carrying vehicles that carry more than 15 passengers, including the driver, or with a gross vehicle weight rating of more than 10,000 pounds shall comply with the applicable Federal Motor Carrier Safety Regulations (FMCSR) of the Federal Highway Administration, including: 49 CFR part 382 - Controlled Substances and Alcohol Use and Testing, part 383 - Commercial Driver's License Standards; Requirements and Penalties, part 390 - Federal Motor Carrier Safety Regulations; General, subdivisions 391.21, except for (b)(12), 391.23, except for (b) and (c), 391.25, 391.27, except for (c) and (d), 391.41, 391.43 and 391.51, except for (b)(3), (b)(7) and (d)(4), of part 391 - Qualifications of Drivers, part 392 Driving of Commercial Motor Vehicles, part 393 - Parts and Accessories Necessary For Safe Operation, part 396 - Inspection, Repair, and Maintenance, except for subdivisions 396.3(a)(2) and (b)(4) and part 397 - Transportation of Hazardous Materials; Driving and Parking Rules. With respect to commercial drivers that are licensed with a passenger endorsement to operate a bus on an intrastate basis only, parts 390 to 397 shall not apply to commercial drivers when operating a school bus, and the adopted portions of part 391 shall only apply to those drivers that received their initial commercial driver's license after 5/19/1999, the first effective date of this regulation. With respect to hours of service of bus drivers the requirements of 17 NYCRR 820.6 apply.

*Section 721.6. Incorporation by reference.*

The provisions of the Code of Federal Regulations that have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the books entitled: Title 49 Code of Federal Regulations Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999, revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The incorporated regulations may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation and Office of Counsel, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

Section 750.3. Minimum levels of financial responsibility for for-hire motor carriers of passengers.

The Commissioner of Transportation adopts part 387 of title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length for for-hire motor carriers of passengers operating motor vehicles in interstate and foreign commerce. The provisions of Title 49 of the Code of Federal Regulations that have been incorporated by reference in this Part, including Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999, revised as of October 1, 2017, have been filed in the Office of the Secretary of State of the State of New York, the publications so filed being the books entitled: Title 49 Code of Federal Regulations Parts 100 to 177, Parts 178 to 199, and Parts 300 to 399, Parts 400-571, revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The incorporated regulations may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation and Office of Counsel, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

*Section 820.13. Incorporation by reference.*

The provisions of the Code of Federal Regulations that have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publications so filed being the books entitled: Title 49 Code of Federal Regulations Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999, revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The provisions of Subpart B Part 395 of Title 49 the Code of Federal Regulations specifically include the Electronic Logging Device requirement and that is incorporated by reference into section 820.6 of this Part. The incorporated regulations may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation Office of Counsel, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

Section 855.2. Minimum levels of financial responsibility for interstate motor carriers of property.

The provisions of the Code of Federal Regulations that have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publications so filed being the books entitled: Title 49 Code of Federal Regulations Parts 100 to 177, Parts 178 to 199, Parts 300 to 399, Parts 400-571 and Parts 572-999, revised as of October 1, 2017, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated by reference may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation, Office of Counsel or Motor Carrier Compliance Bureau, 50 Wolf Road, Albany, NY 12232. They may be purchased by mail from the US Government Printing Office, New Orders, P.O. Box 979050, St. Louis, MO 63197-9000 with payment by check or

with payment by credit card at 8066-512-1800. The full text of the Code of Federal Regulations is available in electronic format at [www.ofr.gov](http://www.ofr.gov). Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

**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 March 25, 2019.

**Text of rule and any required statements and analyses may be obtained from:** David E. Winans, Associate Counsel, Department of Transportation, Division of Legal Affairs, 50 Wolf Rd., Albany, NY 12232, (518) 457-5793, email: [david.winans@dot.ny.gov](mailto:david.winans@dot.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

##### 1. Statutory authority:

Transportation Law section 14(18), Transportation Law section 140, and Transportation Law section 211. This is an update to a more recent edition of federal motor carrier regulations that have been incorporated by reference into New York regulations. The commissioner of transportation is empowered to prescribe rules and regulations concerning the safety of motor carriers by Transportation Law section 14(18). Transportation Law section 140 empowers the commissioner to prescribe rules and regulations in relation to motor carrier safety. Transportation Law section 211 authorizes the commissioner to promulgate rules and regulations governing the hours of service of drivers of trucks and motor buses.

##### 2. Legislative objectives:

The legislative objective is to promote and enforce public safety and responsibility of motor carriers that are subject to regulation by the Federal Motor Carrier Safety Administration (FMCSA). FMCSA regulations are set forth in Title 49 of the Code of Federal Regulations (CFR). New York is required by 49 USC Section 31141 to adopt and enforce the minimum safety standards on commercial motor vehicles and is generally preempted from applying either more stringent standards or more lax standards to motor carriers engaged in interstate commerce. In addition to the legislative mandate, New York is a participant in the Motor Carrier Safety Assistance Program (MCSAP) pursuant to an agreement most recently approved on January 9, 2017. Pursuant to this agreement, New York assumes the role and obligation of performing motor carrier enforcement for FMCSA in return for federal funding that amounts to \$14,775,210 for the current fiscal year. As a condition of this agreement, New York must annually certify that it has adopted and is enforcing the current version of the federal rules.

New York, through its Department of Transportation (NYSDOT) has previously adopted the relevant federal regulations for motor carrier operation, regulation and enforcement.

Most of the federal motor carrier vehicle safety standard regulations date back to their initial adoption in 1968. Over the last five decades there have been occasional changes, most of which have been minor. Hours of Service (HOS) rules for drivers of commercial motor vehicles date back to 1938 and the Interstate Commerce Commission. In 2005, the FMCSA issued the first of their changes to the HOS rules.

As concerns the adoption of 49 CFR Part 395 into 17 NYCRR 820.6 pertaining to the hours of service of drivers, the legislative objective has been and is "to promote safe driving of commercial motor vehicles (CMVs) by limiting on-duty driving time, thereby ensuring that drivers have adequate time to obtain rest. FMCSA conducts regular checks at the roadside and performs in-depth compliance reviews to ensure that drivers are operating within the HOS limits." There is no change in this objective related to this update to the current version of Part 395. What has changed between the 2013 version and the 2017 version of Part 395 are some changes related to roadside inspection, and most significantly, the addition of Subpart B to Part 395 that mandates the use of "Electronic Logging Devices" (ELDs) for certain classes of motor carriers under certain circumstances as spelled out in the newer version of the CFR.

ELDs are electronic devices that automatically record driving time and facilitate electronic recording of other duty status categories, and provide the same information currently collected on paper records of duty status (RODS). The update to the current version of Part 395 by a consensus rule met with objections from the Owner-Operator Independent Drivers Association, Inc. ("OOIDA") making consensus adoption of the update impossible and triggering this rulemaking. Based upon the 29 pages of public comment objecting to the consensus update, OOIDA takes issue with truck inspections, in general, and takes specific exception with the ELD mandate in Part 395. None of the stated comments/objections by OOIDA would appear to pertain to the general updates to the newer version of the CFR outside of Part 395. However, because the CFR books contain multiple parts, it became impossible to proceed by consensus even for any other changes between the 2013 and 2017 versions of the regulations.

##### 3. Needs and benefits:

The purpose of this rulemaking is to comply with federal requirements. These requirements include those imposed by law, as well as those assumed pursuant to the agreement by the State of New York to participate in the Motor Carrier Safety Assistance Program (MCSAP). MCSAP is a grant program under regulatory provisions in 49 CFR Part 350 that contributes half the cost of enforcing safety regulations on commercial motor carriers operating within or through the state. Concerning HOS enforcement, adoption of the ELD mandate will better assure compliance with HOS regulations that have long been recognized as the key to preventing accidents that occur because of fatigued driving.

NYSDOT is simply updating the version of the federal motor carrier regulations to the edition published in 2017. The regulations referencing the version of the CFR are 17 NYCRR Sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13, and 855.2. Pursuant to the MCSAP agreement, these updates to the references to the CFR must put New York into compliance with the CFR within three years of the most current edition. These periodic updates are normally effected by a consensus rule because New York has no choice but to adopt the federal regulations and because, until now, nobody had expressed any objections to the periodic update bringing New York into compliance with national standards for motor carriers as adopted by FMCSA.

The changes effected by updating the edition of the CFR are normally very minor, and nationally applicable. These regulations that are already enforced by NYSDOT and cooperating police agencies and are not changing. The update to the current edition of the federal rules does result in some limited situations where enforcement of the updated rule may impose additional requirements on the motor carriers that are subject to FMCSA regulation. The only known situation where the proposed update changes motor carrier requirements involves the ELD mandate and the manner that hours of service (HOS) inspections and enforcement will be undertaken using data that may now be required to come from an ELD as opposed to data from a log book that was previously allowed.

There were delays in the implementation of the final rule at FMCSA from 2010 through 2017 because of challenges at FMCSA, including a challenge by OOIDA that was resolved in the 7th Circuit Court of Appeals. *Owner Operator Ind. Drivers Ass'n v. United States DOT*, 840 F.3d 879 (7th Cir. 2016). The ELD final rule made changes to the technical requirements. Specifically, the final rule simplified the data transfer options and exempted vehicles with a pre-2000 model year from the ELD requirement.

##### 4. Costs:

The FMCSA undertook extensive study over a period of many years at untold expense to formulate what they call a "Regulatory Evaluation of Electronic Logging Devices and Hours of Service" in support of the ELD rule in Part 395. This effort culminated in a document that is 170 pages in length. FMCSA published a synopsis of their findings in 80 FR 78292 (publication date 12/16/2015). A copy of the 253-page document will be posted on the Department's webpage at <https://www.dot.ny.gov/divisions/operating/oss/bus/rules-regulations>.

The ELD mandate requires that certain motor carriers equip their vehicles with ELDs and incur other expenses projected to total \$1,836 per year. The ELD mandate also makes it more difficult for motor carriers to evade responsibility for HOS violations. The cost-benefit analysis utilized by FMCSA when the ELD mandate was adopted in Part 395 estimates that implementation of the rule results in significant savings on paperwork (including labor expenses) and crash reductions that are valued at \$3,010 per year. The FMCSA regulatory impact statement thus estimates a net annual financial benefit to motor carriers of \$1,174.

The Department initiates rulemaking of this nature as a nondiscretionary, ministerial undertaking pursuant to higher authority. The purpose of incorporating 49 CFR Part 395 into 17 NYCRR Part 820 is to require motor carriers operating within and through this state to utilize the most accurate, tamperproof and error free-technology for recordation of records on hours of service of drivers of commercial motor vehicles. These electronic devices record automatically and the records they create will replace paper logbooks, that are frequently found to be incomplete, inaccurate or missing altogether. With the arguable exception for implementation of the ELD mandate, it is not expected that updating to the 2017 version of the CFR will have any significant cost impacts on motor carriers that are subject to NYSDOT/FMCSA regulation and enforcement. The necessary update makes no changes to the longstanding and current system of commercial motor vehicle enforcement. Most truck and/or driver inspections are performed roadside under the "pervasively regulated industry" exception to the Fourth Amendment of the U.S. Constitution.

##### 5. Local government mandates:

The rule imposes no local government mandates.

##### 6. Paperwork:

The paperwork requirements relating to motor carrier safety regulations are prescribed by the underlying regulations. No increase in the paperwork

requirements will be occasioned by the update in the incorporated version of the federal regulations.

As concerns the adoption of the ELD mandate in Part 395 of the HOS regulations, utilization of the ELD is projected to result in a reduction of paperwork because the ELD automatically records driving time and facilitates electronic recording of other duty status categories, and provides the same information currently collected on paper records of duty status (RODS). In this way, the ELD replaces the log books that have been used in the past. FMCSA estimates that the paperwork savings connected to adoption of the ELD rule have an annual value of \$2,438.60 per year per truck.

7. Duplication:

There are no duplications, overlaps or conflicts associated with the rule.

8. Alternatives:

There is no alternative to adoption of the update to the version of the federal rules. New York is required to apply the federal rules and has agreed to do so under the MCSAP agreement. Failure to timely adopt the update will put New York in violation of the federal law and constitute a breach of the MCSAP agreement and result in the loss of federal assistance estimated to be \$14,775,210 for the current fiscal year.

9. Federal standards:

49 USC Section 31141 requires New York to adopt and enforce the minimum safety standards on commercial motor vehicles as adopted by FMCSA and New York is generally preempted from applying either more stringent standards or more lax standards to motor carriers engaged in interstate commerce.

10. Compliance schedule:

FMCSA allowed for a gradual roll-out of the ELD mandate with the federal rule taking effect in December of 2017, and enforcement delayed until April 1, 2018. Because of objections to the consensus update, New York has not begun to do any enforcement of the ELD mandate. Unless the ELD mandate is implemented in New York, the State will face the elimination of MCSAP funding. Adoption is therefore a matter of high priority and will be effected as soon as possible.

**Regulatory Flexibility Analysis**

1. Effect of rule. The rule serves to effect an update to the edition of the federal motor carrier safety regulations that apply to commercial motor carriers. This update will result in no changes to the requirements for commercial motor carriers to comply with regulations and submit to routine roadside vehicle/driver inspections and safety audits. Some of the requirements applicable to vehicle safety may involve minor changes as New York conforms to the current federal standards. As concerns the hours of service for drivers covered by 49 CFR Part 395, the updated version adds Subpart B that now requires certain drivers for motor carriers to equip vehicles with Electronic Logging Devices (ELDs). FMCSA has compiled national estimates on the number of businesses affected by this ELD rule. For hire general and specialized freight, private property carriers and for hire and private passenger together totaled 539,000, of which 533,970 were classified as small businesses. As such, the percentage of such operators constitute most of the target population, to wit: "... FMCSA estimates that 99.1 percent of regulated motor carriers are small businesses according to Small Business Administration (SBA) size standards." 80 FR 78292, \*78376. There are no specific figures available for New York.

2. Compliance requirements. As concerns the ELD requirement in 49 CFR Part 395, FMCSA conducted extensive investigations into the issue of cost to small business nationwide, which are thoroughly documented in 80 FR 78292 on the Department's webpage at <https://www.dot.ny.gov/divisions/operating/oss/bus/rules-regulations>. One paragraph pertinent to this category is this: "ELDs can lead to significant paperwork savings that can offset the costs of the devices. The Agency, however, recognizes that these devices entail an up-front investment that can be burdensome for small carriers. At least one provider, however, provides free hardware and recoups the cost of the device over time in the form of higher monthly operating fees. The Agency is also aware of lease-to-own programs that allow carriers to spread the purchase costs over several years. Nevertheless, the typical carrier will likely be required to spend about \$584 per Commercial Motor Vehicle (CMV) to purchase and install ELDs. In addition to purchase costs, carriers will also likely spend about \$20 per month per CMV for monthly service fees." 80 FR 78292, \*78378. Costs were considered justified to achieve the benefits of the rule.

3. Professional services. As concerns the ELD requirement in 49 CFR Part 395, professional services are not broken out in the federal analysis as a standalone category. Device installation and maintenance are included in the cost of the devices and associated equipment installation. Driver training costs are \$9.4 (in 2013 millions) nationwide. Both categories of expenditure are likely to be offset by time savings realized by discontinuance of hours of service recordation with paper logbooks and the clerical expense associated with that recordkeeping.

4. Compliance costs. As concerns the ELD requirement in 49 CFR Part 395, costs of improved hours of service compliance per ELD was

computed nationwide at \$286 per CMV for long haul operators and \$193 per CMV for short haul operators (in 2013 dollars).

5. Economic and technological feasibility. FMCSA analysis did not determine economic or technological feasibility to be constraining factors in implementation of the ELD rule.

6. Minimizing adverse impact. Because small businesses comprise such a large portion of the motor carrier population subject to the Federal Motor Carrier Safety Regulations (FMCSRs), FMCSA stated in the 2011 NPRM that it is neither feasible nor consistent with the Agency's safety mandate to allow a motor carrier to be excepted from the requirement to use Automatic on Board Recording Devices (AOBRs) based only on its status as a small business entity. As the state is constrained from altering the federal regulation, there is no methodology to achieve a minimization of adverse impact. The updated version of 49 CFR Part 395 does include exceptions to the ELD mandate where a driver may use a log book as proof of compliance with Record of Duty Status requirements (normally a log book) under the following circumstances: (1) the vehicle is used no more than eight days in any 30-day period, (2) a driveaway-towaway operation in which the vehicle is driven is part of the shipment being delivered, (3) a driveaway-towaway operation in which the vehicle is driven is a motor home or a recreational vehicle trailer or (4) the vehicle was manufactured before model year 2000.

7. Small business and local government participation. Small business was afforded ample opportunity to participate in the federal rulemaking associated with the ELD rule. As that process has closed and the federal ELD rule is now in effect, there is no ability to reopen the public participation initiative at the state level.

8. Cure period or other opportunity for ameliorative action: Pursuant to SAPA 202-b(1-a)(b), no such cure period is included in the rule. The rule involves an update to the applicable federal regulations that apply to motor carriers. There was a gradual roll-out period leading to the adoption, implementation and enforcement of the ELD rule. The rule became effective at the federal level in December of 2017. No enforcement was to occur before April 1, 2018. Because this update has not been effected in New York, enforcement of the ELD rule will not occur until adoption. There is no additional cure period for the avoidance of penalties associated with the violation of the ELD rule as such would be counter to provisions of the Federal Motor Carrier Safety Assistance Program (MCSAP) agreement in force. Per 49 CFR 350.335: (a) FMCSA may initiate a proceeding to withdraw Plan approval or withhold MCSAP funds in accordance with 49 CFR 320.215 in the following situations: (1) When a State that currently has compatible CMV safety laws and regulations pertaining to interstate commerce (i.e., rules identical to the FMCSRs and Hazardous Material Regulations (HMRs) or have the same effect as the FMCSRs and identical to the HMRs) and intrastate commerce (i.e., rules identical to or within the tolerance guidelines for the FMCSRs and identical to the HMRs) enacts a law or regulation which results in an incompatible rule.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas. The proposed rulemaking involves an update to the edition of federal motor carrier regulations that have previously been incorporated by reference into state regulations. The only material change expected from this update is the addition of the mandate for Electronic Logging Devices (ELDs) for certain commercial motor vehicles for the purpose of enforcing 49 CFR Part 395 on the hours of service of drivers. This update is supported, in part, by the Regulatory Evaluation of Electronic Logging Devices supporting the adoption of the final rule at FMCSA dating from November 2015. This Regulatory Impact Analysis does not include an analysis of the rulemaking associated with ELD on commercial motor carriers situated or operating primarily within rural areas as defined by federal law. The purpose of the ELD rule, to reduce the incidence of commercial motor vehicle accidents due to driver fatigue is unaffected by external factors related to the area of operation being rural as opposed to urban; as such, analysis focused on rural areas would not have produced data disposed to produce consequences on the rulemaking. The rule applies across the state. Per SAPA section 102(10): "Rural area" means those portions of the state so defined by subdivision seven of section four hundred eighty-one of the executive law," to wit: "Rural areas" means counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of two hundred thousand or greater population, "rural areas" means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein." Federal law does not provide a definition of "rural area" strictly comparable to the state definition. Per 49 USC section 5302(16), "The term "rural area" means an area encompassing a population of less than 50,000 people that has not been designated in the most recent decennial census as an "urbanized area" by the Secretary of Commerce." It should be noted that under 17 NYCRR Section 820.6(b)(1), "the operation of a

commercial motor vehicle owned by a farmer and operated by himself or an employee when used in the hauling of farm, dairy, or horticultural products and farm supplies for himself or his farm neighbors to market” is excepted, so that the applicability of the ELD mandate to farmers is limited. There is also an exemption for farm vehicles engaged in most interstate operations found at 49 CFR Section 390.39, including the requirements in Part 395.

2. Reporting, recordkeeping and other compliance requirements and professional services. Motor carrier regulation and enforcement is not expected to change significantly from that provided under the existing regulations. As concerns the new requirement for ELDs, recordkeeping is reduced in that ELD driver record of duty status is recorded automatically and retained electronically, rather than via manual recordation retained on paper. Compliance costs include purchase, installation and maintenance of the ELD. Professional services may include driver training in the use of the device all of which are discussed in costs below. Per the 2015 federal RIA, “Substantial paperwork and recordkeeping burdens are ... associated with HOS rules, including time spent by drivers filling out and submitting paper RODS and time spent by motor carrier staff reviewing, filing, and maintaining these RODS. ELDs will eliminate clerical tasks associated with the RODS and significantly reduce the time drivers spend recording their HOS. These paperwork reductions offset most of the costs of the devices.” The types and numbers of rural areas in which affected entities may be domiciled is undetermined but is considered irrelevant to the purpose of the rulemaking. Commercial motor carriers headquartered in rural areas are not expected to encounter disproportionate operational or regulatory compliance costs related to the incorporation of federal safety standards associated with ELD into Title 17 NYCRR.

3. Costs. As concerns the ELD requirement, the initial capital costs are described in the RIA Part 3. ‘Costs of Final Rule’ on the Department’s webpage at <https://www.dot.ny.gov/divisions/operating/oss/bus/rules-regulations>. The total annualized cost of ELD with Universal Serial Bus (USB) at 5 and 10-year replacement intervals at \$166; the cost was compiled from vendor marketing material so it does not reflect actual expenditures, which may vary depending on the size of carrier fleets.

4. Minimizing adverse impact. As incorporation of 49 CFR Part 395 into Title 17 regulations is mandatory the Department has no discretion to alter the federal regulatory provisions to furnish relief to rural area carriers. However, the FMCSA received a comment in 2014 which made them aware of important wireless coverage issues: “A rural transit provider stated that connectivity is not available in many areas, so Internet and cellphone reception is not possible. ELDs that rely on such connectivity are not viable.”

5. Rural area participation. 49 USC section 30103(b) provides that a state, “... may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter...”; as such, the agency provided no public or private interests in rural areas with the opportunity to participate in the rule making process for the purpose of determining how to modify the federal ELD regulations to minimize cost or complexity, as a less stringent regulation on the subject would be preempted.

#### **Job Impact Statement**

1. Nature of impact: The proposed rule changes are advanced periodically to retain consistency of Title 17 NYCRR with Title 49 CFR provisions related to safe operation of commercial motor vehicles; said CFR provisions are incorporated by reference. Since the Department last adopted such updates by incorporation of the 10/1/2013 edition of CFR safety provisions in January 2015, commercial motor carriers subject to hours of service (HOS) requirements have been required under new federal mandates to transition from paper logbooks to electronic logging devices (ELD) to document compliance with limitations on hours behind the wheel, termed “record of duty status” (RODS). Said federal regulations were adopted with a compliance date of December 18, 2017 in 80 FR 78292. The present rule update serves to capture that material by incorporation and is not expected to have a significant impact on jobs; the associated New York State Department of Transportation (NYSDOT) enforcement activity will be consistent with past practice.

2. Categories and numbers affected: Federal rules except limited numbers of commercial motor carriers from compliance with ELD requirement. Most motor carriers whose drivers currently maintain paper logbooks are required to transition to ELD and those excepted must continue to maintain paper logbooks if required to document RODS. Exclusion of small businesses was considered but ultimately rejected by FMCSA as inconsistent with the federal statutory framework under which rulemaking is undertaken (80 FR 78292, \*78313).

3. Regions of adverse impact: Inspections and reviews are conducted pursuant to Department policy and there is no variance in the methodology across regions. No adverse impact on jobs in any particular region is anticipated.

4. Minimizing adverse impact: Cost estimates for compliance with the ELD mandate vary depending on the number of vehicles a carrier has in operation. Larger carriers are expected to enjoy significant cost savings, whereas smaller carriers and single operators may see modest cost increases of a few hundred dollars per vehicle, that are expected to evaporate over time as the ELD becomes standard equipment in newer model commercial vehicles and such vehicles replace older ones in the operator’s fleets. FMCSA determined that time savings to drivers and carriers from filling out, submitting, and handling paper can exceed the annualized costs of equipping and maintaining ELD. The possible cost increases that may occur in certain cases were estimated to not likely exceed a few hundred dollars per year and were not considered to represent a significant impact. Business case studies performed by FMCSA following the implementation of electronic management systems consistently revealed the cost of compliance management, including truck mounted data terminal hardware, to be 30% lower than manual compliance management procedures used for paper logs (80 FR 78292, \*78344).

Title 17 NYCRR regulations must remain consistent with the CFR, per 49 USCS section 31141. As such, NYSDOT reviews and inspections are performed using the standards that are found in the CFR regulations incorporated by reference in 17 NYCRR. Neither the frequency of inspections nor the basis for NYSDOT enforcement action is expected to change in any way post adoption of the instance rulemaking, so categories and numbers affected remain status quo. The purpose of performing motor carrier enforcement activities is the advancement of public safety through verification of compliance with state law and regulation pertaining to motor carrier safety; consequently, there are no adverse impacts.