RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Sanitation in Retail Food Stores and Method of Sale, at Retail, of Certain Food

I.D. No. AAM-42-16-00006-A
Filing No. 1111
Filing Date: 2016-12-06
Effective Date: 2016-12-21

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

Action taken: Addition of Parts 271 and 272 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18, 96-s and 214-b

Subject: Sanitation in retail food stores and method of sale, at retail, of certain food.

Purpose: To cause the republication of regulations governing retail food stores and the method of sale of certain foods at retail.

Substance of final rule: This rule contains referenced material in the following Parts, sections, subdivisions or paragraphs:

271-2.1(b)	21 CFR Part 74
271-2.2(g)(2)	9 CFR Part 352 9 CFR Part 354
271-2.2(g)(5)	50 CFR Part 17
271-4.7(b)	21 CFR section 178.3570
271-5.3(j)	21 CFR section 178.1010
271-5.4(g)(6)	21 CFR section 178.1010
271-6.4	21 CFR section 173.310

Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Stephen D. Stich, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-4492, email: Stephen.Stich@agriculture.ny.gov

Assessment of Public Comment
The agency received no public comment.

Office of Children and Family Services

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Child Custody and Emergency Proceedings Involving Indian Children in Foster Care and Adoptive Placements

I.D. No. CFS-51-16-00007-P

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

Proposed Action: Amendment of section 431.18 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 436

Subject: Child custody and emergency proceedings involving Indian children in foster care and adoptive placements.

Purpose: To implement Federal standards involving Indian children in foster care and adoptive placements.

Substance of proposed rule (Full text is posted at the following State website:http://ocfs.ny.gov): The proposed regulations would amend the definition of an Indian child's tribe in 18 NYCRR 431.18(a)(3) to address the situation where the Indian child belongs to more than one tribe.

The proposed regulations would amend the definition of a child custody proceeding in 18 NYCRR 431.18(a)(4) to add pre-adoptive placements and to exclude emergency proceedings. The proposed regulations would amend the definition of a child custody proceeding in regard to a foster care placement to clarify that it involves a child placed in a foster care facility and not only a child placed in a foster care institution as defined in state law or regulation and that it applies to where a parent, whose parental rights have not been terminated, may not obtain the return of the child upon demand.

The proposed regulations would amend the definition of a qualified expert witness in 18 NYCRR 431.18(5) to provide that such person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

The proposed regulations would add a definition of an Indian custodian in 18 NYCRR 431.18(a)(6) and an emergency proceeding in 18 NYCRR 431.18(a)(7).

The proposed regulations would amend the standards as set forth in 18 NYCRR 431.18(c) relating to the notification of the Indian child's tribe, the Indian child's parent or Indian custodian and the federal Bureau of

Indian Affairs in involuntary child custody proceedings, exclusive of juvenile delinquency proceedings. The proposed regulations would also amend the content of the notice to conform to federal regulations. The proposed regulations would address how such notice is to be provided to the federal Bureau of Indian Affairs and the Office of Children and Family Services, where it is to be sent where the location or the identity of the parent, Indian custody or Indian tribe cannot be determined.

The proposed regulations would amend the active efforts provisions set forth in 18 NYCRR 431.18(d) to provide that such efforts must be tailored to the facts and circumstances of the case.

The proposed regulations would amend the provisions set forth in 18 NYCRR 431.18(e) relating to the ongoing obligation of the local department of social services to inform the court that it has reason to know that a child in a child custody proceeding or an emergency proceeding is an Indian child.

The proposed regulations would amend the standards for foster care and adoptive placements set forth in 18 NYCRR 431.18(f) to require placements in the least restrictive setting taking into consideration sibling attachment, the Indian child's special needs and proximity to the Indian child's home, extended family and siblings. The proposed regulations would also amend 18 NYCRR 431.18(f) and (g) in regard to the placement preferences for foster care and adoptive placements and would address the conditions where good cause not to apply such preferences would exist. Finally, the proposed regulation would clarify that the preference provisions apply to both local departments of social services and voluntary authorized agencies.

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, New York State Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 473-7793, email: info@ocfs.ny.gov

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Chapter 436 of the Laws of 1997 authorizes OCFS to carry out the functions previously exercised by the former New York State Department of Social Services relating to Indian affairs.

2. Legislative objectives:

The proposed regulations would implement federal regulations set forth in 25 CFR Part 23 that relate to the federal Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.). The federal regulations take effect on December 12, 2016.

3. Needs and benefits:

The proposed regulations are necessary for New York to be compliant with applicable federal standards involving Indian children in child custody and emergency proceedings, exclusive of juvenile delinquent proceedings, and involved in foster care and adoptive placements.

The proposed regulations would amend the definition of a child custody proceeding to add pre-adoptive placements and to exclude emergency proceedings. In addition, the proposed regulations would amend the definition of a child custody proceeding in regard to a foster care placement to clarify that it involves a child placed in a child care facility and that it applies to where a parent, whose parental rights have not been terminated, may not obtain the return of his or her child upon demand.

The proposed regulations would amend the definition of an expert witness to provide that such a person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The proposed regulations would also add definitions of an Indian custodian and an emergency proceeding.

In addition, the proposed regulations would amend the standards relating to the notification of the Indian child's tribe and the Indian child's parent or Indian custodian in each involuntary child custody proceedings, exclusive of juvenile delinquency proceedings. The proposed regulation would expand notification of the federal Bureau of Indian Affairs by social services officials to include all involuntary child custody proceedings. The proposed regulations would retain the current requirement in 18 NYCRR 431.18(c) that a social services official must notify the federal Bureau of Indian Affairs and OCFS when the social services official cannot determine the identity or location of the parent, Indian custodian or Indian tribe. The proposed regulations also address the content of the notice that must be sent by the social services official.

Also, the proposed regulation would amend provisions relating to active efforts to prevent removal of the Indian child from his or her parent to provide that such efforts must be tailored to the facts and circumstances of the case and must be recorded in the Indian child's case record.

The proposed regulations would address the ongoing obligation of a local department of social services (LDSS) to notify the court in a child custody proceeding or in an emergency proceeding that it has reason to know that the child involved in the case is an Indian child.

Finally, the proposed regulations would amend the standards in foster care and adoptive placements to require that such placements be in the least restrictive setting taking into consideration sibling attachment, the Indian child's special needs and proximity to the Indian child's home, extended family and siblings. The proposed regulations would also amend foster care and adoptive placement preferences, clarify that such preferences apply to placements made by a LDSS or by a voluntary authorized agency (VA) and the conditions where good cause exists not to apply such preferences.

The proposed regulations clarify that when a parent of an Indian child requests anonymity in the voluntary transfer of an Indian child such request does not relieve the social services official or voluntary authorized agency from complying with the requirements of the Indian Child Welfare Act of 1978 or 18 NYCRR 431.18.

4. Costs:

The proposed regulations would have a negligible cost to the State. LDSSs or VAs.

5. Local government mandates:

The proposed regulations would apply to LDSSs. The proposed regulations would only implement requirements otherwise imposed by federal statute or regulation. The new mandates would include notification by a social services official to the Bureau of Indian Affairs of all involuntary child custody proceedings where the social services official knows or has reason to know that an Indian child is involved. Current OCFS regulations only mandate such notice to the Bureau of Indian Affairs where the social services official is not able to determine the identity or location of the Indian child, the Indian child's parents or Indian custodian or the tribe. In addition, the proposed regulations would expand the content of such notice. Also, the proposed regulations would require the social services official to inform the court whenever the social services official has reason to know that a child is an Indian child in an involuntary child custody proceeding.

6. Paperwork:

The requirements imposed by the proposed regulations will be supported and recorded in New York's existing statewide automated child welfare information system, CONNECTIONS.

7. Duplication:

The proposed regulations do not duplicate other state or federal requirements.

8. Alternatives:

Because of the federal mandates, no alternative approaches to implementing the changes to regulation were considered.

9. Federal standards:

The proposed regulations comply with applicable federal standards relating to Indian children and child custody proceedings, emergency proceedings, foster care placements and adoptive placement, as set forth in the Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.) and 25 CFR Part 23.

10. Compliance schedule:

The effective date of the proposed regulations would be December 12, 2016 to conform to the effective date of the federal Indian Child Welfare Act regulations.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments:

The proposed regulations will have an effect on the 55 local departments of social services (LDSSs) and 83 voluntary authorized agencies (VAs) within New York State.

2. Compliance Requirements:

The proposed regulations are required to implement federal regulations (25 CFR Part 23) filed by the Department of the Interior on June 14, 2016 that implement the federal Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.). The federal regulations take effect on December 12, 2016. The proposed regulations address the requirements imposed on LDSSs and VAs in regard to the standards that must be applied in regard to child custody and emergency proceedings and foster and adoptive placements involving Indian children, as that term is defined in federal and state statue. The proposed regulations would amend the definitions of an Indian child's tribe, a child custody proceeding, and a qualified expert witness and would add definitions of an Indian custodian and an emergency proceeding. In addition, the proposed regulations would amend standards and procedures for the notification of the Indian tribe and the Indian child's parent or Indian custodian in involuntary court proceedings. The proposed regula-

tion would amend the notification requirements to require notification of the federal Bureau of Indian Affairs of involuntary court proceedings involving an Indian child. Also, the proposed regulations would address the ongoing obligation of a LDSS to notify the court where the LDSS has reason to know that a child in a child welfare proceeding, exclusive of a juvenile delinquent proceeding, is an Indian child. The proposed regulation would clarify that when exercising active efforts to alleviate the need for removal of an Indian child from his or her home, such efforts must be tailored to the facts and circumstances of the case. Finally, the proposed regulations clarify the standards for placement preferences for both foster care and adoptive placements of Indian children, including the standards for good cause not to apply such preferences.

3. Processional Services:

The proposed regulations do not create the need for additional professional services.

4. Compliance Costs:

The proposed regulations would have a negligible cost to the State, LDSS or VAs.

5. Economic and Technological Feasibility:

The proposed regulations would not have an adverse economic impact on LDSSs or VAs and would not require the hiring of additional staff. Technologically, implementation of the proposed regulations would be supported by the existing statewide automated child welfare information system, CONNECTIONS.

6. Minimizing Adverse Impact:

It is not anticipated that the proposed regulations will have an adverse impact on local governments or small businesses. The proposed regulations would only implement standards required by federal statute and regulation.

7. Small Business and Local Government Participation:

LDSSs and VAs will be notified via policy directive about the changes to New York's implementation of the recently promulgated federal regulations applicable to the Indian Child Welfare Act.

8. For Rules That Either Establish or Modify a Violation or Penalties:

The proposed regulations do not establish or modify a violation or penalty.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

The proposed regulations will affect the 44 local departments of social services (LDSSs) and approximately 35 voluntary authorized agencies (VAs) that are in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

The proposed regulations would implement federal regulations (25 CFR Part 23) filed by the Department of the Interior on June 14, 2016 that implement the federal Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.). The federal regulations take effect on December 12, 2016. The proposed regulations address the requirements imposed on LDSSs and VAs in regard to the standards that must be applied in regard to child custody and emergency proceedings and foster and adoptive placements involving Indian children, as that term is defined in federal and state statue. The proposed regulations would amend the definitions of an Indian child's tribe, a child custody proceeding, and a qualified expert witness and would add definitions of an Indian custodian and an emergency proceeding. In addition, the proposed regulations would amend standards and procedures for the notification of the Indian tribe and the Indian child's parent or Indian custodian in involuntary court proceedings. The proposed regulations would expand the notification requirements to include notification of the federal Bureau of Indian Affairs of all involuntary court proceedings involving an Indian child. Also, the proposed regulations would address the ongoing obligation of a LDSS to notify the court where the LDSS has reason to know that a child in a child welfare proceeding, exclusive of a juvenile delinquent proceeding, is an Indian child. The proposed regulation would clarify that when exercising active efforts to alleviate the need for removal of an Indian child from his or her home, such efforts must be tailored to the facts and circumstances of the case. Finally, the proposed regulations clarify the standards for placement preferences for both foster care and adoptive placements of Indian children, including the standards for good cause not to apply such preferences.

3. Costs:

The draft regulations would have a negligible cost to the State, LDSSs or VAs.

4. Minimizing adverse impact:

It is not anticipated that the proposed regulations will have an adverse impact on LDSSs or VAs that are in rural areas.

5. Rural area participation:

LDSSs and VAs will be notified via policy directive about the changes to New York's implementation of the recently promulgated federal regulations applicable to the Indian Child Welfare Act.

Job Impact Statement

The proposed amendment to regulations will not have a negative impact on jobs or employment opportunities in either public or private child welfare agencies. A full job impact statement has not been prepared for the proposed regulations as it is assumed that the proposed regulations will not result in the loss of any jobs.

Department of Corrections and Community Supervision

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Residential Treatment Facility Designation

I.D. No. CCS-51-16-00005-EP
Filing No. 1107
Filing Date: 2016-12-05
Effective Date: 2016-12-05

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

Proposed Action: Amendment of sections 100.20(c), 100.100(d) and 100.109(c) of Title 7 NYCRR.

Statutory authority: Correction Law, sections 70 and 112

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

Specific reasons underlying the finding of necessity: Since March 31, 2011, the Department of Corrections and Community Supervision has been responsible for both the care and custody of individuals confined in State correctional facilities as a result of their felony convictions, but also their re-entry back into the community through the supervision provided by the Department's parole officers. See Chapter 62 of the Laws of 2011, Part C, subpart A. In this regard, the legislation that created the Department in 2011 provided:

"[a]s a result of the evolution of the sentencing structure and focus on reentry the historical separation of the department of correctional services and the division of parole is no longer warranted. In view of the commonality of purpose governing the fundamental missions of both agencies, a single new state agency should be created to oversee the combined responsibilities of both and, in effect, provide for a seamless network for the care, custody, treatment and supervision of a person, from the day a sentence of state imprisonment commences, until the day such person is discharged from supervision in the community. This not only will enhance public safety by achieving better outcomes for the greatest number of individuals being released from prison, but also will allow for greater efficiencies and the elimination of duplicative responsibilities, thus resulting in significant savings for the state."

Id. at section 1. As part of this responsibility, the Department seeks to determine proper means with which to manage inmates as they transition to community supervision, which includes post-release supervision ("PRS"). See Correction Law section 2(31).

Pursuant to New York's Sexual Assault Reform Act ("SARA"), certain felony sex offenders, as well as those who have been designated Level 3 sex offenders under the Sex Offender Registration Act, Correction Law Article 6-c, are subject to a mandatory condition of community supervision that prevents them from being within 1,000 feet of school grounds, as that term is defined by section 220.00 of the Penal Law, or in any facility primarily used for the care or treatment of persons under 18 years of age when such persons are present. See Executive Law section 259-c(14). To effectuate SARA, the Department must make certain that all offenders subject to its provisions while on community supervision, (see Correction Law section 201[2]; Penal Law section 70.45[5][a]), are neither released to nor reside in residences that are not SARA-compliant. See generally People v. Diack, 24 N.Y.3d 674 (2015); Williams v. Department of Corrections and Community Supervision, 136 A.D.3d 147 (1st Dept. 2016); People ex rel. Johnson v. Superintendent, Fishkill Correctional Facility, 47 Misc.3d 984 (Sup. Ct., Dutchess Co., 2015).

Because some offenders have experienced difficulty in identifying, developing and securing SARA-compliant residences within the communities to which they intend to return, both the Board of Parole and Department, either through the Board's imposition of a special condition pursuant to section 70.45(3) of the Penal Law or a Commissioner's designation pursuant to Correction Law section 73(10), have required that

they reside within one of the Department's residential treatment facilities ("RTF") until a SARA-compliant residence within the community can be developed. Section 73(3) of the Correction Law requires the establishment of programs directed toward the rehabilitation and reintegration of persons transitioning through RTF status. The Department is resolved to provide such services while at the same time affording assistance to offenders in their efforts to find more permanent residences that comply with the requirements of Executive Law section 259-c(14).

Toward these ends, the Department has a group of facilities to serve as RTFs. The RTFs are situated through the State to provide service areas for geographic regions. These tend to be larger-size facilities, with personnel and resources which the smaller facilities customarily do not have. Deciding which of the RTFs is best suited to serve as an offender's residence involves consideration of the RTF's proximity to an offender's self-described home area, available beds, available programming, adequate staffing for the RTF programs and work crews that only RTF residents can be a part of, and finally, the locations of the Parole Officers to whom the offender's community supervision, (e.g. PRS), is assigned.

With the use of RTFs to provide offenders with SARA-complaint residences while they attempt to secure more permanent SARA-compliant residences for the duration of their PRS, the Department has recognized that some offenders' have needs that cannot be addressed in the most appropriate manner at one of the existing RTFs. In this vein, it must be noted that not every person on community supervision for whom a RTF serves as a residence is subject to SARA. For example, there have been instances where for medical reasons an offender has not been released to the community or transferred to the programs of a RTF, but instead has remained within a correctional facility.

Recently, it has been made clear that when the constraints of SARA require the imposition of a special condition under Penal Law section 70.45(3) or a designation under Correction Law section 73(10), the offender must be transferred to the RTF. See People ex rel. Green v. Superintendent, Sullivan Correctional Facility, 137 A.D.3d 56 (3d Dept. 2016). Given the inability of some offenders to secure more permanent SARA-compliant residences in the community while serving their PRS, coupled with the broad spectrum of needs and placement concerns associated with these offenders, the Department's ability to comply with Executive Law section 259-c(14) necessitates additional correctional facilities being designated to serve as residential treatment facilities. Designating the facilities, or potion thereof, as residential treatment facilities is necessary to assure compliance with SARA, meeting offenders' needs while on PRS and public safety.

Subject: Residential treatment facility designation.

Purpose: To designate additional correctional facilities, or parts thereof, to serve as residential treatment facilities.

Text of emergency/proposed rule: Subdivision (c) of section 100.20 of Part 100 of this Chapter is hereby amended to read as follows:

(c) Green Haven Correctional Facility shall be classified as a maximum security correctional facility, to be used for the following functions:

(1) general confinement facility for males 21 years of age or older; provided, however, that males between the ages of 16 and 21 may be placed therein for general confinement purposes in accordance with Part 110 of this Chapter; [and]

(2) detention center for males 16 years of age or older[.]; *and*

(3) residential treatment facility.

Subdivision (d) of section 100.100 of Part 100 of this Chapter is hereby amended to read as follows:

(d) There shall be on the grounds of the institution a maximum security compound to enclose the Walsh Regional Medical Unit. *Such regional medical unit shall also function as a residential treatment facility.*

Subdivision (c) of section 100.109 of Part 100 of this Chapter is hereby amended to read as follows:

(c) Wende Correctional Facility shall be classified as a maximum security facility, to be used for the following functions:

(1) general confinement facility; [and]

(2) detention center[.]*;and*

(3) residential treatment facility in that portion of the facility functioning as the regional medical unit.

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 4, 2017.

Text of rule and any required statements and analyses may be obtained from: Kevin P. Bruen, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue, Harriman State Campus, Albany, N.Y. 12226-2050, (518) 457-4951, email: Rules@doccs.ny.gov

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

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

Regulatory Impact Statement

Statutory Authority: Correction Law section 112 gives the Commissioner superintendence, management and control of the correctional facilities in the Department and all matters related to the government thereof, as well as the management and control of all persons released on community supervision and all matters related to such persons' effective reentry into the community. Pursuant to Correction Law section 112, the Commissioner is authorized to make rules and regulations to carry-out these statutory responsibilities. With respect to each of the Department's facilities, section 70 of the Correction Law requires that through rule making, the Commissioner designate the function of each facility.

Legislative Objectives: To designate three additional facilities, or units therein, to serve as residential treatment facilities so that the Department can address the medical and mental health needs of those offenders who may need to reside in a residential treatment facility setting for a period of time while on community supervision.

Needs and Benefits: The Department's need to adhere to the Sexual Assault Reform Act, "SARA", Executive Law section 259-c(14), when releasing offenders to and supervising them on community supervision, has necessitated its use of those facilities currently designated as residential treatment facilities to serve as SARA-compliant residences for certain offenders until a more permanent SARA-compliant residence in the community can be developed. In addition, some offenders not subject to SARA have been unable to develop suitable residences within the community that has occasioned their placement in a residential treatment facility. Both populations have presented needs, in particular medical and mental health needs, for which the current residential treatment facilities are not best suited. Through this rulemaking, the Department is expanding those facilities that can also function as residential treatment facilities so they can properly address the needs of the residents therein, as well as the management and control of all persons released on community supervision and all matters related to such persons' effective reentry into the community.

Costs: (a) There are no additional costs to the Department or State. This proposed rulemaking imposes no costs on any other State or local agency.

(b) As the proposed rulemaking does not apply to private parties, no costs are imposed on private parties.

(c) This cost analysis is based on Department's need to properly designate existing facilities to serve as residential treatment facilities so that the limited number of offenders who are already in residential treatment facility status, as well as those who may assume that status sometime in the future, can reside in a residential setting best suited to address their particular needs.

Local Government Mandates: This rulemaking imposes no program, service, duty or responsibility on any county, city, town, village, school district, or other special district. It applies only to correctional facilities and their designation as residential treatment facilities.

Paperwork: This rulemaking will not add any new reporting requirements, including forms or other paperwork. The forms and other paperwork associates with the Department's use of its residential treatment facilities already exists.

Duplication: There is no overlap or conflict with any other legal requirements of the State of federal government.

Alternatives: There are no alternatives. The facilities, or portions thereof, being designated to serve as residential treatment facilities through this rulemaking, have been identified by the Department as the facilities best suited to provide the appropriate level of medical and mental health services needed by those offenders for whom a residential treatment facility must serve as an interim residence.

Federal Standards: There are no federal standards that apply to the proposed rulemaking.

Compliance Schedule: Compliance with the proposed rulemaking is expected upon its emergency adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the proposed rule changes will have no adverse impact upon small businesses and local governments, nor do the rule changes impose any reporting, record keeping or other compliance requirements upon small businesses and local governments. Small businesses and local governments have no role in the Parole Board's parole release decision-making function. The proposed rule making will only affect the Parole Board's decision-making practices for inmates confined in State correctional facilities.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice, for the proposed rules will have no adverse impact upon rural areas, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon rural areas. The proposed rules only affect the designation of certain correctional facilities to serve as residential treatment facilities.

Job Impact Statement
A Job Impact Statement is not being submitted with this notice, for the proposed rules will have no adverse impact upon jobs or employment opportunities, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon employers. The proposed rules only affect the designation of certain correctional facilities to serve as residential treatment facilities.

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pre-Employment Corrections Training

I.D. No. CJS-51-16-00011-P

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

Proposed Action: Addition of Part 6019 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 837-a(9) and 840(2-a)

Subject: Pre-Employment Corrections Training.

Purpose: Allow employers to hire an individual who has already completed a large portion of the basic course, thereby saving resources.

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

Executive Law section 837-a(9) authorizes the Commissioner of the Division of Criminal Justice Services (Commissioner), in consultation with the State Commission of Correction (SCOC) and Municipal Police Training Council (Council), to establish and maintain training programs for correction officers. Executive Law section 840(2-a) empowers the Council, in consultation with SCOC, to promulgate regulations regarding the approval, or revocation thereof, of basic correctional training programs administered by municipalities; minimum courses of study, attendance requirements, and equipment and facilities to be required at approved correctional training programs; minimum qualifications for instructors at approved correctional training programs; and the requirements of a minimum basic correctional training program required by Executive Law section 837-a(9).

The Pre-Employment Corrections Training program is an alternative method of completing the Basic Course for Correction Officers. The program is conducted in two phases. Phase 1 is designed to be completed by a civilian; and phase 2 is completed after an individual successfully completes the initial or pre-employment phase and is appointed as a sworn corrections officer. In contrast, a conventional basic correctional course is completed in its entirety only by sworn corrections officers. However, the Pre-Employment Corrections Training program does not cover topics deemed appropriate only for sworn corrections officers, such as firearms training.

A new Part 6019 is added to 9 NYCRR to read as follows:

PART 6019

PRE-EMPLOYMENT CORRECTIONS TRAINING

6019.1. Definitions. The following definitions were added: commissioner, council, pre-employment corrections basic training course, pre-employment corrections training school, director, municipality, college, university and junior college or two-year college.

6019.2. Statement of purpose.

The purpose of this Part is to set forth minimum standards for a pre-employment corrections basic training course, including, but not limited to, subject matter and time allotments, requirements for administration of the course-by-course directors, and rules governing attendance and completion of such course.

The pre-employment corrections basic training course is an alternative method of corrections officer basic training set forth in Part 6018 and is designed to be completed by civilians. An individual who successfully completes a pre-employment corrections basic training course must complete additional training after appointment as a sworn corrections officer in order to fulfill requirements set forth in section 2.30 of the Criminal Procedure Law. Provided, however, nothing in this Part shall preclude a sworn corrections officer from attending a pre-employment corrections basic training course.

Use of a pre-employment corrections basic training course is not required and the determination to utilize this alternative method of training shall be within the discretion of each employer. An employer may require an individual who has been appointed as a sworn corrections officer, and who previously successfully completed a pre-employment basic course, to complete the basic course for corrections officers.

6019.3. Minimum standards for approval of a pre-employment corrections basic training course and 6019.4. Requirements for approval of a pre-employment corrections training school.

As the headers state, sections 6019.3 and 6019.4 respectively provide the minimum standards for approval of a pre-employment corrections basic training course and the requirements for approval of a pre-employment corrections training school. For instance, the course and school must be pre-approved by the Commissioner.

6019.5. Revocation or suspension of approval of a pre-employment corrections training school.

This section provides that the Commissioner may suspend or revoke the approval granted to a pre-employment corrections training school for cause at any time. Reasons for such suspension or revocation may include, but not be limited to, violation of the program requirements.

6019.6. Term and renewal of pre-employment corrections training school approval.

This section provides that the pre-employment corrections training school approval shall be valid for a period of two years from the date of approval, provided that the Council has not made any changes to the minimum qualifications. Such approval may be renewed by a pre-employment corrections training school upon filing a copy of the current school qualifications and approval by the Commissioner.

6019.7. Requirements for conducting a pre-employment corrections basic training course and 6019.8. Requirements for completion of a pre-employment corrections basic training course.

As the headers state, sections 6019.7 and 6019.8 respectively provide the requirements for conducting a pre-employment corrections basic training course and the requirements for completion of a pre-employment corrections basic training course. For instance, within 10 days of the commencement of a pre-employment corrections basic training program, the course director must forward a course roster to the Commissioner listing the names, and other information required by the Council, for all attendees. In addition, within 10 days after the conclusion of a basic course, the director must forward the course roster to the Commissioner denoting the performance of the respective trainees.

Further, pursuant to section 6019.8, the training completed pursuant to this Part shall remain valid for two years from the date of completion recorded on the transcript. An individual who has completed the pre-employment corrections basic training course has two years from the date of completion recorded on the transcript to obtain employment as a sworn corrections officer and, thereafter, complete the remaining training requirements prescribed by the Council in accordance with the requirements of Part 6018 for purposes of compliance with the provisions of section 2.30 of the Criminal Procedure Law. After 2 years from the date of completion recorded on the transcript, the training will no longer be valid for purposes of compliance with the provisions of section 2.30 of the Criminal Procedure Law.

6019.9. Limitations regarding pre-employment corrections basic training courses.

This section provides that the completion of a pre-employment corrections basic training course not approved by the Commissioner and pre-employment corrections training completed before the effective date of this regulation shall not be deemed to be successful completion of a pre-employment corrections basic training course and shall not be recognized by the Council or the Commissioner for purposes of compliance with the provisions of section 2.30 of the Criminal Procedure Law.

Also, the completion of a pre-employment corrections basic training course does not entitle or guarantee employment as a corrections officer, nor affect, in any way, the applicability of the Civil Service Law or other provisions of law regarding the hiring and retention of corrections officers.

Text of proposed rule and any required statements and analyses may be obtained from: Natasha M. Harvin-Locklear, Esq., NYS Division of Criminal Justice Services, Alfred E. Smith Building, 80 South Swan Street, Albany, New York 12210, (518) 457-8420, email: dcjslegalrulemaking@dcjs.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: Executive Law sections 837-a(9) and 840(2-a).

2. Legislative objectives: Executive Law section 837-a(9) authorizes the Commissioner of the Division of Criminal Justice Services (Commissioner), in consultation with the State Commission of Correction (SCOC) and Municipal Police Training Council (MPTC), to establish and maintain

training programs for corrections officers. Executive Law section 840(2-a) empowers the MPTC, in consultation with SCOC, to promulgate regulations regarding the approval, or revocation thereof, of basic correctional training programs administered by municipalities; minimum courses of study, attendance requirements, and equipment and facilities to be required at approved correctional training programs; minimum qualifications for instructors at approved correctional training programs; and the requirements of a minimum basic correctional training program required by Executive Law section 837-a(9).

3. Needs and benefits: The Pre-Employment Corrections Training program is an alternative method of completing the Basic Course for Correction Officers. The program is conducted in two phases. Phase 1 is designed to be completed by a civilian; and phase 2 is completed after an individual successfully completes the initial or pre-employment phase and is appointed as a sworn corrections officer. In contrast, a conventional basic correctional course is completed in its entirety only by sworn corrections officers. However, the Pre-Employment Corrections Training program does not cover topics deemed appropriate only for sworn corrections officers, such as firearms training.

The Pre-Employment Corrections Training program would allow employers to hire an individual who has already completed a large portion of the basic course, thereby saving the employer considerable time and expenses associated with training the individual.

4. Costs:

a. There are no expected costs to regulated parties for the implementation of and continuing compliance with the rule.

b. There are no expected costs to the agency or State and local governments for the implementation of and continuing compliance with the rule.

c. The cost analysis is based on the fact that there are no new mandates and there will be fiscal relief. Use of a pre-employment corrections basic training course is not required and the determination to utilize this alternative method of training shall be within the discretion of each employer. In addition, the program would allow employers to hire an individual who has already completed a large portion of the basic course, thereby saving the employer considerable time and expenses associated with training the individual.

5. Local government mandates: None.

6. Paperwork: A municipality would be required to complete an application to become an approved pre-employment school, and a curriculum content form for review and approval by the Commissioner. In addition, the course director would be required to submit an initial roster at the commencement of the pre-employment training and a final roster at the conclusion of the pre-employment phase.

7. Duplication: There are no other federal or State legal requirements that duplicate the proposed rule.

8. Alternatives: SCOC was consulted on this matter and there are no alternatives.

9. Federal standards: There are no federal standards.

10. Compliance schedule: Regulated parties are expected to be able to achieve compliance with the proposed rule immediately.

Regulatory Flexibility Analysis

A RFASBLG is not being submitted because the proposed rule would not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. The rule would allow employers to hire an individual who has already completed a large portion of the Basic Course for Correction Officers, thereby saving the employer considerable time and expenses associated with training the individual.

Rural Area Flexibility Analysis

A RAFA is not being submitted because the proposed rule would not impose any adverse impact on rural areas; or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The rule would allow employers to hire an individual who has already completed a large portion of the Basic Course for Correction Officers, thereby saving the employer considerable time and expenses associated with training the individual.

Job Impact Statement

A JIS is not being submitted because it is apparent from the nature and purpose of the proposed rule that it would not have a substantial adverse impact on jobs and employment opportunities. The rule would allow employers to hire an individual who has already completed a large portion of the Basic Course for Correction Officers, thereby saving the employer considerable time and expenses associated with training the individual.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-51-16-00001-E
Filing No. 1080
Filing Date: 2016-11-30
Effective Date: 2016-11-30

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

Action taken: Amendment of Parts 10 and 11; renumbering and amendment of Parts 12 through 14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; L. 2009, ch. 57

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

Subject: Empire Zones reform.

Purpose: Allow Department to continue implementing Zones reforms and adopt changes that would enhance program's strategic focus.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the

eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner"). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute's deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone's boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers' compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a non-manufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b) the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm's application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate or which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six years, all information related to the application and business annual reports.

15. The emergency rule clarifies the statutory requirement from Chapter 63 of the Laws of 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality.

16. The emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage; the rule removes the requirement that any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

17. The emergency rule clarifies the statutory requirement that certain defined "regionally significant" projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agri-business or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

20. The emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

The full text of the emergency rule is available at www.empire.state.ny.us

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires February 27, 2017.

Text of rule and any required statements and analyses may be obtained from: Thomas P. Regan, NYS Department of Economic Development, 625 Broadway, Albany NY 12245, (518) 292-5123, email: tregan@esd.ny.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commis-

sioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State's administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

The emergency rule conforms to provisions of Article 18-B of the General Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

Regulatory Flexibility Analysis

1. Effect of rule

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and large businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in full compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small businesses and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Procedures for Modifying or Extinguishing a Conservation Easement Held by the NYS Department of Environmental Conservation

I.D. No. ENV-52-15-00010-A
Filing No. 1108
Filing Date: 2016-12-05
Effective Date: 2016-12-21

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

Action taken: Addition of Part 592 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301(2)(m), (v), 49-0301, 49-0303(1), 49-0305(7), 49-0307(2), (2)(a), (3), (3)(a) and (d)

Subject: Procedures for modifying or extinguishing a conservation easement held by the NYS Department of Environmental Conservation.

Purpose: Establish standards for the Department of Environmental Conservation to follow when modifying or extinguishing a CE and provide for a formal public review process.

Text of final rule: A new 6 NYCRR Part 592 is added to Subchapter D (formerly Subchapter C) of Chapter V, Real Property and Land Acquisition, to read as follows:

6 NYCRR Part 592

Procedure for the modification or extinguishment of a conservation easement held by the New York State Department of Environmental Conservation

Section 592.1 Purpose and applicability

(a) The purpose of this Part is to set forth in regulation a procedure to be followed by the department when modifying or extinguishing a DEC conservation easement, as that term is defined in section 592.2(c) below.

(b) This Part will not apply to conservation easements which are owned or held by not-for-profit organizations or public bodies other than the department.

Section 592.2 Definitions

(a) "Commissioner" means the Commissioner of the New York State Department of Environmental Conservation, or the Commissioner's designated agent.

(b) "Department" or "DEC" means the New York State Department of Environmental Conservation.

(c) "Conservation easement" means an easement, covenant, restriction or other interest in real property, created under and subject to the provisions of Title 3 of article 49 of the Environmental Conservation Law which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property in a manner consistent with the public policy and purpose set forth in section 49-0301 of the Environmental Conservation Law, provided that no such easement shall be acquired or held by the state which is subject to the provisions of Article XIV of the State Constitution.

(d) "ECL" means the New York State Environmental Conservation Law.

(e) "Environmental Notice Bulletin" or "ENB" means the weekly publication of the department that is published pursuant to section 3-0306 of the Environmental Conservation Law, and accessible on the department's website.

(f) "Grantee" means the department, as owner and holder of a DEC conservation easement.

(g) "Grantor" means the person or entity which is the owner of the underlying fee lands subject to the DEC conservation easement at the time of the grant of the DEC conservation easement or, as applicable, the grantor's respective successors, heirs and assigns.

(h) "Modification" means a change, addition, deletion, correction or amendment to a DEC conservation easement.

(i) "Property" means the underlying fee lands subject to the DEC conservation easement.

(j) "Purpose(s)" means the conservation objectives and goals set forth in the express language of a DEC conservation easement, or in the absence of such express language, as provided in ECL section 49-0303(1).

(k) "Third party enforcement right" means a right which may be granted in a DEC conservation easement which empowers a public body or a not-for-profit conservation organization which is not a holder of the DEC conservation easement to enforce any of the terms of the DEC conservation easement.

Section 592.3 Standards.

(a) The standards for the modification of a DEC conservation easement include:

1. A modification of a DEC conservation easement, other than a modification to the stated purpose(s) as set forth in a DEC conservation easement, must not alter, and must be consistent with, the stated purpose(s) of the DEC conservation easement; and

2. A modification of a DEC conservation easement must not affect the perpetual nature of the DEC conservation easement; and

3. The modification must comply with all existing policies, laws or regulations, including the specific requirements of the provisions of ECL section 49-0307, in effect at the time of the modification; and

4. The proposed modification of a DEC conservation easement shall result in a net conservation benefit to the state, which must be calculated and considered within the spatial confines of the conservation easement in question or in the surrounding contiguous and adjoining lands, as determined by the department, after public comment, including consideration of any change in the level of public recreational opportunities or any change to the limitations or restrictions on the development, management or use of the property, or any other real property owned by or under the control of the grantor, for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the area where the property is located in a manner consistent with the public policy and purpose set forth in ECL section 49-0301.

(b) The standard for the modification of the purpose(s) or the extinguishment of a DEC conservation easement shall require a finding by the department that: the proposed new or modified purpose(s) enhance the original purpose(s) of the DEC conservation easement; or the DEC conservation easement can no longer substantially accomplish its original purpose(s) or any of the purposes set forth in the ECL section 49-0301 which include conserving, preserving and protecting its environmental assets and natural and man-made resources, the preservation of open spaces, the preservation, development and improvement of agricultural and forest lands, the preservation of areas which are significant because of their scenic or natural beauty or wetland, shoreline, geological or ecological character, including old-growth forest, character, and the preservation of areas which are significant because of their historical archaeological, architectural or cultural amenities, and the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.

Section 592.4 Procedures

The department must comply with the following procedures for any modification or the extinguishment of a DEC conservation easement.

(a) Written notice to grantor and entities entitled to third party enforcement rights and the Office of the Attorney General. The department must provide written notice of the proposed modification or extinguishment of a DEC conservation easement to the grantor, entities designated in the DEC conservation easement as having third party enforcement rights, and the Office of the Attorney General by certified mail, return receipt requested to the addresses on file with the department for the respective entities; and

(b) Public notice, comment period, non-adjudicatory hearing.

1. Public Notice.

i. For modification only of a DEC conservation easement. The department must publish public notice in the ENB of the department's intent to modify a DEC conservation easement including a general summary of the proposed modification(s) and the opportunity for the public to submit written public comments to the department. The public comment period shall begin on the date the notice of the public comment period appears in the ENB.

ii. For modification to the purpose(s) or extinguishment of a DEC conservation easement. The department must publish public notice of its intent to modify the purpose(s) or extinguish a DEC conservation easement in the State Register, the ENB and in a newspaper having a general circulation in the county where the property is located. The public notice shall include the facts supporting a finding that: the proposed new or modified purpose(s) enhance the original purpose(s) of the DEC conservation easement; or the DEC conservation easement can no longer substantially accomplish its original purpose(s) or any of the purposes set forth in the ECL section 49-0301.

2. Public comment period. The department must provide for a public comment period for thirty (30) calendar days to accept public comments related to the proposed modification to, or extinguishment of, a DEC conservation easement. The department may provide for the receipt of public comment through the use of meetings, exchanges of written material, or other means during the public comment period.

3. Non-adjudicatory public hearing. For proposals which include the modification of the purpose(s) or extinguishment of a DEC conservation easement, the department must conduct a non-adjudicatory public hearing to be held during the public comment period to provide the public with an opportunity to be heard on the modification of the purpose(s) or the extinguishment of a DEC conservation easement. Notice of the public hearing shall be included in the notice of the proposed modification of the purpose(s) or extinguishment of the conservation easement as set forth in subparagraph ii of paragraph 1 subdivision (b) of this section.

(c) Commissioner's determination only for modification to the purpose(s) or extinguishment of DEC conservation easement.

1. For any proposed modification to the purpose(s) or the extinguishment of a DEC conservation easement, the Commissioner must make a written determination that the proposed new or modified purpose(s) enhances the original purpose(s) of the DEC conservation easement; or the DEC conservation easement can no longer substantially accomplish its original purposes. The proposed modificaton to the purpose(s) or extinguishment of a DEC conservation easement following closure of the public comment period, shall comply with the requirements of section 592.3 of this Part and be consistent with the policies and objectives set forth in ECL section 49-0301. If a DEC conservation easement is modified or extinguished pursuant to this Part, it shall be set forth in an instrument which complies with the requirements of ECL section 49-0305.

2. The Commissioner will publish a notice of determination in the ENB with a hyperlink to the determination document. The recording of a deed or other conveyance document in the county clerk's office where the DEC conservation easement is located must be filed no earlier than one hundred twenty (120) calendar days after the notice of the Commissioner's determination appears in the ENB.

Final rule as compared with last published rule: Non-substantive changes were made in sections 592.1(b), 592.2(b), (c), 592.3(a)(3), (4), (b), 592.4 introductory paragraph, (a), (b)(1)(i), (ii), (3), (c)(1) and (2).

Text of rule and any required statements and analyses may be obtained from: James Sessions, NYS DEC, 625 Broadway, Albany, NY 12233, (518) 473-9518, email: jim.sessions@dec.ny.gov

Additional matter required by statute: A EAF/Negative Declaration was prepared in compliance with Article 8 of the Environmental Conservation Law.

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

Non-substantive changes were made to the regulation that did not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department of Environmental Conservation (DEC) proposed draft regulations, Part 592 of 6 NYCRR, establishing procedures for the modification and extinguishment of conservation easements held by DEC. The Notice of Proposed Rulemaking was published in the State Register on December 30, 2015. A total of 51 comments were received from both individuals and organizations during a 45 day comment period that ended on February 13, 2016. While DEC processed and responded to each unique comment in the Assessment of Public Comment, for purposes of this summary, the Department grouped together similar comments and responses. Non-substantive changes were made to the proposed regulation to address public comment and to further clarify the original meaning. A revised rule making is not required.

PURPOSE AND APPLICABILITY

Comment:

The regulations should be entitled "Regulations for Conservation Easements and Extinguishments".

Response: For consistency purposes, the title of the proposed regulations is taken directly from Environmental Conservation Law (ECL) § 49-0307.

Comment:

Clarification is needed as to whether the proposed regulations apply when a public body, other than DEC, modifies or extinguishes an easement.

Response: The proposed Part 592 regulations apply only to the modification or extinguishment of State-owned conservation easements under the jurisdiction of the DEC. Accordingly, subdivision 592.1(b) has been revised to clarify that modifications or extinguishments of conservation easements by other entities are not the subject of this rulemaking.

Comment:

The regulatory language should explicitly provide that modifications and extinguishments be accomplished in accordance with ECL § 49-0301.

Response: The proposed regulations provide that modifications to existing conservation easements will only be entertained if the modification furthers the purposes as set forth in ECL § 49-0301. Conservation easements that no longer serve their original purpose should be extinguished. The DEC will make every effort to enforce the original terms of the conservation easement.

DEFINITIONS

Comment:

The definition of "conservation easement" is confusing, unduly restrictive, and should mirror the definition and public policy set forth in ECL § 49-0303(1).

Response: The DEC recognizes the importance of defining key regulatory terms. Accordingly, the definition of conservation easement has been amended to mirror the statutory definition and policy contained in ECL § 49-0303(1).

Comment:

A distinction needs to be made in regards to "extinguishment" of conservation easements and "modification". "Extinguishment" should be defined as the removal of some or all of the land subject to a conservation easement.

Response: Subdivision 592.2(h) of the proposed regulations provide a definition for "modification" of a conservation easement. Since removal of some of the land subject to an easement does not always constitute an "extinguishment", a case specific analysis is necessary and DEC declines to define this term.

Comment:

Subdivision 592.2(k) of the proposed regulations should be amended so that a public body or a not-for-profit organization which is not a holder of the DEC conservation easement can enforce the terms of the easement.

Response: The regulatory definition of "third party enforcement right" is constrained by the statutory definition in ECL § 49-0303(4) and therefore, the DEC declines to make this change.

Comment:

The proposed regulations should include language providing that conservation values of working lands supersede conservation values of recreational lands and therefore are a priority for modification of a conservation easement.

Response: Pursuant to the Declaration of Policy and Statement of Purpose in ECL § 49-0301, no one purpose for acquiring conservation easement lands is paramount. Therefore, it is not appropriate for the regulations to provide that any of these values takes precedence.

Comment:

The proposed regulations should include explicit language stating that major modifications will follow the State Environmental Quality Review Act (SEQRA) and include a full list of alternatives.

Response: Since all DEC actions including modifications to conservation easements are subject to SEQRA, there is no need to explicitly include this language in the regulations.

STANDARDS

Comments:

The language in § 592.3 needs to reflect ECL 49-0301. Section 592.3 must reflect a positive net gain in the conservation values prescribed within the easement, rather than a vague "no net loss of benefits to the state". Conservation benefits must be considered within the spatial confines of the conservation easement. Additionally, the standard for modification should be more specific and the concept of "net benefit" should be clarified. The word "reasonable" should be added to the standards. Finally, the proposed regulation should permit modifications to improve and strengthen the original purpose of the conservation easement.

Response: The regulatory language has been amended to require that modifications result in a net conservation benefit to the purposes of the conservation easement and the other property has some degree of connection to the easement property. The net benefit concept includes a variety of factors including, but not limited to, whether the modification will increase public recreational opportunities or provide additional environmental and ecological protections. Additionally, language has been included in the proposed regulation to allow for modifications to enhance the original purpose of a DEC held conservation easement. A "reasonableness" concept is already encompassed in the "arbitrary and capricious" standard for judicial review of DEC actions.

PROCEDURE & PUBLIC NOTICE

Comment:

The public participation process for modifications and extinguishments of conservation easements is pro forma and lacks an appeals process. The proposed regulation should include consideration of a variety of factors - the purpose of the easement, the conservation outcome, and the need for a modification - in making a determination as to whether an amendment results in a positive or neutral conservation outcome.

Response: Implicit in the public process is the ability of the DEC to modify its proposals based on public comment and to take into account a variety of factors where appropriate. The DEC will not undertake a conservation easement modification which does not result in a net conservation benefit. The proposed regulations do not prevent appeals of DEC determinations as currently authorized by law.

Comment:

Consideration should be given to Standards and Practices of the Land Trust Alliance (LTA).

Response: The proposed regulation is consistent with the LTA's Standards and Practices, however the LTA is a non-profit conservation organization and the DEC is a State agency.

Comment:

The proposed regulations should provide an expedient process for de minimis changes to conservation easements.

Response: All modifications will follow the transparent process outlined in the proposed regulation. This process is not unduly burdensome and the creation of a subjective distinction between minor and major modifications would create unnecessary confusion and delay.

Comment:

The proposed regulations contain conflicting language as to when a non-adjudicatory hearing is to be held.

Response: The DEC has revised the regulatory language in subdivision 592.4(3) to require that non-adjudicatory hearings are "to be held during the public comment period".

Comment:

The proposed regulations should be amended to require notice to the Attorney General when DEC modifies or extinguishes a conservation easement.

Response: Subdivision 592.4(a) of the proposed regulations has been amended to require notice to the Attorney General when DEC modifies or extinguishes a conservation easement.

Comment:

Clarification is requested as to whether determinations pursuant to subdivision 592.4(2)(b) to alter the stated purposes or to extinguish the conservation easement require publication of the "determination and summary of the determination" in the Environmental Notice Bulletin (ENB).

Response: Changes to the proposed regulatory language clarify that the DEC will publish a notice of determination in the ENB.

MISCELLANEOUS

Comment:

The proposed regulations do not adequately take into account funding sources and their associated limitations.

Response: The funding sources used to acquire a conservation easement will be reviewed prior to any modification or extinguishment in order to ensure consistency with the terms and conditions of funding. Prior to modification of an existing DEC conservation easement, an appraisal is required to determine the value of the modification. While these regulations do not alter DEC's historic practice of declining to extinguish conservation easements, ECL § 49-0307 does enumerate situations where extinguishments may occur. Most conservation easements have been purchased and paid for with public funds; thus any extinguishment would have to address repayment of the benefit received by the private grantor for the easement.

Comment:

The draft regulations preclude landowners who donate conservation easements to the DEC from qualifying for federal tax benefits and allow the DEC to extinguish conservation easements without satisfying federal tax requirements.

Response: The draft regulations do not change the statutory process under which the DEC entertains modifications or extinguishments of conservation easements. Landowners who wish to qualify for any federal tax benefits associated with a conservation easement should consult a tax attorney before they seek modifications.

Comment:

The proposed regulations appear to authorize land swaps and will potentially erode public access for the purpose of hunting, trapping and recreation.

Response: The proposed regulations do not propose wholesale land "swaps" nor do they alter the premise for acquisition of conservation easements - public recreation and natural resource protection. In recognition of these goals, the proposed regulations include a transparent public notice and participation component.

Comment:

The requirements for conservation easements should be uniform and protective of the original purpose of the easement and changes or modifications to conservation easements should be undertaken "to the minimum extent necessary" and in accordance with ECL Article 49.

Response: While the DEC acknowledges that uniformity among conservation easements can be beneficial, it recognizes that the purpose and negotiation surrounding each individual easement will vary thereby requiring a case specific analysis. The proposed regulations protect the original purposes and policies of DEC conservation easements as enumerated in statute and a modification that does not further the purpose of the existing conservation easement, will not be approved. The ECL provisions providing that a conservation easement be amended only "to the minimum extent necessary" apply only to modifications caused by utility transmission lines. With respect to other modifications, no proposed modification may alter the original purposes of the original easement.

Comment:

The proposed regulations should include an Adirondack Park State Conservation Easements Lands Master Plan.

Response: The 2010 Memorandum of Understanding between DEC and the Adirondack Park Agency (APA) Concerning State-Owned Conservation Easements on Private Lands within the Adirondack Park outlines how DEC and APA work together on conservation easements. The DEC does not seek wholesale changes. Each proposed modification will be examined on a case by case basis and the DEC and APA will continue to work together on conservation easement lands.

Comment:

A Recreation Management Plan (RMP) must be completed before DEC conducts a net benefit analysis to ensure that some level of site investigation, data collection and planning analysis is done with the landowner and DEC.

Response: Requiring a RMP is unnecessary since the Attorney General requires the DEC to have an Interim Recreation Management Plan and an approved Baseline Report in place at the time of closing.

Department of Financial Services

NOTICE OF ADOPTION

Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property

I.D. No. DFS-41-16-00006-A
Filing No. 1113
Filing Date: 2016-12-06
Effective Date: 2016-12-21

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

Action taken: Addition of Part 422 to Title 3 NYCRR.

Statutory authority: Real Property Actions and Proceedings Law, sections 1306, 1308 and 1310

Subject: Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property.

Purpose: To implement the requirements imposed by the recent additions to the Real Property Actions and Proceedings Law.

Substance of final rule: Section 422.1 is the preamble, which explains the basis for the regulation, i.e., the implementation of amendments to the Real Property and Procedures Law (RPAPL) enacted in June 2016.

Section 422.2 provides definitions of certain terms used on the legislation and in the regulation, including: mortgage; mortgagee; assignee; mortgage maintenance; mortgage origination; mortgage servicing; public official; residential real property; state or federally chartered bank, savings bank, savings and loan association, and credit union; servicer or mortgage loan servicer; and vacant and abandoned.

Section 422.3 explains how entities that may be subject to RPAPL 1308 are to determine whether they qualify for two possible exemptions to the inspection and maintenance requirements under the statute, and how they are to report that information to the Superintendent of Financial Services.

Section 422.4 explains what information entities subject to the statute are to report to the Superintendent once they learn, or should have learned, that a property is vacant and abandoned. The section also provides guidance how entities are supposed to learn, or should learn, that the property is vacant and abandoned.

Section 422.5 identifies additional information that entities subject to the statute are to provide to the Superintendent on a quarterly basis, to supplement and update the information provided pursuant to Section 422.4.

Section 422.6 identifies the entities to whom the reporting requirements are applicable.

Section 422.7 explains how the requirements of the statute interact with federal law and federal guidelines.

Section 422.8 implements the confidentiality provisions of the statute, explaining how information about vacant and abandoned properties will be treated as confidential and the circumstances under which the information may be released.

Section 422.9 explains how the statute will be enforced.

Section 422.10 identifies the effective date of the regulation.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 422.2, 422.3, 422.4, 422.5, 422.7, 422.8 and 422.9.

Text of rule and any required statements and analyses may be obtained from: Celeste Koeleveld, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1663, email: Celeste.Koeleveld@dfs.ny.gov

Revised Regulatory Impact Statement

1. Statutory Authority.

Part Q of Chapter 73 of the Laws of 2016 enacted two new sections to the Real Property Actions and Proceedings Law ("RPAPL"), 1308 and 1310, which impose requirements on certain persons to maintain vacant and abandoned residential real property in New York and to report vacant and abandoned properties to the New York State Department of Financial Services (the "Department"), and authorizes the Department to promulgate regulations to implement the new requirements.

In addition, RPAPL Section 1306 requires that lenders, assignees and mortgage loan servicers file a notice with the Department before commencing a foreclosure proceeding in New York.

2. Legislative Objectives.

The Legislature added Sections 1308 and 1310 to the RPAPL to address the vacant and abandoned property problems facing affecting New York.

These properties create health and safety concerns for the communities in which they are located, drag down property values in the neighborhood and may be subject to criminal activity. The new RPAPL sections address these issues by requiring that all vacant and abandoned properties to be reported to a database maintained by the Department and imposing requirements on certain persons to maintain vacant and abandoned properties.

3. Needs and Benefits.

The regulation explains the process that will be used to identify state or federally chartered banks, savings banks, savings and loan associations, or credit unions subject to the requirements of Section 1308, how and when enforcement action, except by a municipality, will be taken and application of federal law and investor guidelines under Section 1308(10). In addition, the regulation explains the process to be followed by covered persons in reporting vacant and abandoned properties to the Department and the process to be followed by public officials in asking for information concerning vacant and abandoned properties to be released by the Department.

4. Costs.

The regulation imposes no costs in addition to those already contemplated by RPAPL Sections 1308 and 1310.

5. Local Government Mandates.

None.

6. Paperwork.

The regulation imposes no paperwork in addition to that already contemplated by RPAPL Sections 1308 and 1310. In addition, any impact on existing paperwork requirements is expected to be minimal.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

8. Alternatives.

The Department is not aware of any alternatives to the rule.

9. Federal Standards.

Not applicable.

10. Compliance Schedule.

The rule will become effective upon publication, but allows covered persons until January 20, 2017 to begin the inspections required by RPAPL 1308. Covered persons who previously reported vacant and abandoned properties to the Department will have until February 1, 2017 to update their information.

Revised Regulatory Flexibility Analysis

1. Effect of the Rule:

The regulation implements authority granted to the New York State Department of Financial Services (the "Department") in Sections 1308 and 1310 of the Real Property Actions and Proceedings Law ("RPAPL"), as enacted by Part Q of Chapter 73 of the Laws of 2016. The regulation explains the process that will be used to identify state or federally chartered banks, savings banks, savings and loan associations, or credit unions subject to the requirements of Section 1308, the reports that persons subject to the requirements of Section 1308 will have to submit to the Department regarding delinquent loans on residential real property and efforts to inspect, secure, maintain and foreclose on those properties, and application of federal law and investor guidelines under Section 1308(10). In addition, the regulation explains the process to be followed by covered persons in reporting vacant and abandoned properties to the Department and the procedures to be followed in the event that the Superintendent of Financial Services determines, in the exercise of her sole discretion, to release confidential for information concerning vacant and abandoned properties.

The proposed rule does not have any impact on local governments.

2. Compliance Requirements:

The regulation does not change the compliance requirements imposed by Sections 1308 and 1310 of the RPAPL, but does clarify how covered persons are to comply with the requirements of the RPAPL.

3. Professional Services:

None.

4. Compliance Costs:

None beyond the existing costs to comply with the requirements of the RPAPL.

5. Economic and Technological Feasibility:

Filing of vacant and abandoned property notifications involves common, everyday functions performed by covered persons.

6. Minimizing Adverse Impacts:

The regulation does not impose a new regulatory requirement, but implements the requirements imposed by the addition of RPAPL Sections 1308 and 1310. It is not expected to impact small businesses.

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

The Department complied with SAPA 202-b(6) by providing small businesses and local governments with the opportunity to participate in the rule making process. This occurred through posting notice of the proposed rulemaking on the Department's website and interacting with interested stakeholders. Furthermore, notice of the proposed rule was published in the State Register and the public was provided with an opportunity to comment on the proposed rule. The Department has reviewed the comments received and has completed an Assessment of Public Comments.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

While the regulation is expected to apply to residential real property located in rural areas, it is not expected to increase costs or otherwise have an adverse impact on private or public interests rural areas.

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

The regulation imposes no paperwork in addition to that already contemplated by Real Property Actions and Proceedings Law Sections 1308 and 1310.

3. Costs:

The regulation imposes no costs in addition to that already contemplated by Real Property Actions and Proceedings Law Sections ("RPAPL") 1308 and 1310.

4. Minimizing adverse impact:

The regulation does not impose a new regulatory requirement, but implements the requirements imposed by the addition of RPAPL Sections 1308 and 1310.

5. Rural area participation:

The Department complied with SAPA 202-bb(7) by providing public and private interests in rural areas with the opportunity to participate in the rule making process. This occurred through posting notice of the proposed rulemaking on the Department's website; and interacting with interested stakeholders. Furthermore, notice of the proposed rule was published in the State Register and the public was provided with an opportunity to comment on the proposed rule. The Department has reviewed the comments received and has completed an Assessment of Public Comments.

Revised Job Impact Statement

The regulation is not expected to have an adverse effect on employment.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department of Financial Services ("Department") received oral and written comments from a variety of interested stakeholders, including banking associations, advocacy and public interest groups, and local, state and federal government representatives.

422.2 Definitions

(a) Mortgage – Several commenters observed that the definition of "mortgage" should not be limited to the first lien on residential real property, particularly because RPAPL 1310 is not limited to first lien mortgages. The word "first" has been removed from the definition. One commenter objected that the definition includes more than just "home purchase" loans, but the Department believes that the definition appropriately captures the types of mortgages covered by the underlying legislation. Other commenters questioned whether definitions of "mortgage" and certain other terms defined in the regulation are necessary, but the Department believes that all of the definitions are useful components of a comprehensive regulation.

(b) Mortgagee – Several commentators observed that "note holder" should be included in the definition, and that change has been made. One commenter also expressed concern that including trustees in the definition expands the scope of the definition beyond what was intended by the statute, but the Department respectfully disagrees with that assertion and has left the definition unchanged in this respect.

(c) Assignee – One commenter recommended clarifying that an assignee means a current mortgagee "who has been assigned the mortgage note from the original lender or an assignee pursuant to the laws of the state." The Department concluded that no change should be made.

(d) Mortgage maintenance – One commenter recommended clarifying the language to state that "mortgage maintenance means the continued holding and ownership of a mortgage and note by the person or entity that originated the mortgage or by the assignee." The Department concluded that no change was necessary.

(e) Mortgage origination – One commenter pointed out that "origination" should not include the mere commitment to lend money, short of actually making a loan. The Department agrees, and has modified the definition to make this clear.

(f) Mortgage servicing – One commenter recommended a modification to the reference to reverse mortgages, and a change has accordingly been made. Contrary to the objection of another commenter, however, the reference to reverse mortgages remains in the definition because the Department believes it is consistent with the statute.

(g) Public Official – Several commenters suggested additions to the scope of "public officials" who, under the statute, "shall" be entitled, upon request, to information from the vacant and abandoned property registry established pursuant to RPAPL 1310. The Department believes that the definition is consistent with the categories listed in the statute, which are limited to public officials who represent specific state districts, counties, cities, towns and villages. Some commenters believe that the list should be expanded to include other elected officials and also non-elected officials. The Department determined not to change the definition because it believes that the definition reflects the statutory language and purpose of the registry, including that distribution of information in the registry should be limited, to avoid duplicative requests and potentially conflicting enforcement efforts, and to ensure that information in the registry remains confidential to protect the public. The statute and the regulation allow the Department discretion to release the information to other persons if it determines that such release is in the best interests of the public and confidentiality will be protected.

(h) Residential Real Property – Several commenters expressed concern about the proposed definition's reference to buildings or structures "used for both residential and commercial purposes where no more than twenty percent of the total appraised value is attributable to the commercial purpose." Accordingly, that part of the definition has been removed.

(i) List of covered financial institutions – One commenter observed that the definition should include state and federally chartered branches or agencies of foreign banks; that addition has been made. Another commenter objected that the definition may broaden the scope of entities that are exempt, but the Department respectfully disagrees with this assertion and has left the definition otherwise unchanged.

(k) Vacant and Abandoned – One commenter asserted that the definition should be amended to include a requirement that the mortgage securing the property be delinquent for up to 90 days prior to the first inspection. It is true that under RPAPL 1308(1), the mortgage must be delinquent to trigger the first inspection requirement, but the Department does not believe that a change is necessary to make this clear. Other commenters expressed concern that the definition is incomplete or inaccurate, but the Department respectfully disagrees because the definition tracks the language of RPAPL 1309(2).

422.3 Applicability and Exemption under 1308

A number of commenters objected that, to qualify for an exemption, an entity must engage in mortgage origination, mortgage ownership, mortgage servicing and mortgage maintenance in the given calendar year. The Department agrees that an entity should be able to qualify for an exemption if it originates and owns mortgages, even if it does not service or maintain them. The language of Section 422.3(b)(1)(B) and of Section 422.3(c)(1)(B) has been changed accordingly.

Commenters also objected that the numerator and the denominator for determining the exemption are not "apples to apples," but the Department respectfully disagrees with that comment. Both the numerator and the denominator consist of mortgages that were issued or originated in New York during the given calendar year. The formula, as set forth in the regulation, accurately measures each institution's market participation in the mortgage industry in New York.

One commenter expressed concern that, if it does not qualify for either exemption, the inspection and maintenance obligations will apply to it retroactively. Another commenter objected that it could be required to inspect and maintain properties retroactively if it fails to qualify for the exemption in a particular year despite having qualified for the exemption in the prior year. The Department believes that the exemption provisions in Section 422.3 accurately reflect the statutory rules and that other provisions address the inspection and maintenance requirements.

One commenter objected to placing the burden of proving entitlement to the exemption on the entity seeking the exemption, but the Department believes that allocation of burden is appropriate. Another commenter suggested that entities that miss the December 31 deadline for establishing entitlement to the exemption be given an opportunity to establish good cause for the error. It remains the Department's position that entities seeking the exemption will have ample time to apply for it, but the Department has extended the deadline to February 28, 2017, for the 2017 calendar year, the first full year that the statute and regulation will be in effect.

Two commenters suggested that the Department add a provision making clear that entities that qualify for the exemption under the statute but that are also subject to the Best Practices Agreement with the Department will continue to be subject to the Best Practices Agreement. The Department has accepted this suggestion.

Two commenters observed that it is unclear whether local laws and ordinances regarding inspection and maintenance of vacant and abandoned properties are preempted by the statute. RPAPL 1308(13) provides that local laws and ordinances may not exceed the maintenance requirements imposed on state or federally chartered banks, savings banks, savings and loan associations and credit unions that are subject to RPAPL 1308, meaning that entities that are not exempt must comply with such local laws and ordinances. The Department sees no need, however, to restate this provision of the statute in the regulation.

Finally, one commenter expressed concern that entities might structure their businesses in such a way as to avoid the obligations created by the statute. The Department believes that such concerns can best be addressed by the Department's general investigative and enforcement authority.

422.4, 422.5 Vacant and Abandoned Property Reporting and Quarterly Reporting

A number of commenters expressed concerns that the reporting requirements impose burdens. On the whole, the Department believes that the requirements in the regulation – including quarterly reporting – are consistent with the Department's mandate to issue regulations necessary to implement and enforce the provisions of the statute. While the Department has eliminated the quarterly reporting requirement that reporters identify the persons, and their employers, who have conducted inspections and who have secured and maintained property, mortgagees will still be required to maintain such information in their books and records, subject to inspection by the Department. All other reporting requirements remain the same because they are, in the Department's view, essential to making sure that the obligations imposed by the statute are met.

Some commenters also expressed concern about providing sensitive, private and confidential information to the Department. In some respects, these commenters further asserted, the reporting requirements may exceed reporting permitted under federal law. The Department believes that these concerns are adequately addressed by the fact that the information reported to the Department is deemed confidential under RPAPL 1310 and that the Department only intends to release limited information from the registry about a particular property – such as the address of the property and contact information for the servicer – to the extent that any information is released at all, subject to confidentiality agreements.

Several commenters objected to the "should have learned" language in Section 422.4(b), which is taken directly from the statute, and to the "due diligence" standard in Section 422(c). The Department believes that the "due diligence" standard captures how a mortgagee or mortgage loan servicer "should. . . learn" that a property is vacant and abandoned. The Department has adopted a definition of "due diligence" to clarify what the standard means. Taken together, Sections 422.4(b) and (c) appropriately convey that a mortgagee or mortgage loan servicer cannot avoid responsibility for inspection and maintenance by claiming that it was unaware that a property is vacant and abandoned, when that fact should have been plain from the ordinary exercise of due diligence.

One commenter recommended making it clear that the obligation to learn that a property is vacant and abandoned, and to report on that property, belongs to the mortgagee, which can delegate the responsibility to a mortgage servicer. The Department does not believe that this change is needed.

Some commenters recommended adding specific details to the reporting requirements. One believes that "status of the proceeding" is too vague, and recommends expanding the requirement to make clear that it includes the date of entry of final judgment and the scheduled sale of the property, but the Department believes that it is commonly understood that such information is what "status of the proceeding" calls for. Another suggested requiring the address of the subject property to be included; that reporting requirement has been made explicit in the regulation. Another commenter favored adding contact information for third-party vendors, but the Department disagrees. Finally, a commenter suggested clarifying that the contact number for the servicer responsible for maintaining the property should be the number of someone actually responsible for handling questions about a vacant and abandoned property, not just a customer service number. Again, the Department believes no change is necessary, although it expect that registrants will be providing adequate information to the Department consistently with the goals of the statute.

422.6 Applicability of RPAPL 1310 Reporting Requirements

Some commentators expressed concern that it is unclear who bears the primary or initial burden for reporting, the mortgagee or the mortgage loan servicer. The Department believes that the regulation is consistent with the language of the statute, which places the reporting burden on the mortgagee or the mortgage loan servicer, meaning that either or both may be held responsible if the reporting requirements are not met.

422.7 Federal Law and Federal Guidelines

It was argued that, under the language of the RPAPL 1308(10), compliance with federal guidelines should be deemed compliance with the maintenance obligations in the statute. As to the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, the Department has accepted this proposition in the regulation, based upon the existing federal guidelines as of the statute's effective date; to the extent those guidelines are weakened in the future, such weaker guidelines will not be deemed compliance with the maintenance obligations in the statute.

One commenter argued that compliance with the statute is not required

where the statute imposes an obligation that is greater than that imposed by federal law, court order or the investor or insurer guidelines. The Department believes, however, that more limited obligations do not necessarily obviate the need to comply with RPAPL 1308. Accordingly, Section 422.7 is otherwise unchanged.

422.8 Disclosure of Information from Registry

Some commenters expressed concern that the regulation does not go far enough to protect information in the registry, while others believe that the regulation goes too far in declaring that information in the registry is not subject to disclosure under FOIL. The Department believes that it has struck the right balance in the regulation between confidentiality and disclosure and that it has faithfully interpreted the language of the statute. Accordingly, no change to the regulation has been made.

422.9 Enforcement

Several commenters suggested adding references in this section to the Executive Law, the Civil Practice Law and Rules, and "any other applicable state or federal law." The commenters expressed concern that otherwise, the scope of enforcement under the statute may be unduly narrowed. The Department does not believe that this change to the regulation is warranted, given the statute's enforcement provisions, but did clarify that the enforcement contemplated under the RPAPL would be pursuant to RPAPL section 1308(8). The regulation appropriately reflects the fact that, under the statute, the Superintendent of Financial Services is to pursue, as appropriate and in his or her sole discretion, any alleged violation of the statute. The municipality in which the property is located may also bring an action under the statute, but that authority is "in addition" to the authority given to the Superintendent and must be on ten days' notice to the Superintendent, indicating that the Superintendent is primarily responsible for the efficient and non-duplicative enforcement of the statute. That primary exercise of authority under the statute will, as reflected in the regulation, be exercised under RPAPL section 1308(8), the Financial Services Law and the Banking Law. It is not necessary, in the Department's view, to refer to any other law or procedural rules that may apply in actions or proceedings to enforce the statute.

422.10 Effective Date

Several commenters expressed concern about the need for a phase-in period for the obligations imposed by the statute, particularly for mortgages that are already delinquent and for properties that are already vacant and abandoned as of the December 20, 2016 effective date. In recognition of these concerns, the Department has added phase-in provisions for certain of the obligations. Specifically, under Section 422.3, first inspections of properties with delinquent mortgages must occur by February 1, 2017, and maintenance obligations on vacant and abandoned properties do not go into effect until February 1, 2017. In addition, under Section 422.4, information about vacant and abandoned properties previously reported to the Department must be provided by February 1, 2017.

NOTICE OF ADOPTION

Commercial Crime Coverage Exclusions

I.D. No. DFS-41-16-00012-A

Filing No. 1112

Filing Date: 2016-12-06

Effective Date: 2017-07-01

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

Action taken: Addition of Part 76 (Regulation 209) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301 and 2307; and arts. 23, 24 and 34

Subject: Commercial Crime Coverage Exclusions.

Purpose: To prohibit certain insurance exclusions for loss/damage caused by an employee previously convicted of criminal offense.

Text of final rule: I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301 and 2307 and Articles 23, 24 and 34 of the Insurance Law, do hereby promulgate Part 76 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 209), to take effect on July 1, 2017, with respect to all policies issued, renewed or delivered in this State on or after that date, to read as follows:

PART 76

(INSURANCE REGULATION 209)

COMMERCIAL CRIME COVERAGE EXCLUSIONS

Section 76.0 Preamble and purpose.

(a) Correction Law section 753 states that the public policy of New York, as expressed in Correction Law Article 23-A, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. Correction Law section 752 forbids discrimination based upon a conviction for a previous criminal offense unless there is a direct relationship between one or more of the previous offenses and the specific employment sought or held by the individual; or the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. Correction Law section 753 specifies eight factors, including the public policy of the state, to be considered in making a determination pursuant to section 752.

(b) However, commercial crime insurance policies often have provisions that will exclude coverage for loss or damage caused by an employee who has been convicted of a criminal offense, where the employer knew about the conviction prior to the loss or damage. This puts employers in the untenable position of either not being able to obtain insurance or violating the Correction Law by not hiring the individual, even though a review of the Correction Law factors would weigh in favor of employment. Given the strong public policy of the State, the Superintendent has determined that it would be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state for an insurer that writes commercial crime insurance policies in this state to exclude coverage where the employer has weighed the factors set out in Correction Law Article 23-A and made a determination favorable to the employee.

Section 76.1 Definitions.

For purposes of this Part:

(a) Commercial crime coverage means coverage under a policy of commercial risk insurance that provides burglary and theft insurance or fidelity insurance; and

(b) Commercial risk insurance has the meaning ascribed by Insurance Law section 107(a)(47).

Section 76.2 Prior convictions.

No policy issued, renewed or delivered in this state that provides commercial crime coverage may exclude or limit coverage for loss or damage caused by an employee on the basis that the employee was convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer, if, after learning about an employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A.

Section 76.3 Determined violation.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state, and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, in violation of section 2403 of such law.

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 76.0(a) and 76.2.

Text of rule and any required statements and analyses may be obtained from: Celeste Koeleveld, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1640, email: Celeste.Koeleveld@dfs.ny.gov

Revised Regulatory Impact Statement

1. Statutory authority: Sections 202 and 302 of the Financial Services Law and Sections 301 and 2307 and Articles 23, 24 and 34 of the Insurance Law. Financial Services Law Sections 202 and 302 and Insurance Law Section 301 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law Section 2307 sets forth the requirement that property/casualty insurance policies shall not be misleading or violative of public policy. Articles 23 (Property/Casualty Insurance Rates) and 34 (Insurance Contracts-Property/Casualty) are the general articles applicable to most property/casualty insurance policies. Article 24 prohibits any insurer from engaging in unfair methods of competition or unfair and deceptive acts or practices.

2. Legislative objectives: Correction Law section 753 states that the public policy of New York, as expressed in Correction Law Article 23 -A, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. The law forbids discrimination based upon a conviction for a previous criminal offense unless there is a direct relationship between one or more of the previous offenses and the specific employment sought or held by the individual; or the granting or continuation of employment would involve an unreasonable risk to

property or to the safety or welfare of specific individuals or the general public. Section 753 of the Correction Law specifies eight factors, including the public policy of the state, to be considered in making a determination pursuant to section 752.

However, commercial crime insurance policies often have provisions that will exclude coverage for loss or damage caused by an employee who has been convicted of a criminal offense, where the employer knew about the conviction prior to the loss or damage. This puts employers in the untenable position of either not being able to obtain insurance or violating the Correction Law by not hiring the individual, even though a review of the Correction Law factors would weigh in favor of employment. Given the strong public policy of the State, the Superintendent has determined that it would be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state for an insurer that writes commercial crime insurance policies in this state to exclude coverage where the employer has weighed the factors and made a determination favorable to the employee.

3. Needs and benefits: This rule will prohibit an insurer that writes a commercial crime insurance policy from excluding coverage for loss or damage caused by an employee on the basis that the employee was convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer, provided that, after learning about the employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A. This requirement will further the public policy of New York as stated in Correction Law Article 23-A. Because the employer would have to make a determination utilizing the statutory factors, the risk to insurers should be mitigated. The Department is not aware of any data that would indicate that an employee with a criminal history who has undergone a background check consistent with Article 23-A is any more of an insurance risk than an employee without such a criminal history. These factors include the specific duties and responsibilities necessarily related to the employment sought; the bearing, if any, the offense or offenses will have on the person's ability to perform these duties; the time that has elapsed since the time of the offense; the age of the person at the time of the offense, the seriousness of the offense, information about the person's rehabilitation and good conduct; and the legitimate interest of the employer in protecting property and safety.

4. Costs: Insurers that write commercial crime insurance will incur some one-time costs to revise their policy forms and, where the forms have to be filed with the Superintendent, to refile those forms with the Superintendent.

This rule does not impose compliance costs on state or local governments. The Department of Financial Services does not anticipate that it will incur additional costs, although there will be an increased number of filings.

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

6. Paperwork: Insurance companies will have to submit appropriate filings.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: One alternative would be to continue to allow insurers to exclude the coverage. However, it is unacceptable not to protect employers against losses when they are complying with the strong public policy of the State in hiring individuals who have been convicted of criminal offenses. Another alternative would be simply to prohibit insurers from excluding coverage, regardless of whether the employer considered the Article 23-A factors. However, that would impose a greater risk on insurers than would be necessary to implement the State's public policy mandate.

9. Federal standards: There are no federal standards.

10. Compliance schedule: The rule would be effective 90 days after publication in the State Register with respect to all policies issued, renewed or delivered in this State on or after that date. This should give insurers sufficient time to revise their policy forms and to make appropriate policy form filings with the Superintendent.

Revised Regulatory Flexibility Analysis

The non-substantive changes made to the proposed rule have no bearing on the last published Regulatory Flexibility Analysis for small businesses and local governments. Therefore, no changes have been made to the RFA.

Revised Rural Area Flexibility Analysis

The non-substantive changes made to the proposed rule have no bearing on the last published Rural Area Flexibility Analysis. Therefore, no changes have been made to the RAFA.

Revised Job Impact Statement

The Department of Financial Services finds that this rule should not have any negative impact on jobs and employment opportunities. The rule simply requires property/casualty insurers that write commercial crime insurance policies to provide coverage for loss or damage caused by an employee on the basis that the employee has been convicted of one or more criminal offenses in this state or any other jurisdiction (prior to being employed by the employer), provided that, after learning about the employee's past criminal conviction or convictions, the employer made a determination to hire or retain the employee utilizing the factors set out in Correction Law Article 23-A. If anything, the rule may make the policies more desirable to insureds and may increase the likelihood that they would purchase the coverage.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department of Financial Services ("Department") received written and oral comments from several associations that represent property/casualty insurers and an organization that describes itself as a "coalition of advocates who work to change laws and policies to ensure that people who have had contact with the criminal justice system have a fair chance to succeed as full community members" ("Coalition").

Comment

Several insurance association commenters expressed concern that, by prohibiting an exclusion that is typical in the vast majority of commercial crime policies, the proposed regulation would undermine how risk is addressed under a commercial crime policy, and could make commercial crime policies less available or more expensive.

Department's Response

The Department recognizes these concerns, but no data has been provided to the Department supporting increased risk or increased rates. No documentation has been provided to indicate that convicted persons present a greater risk of loss than those who have not been convicted where a Correction Law Article 23-A analysis has been performed and a determination to hire is made taking the Article 23-A factors into account. If there is any such data, it would appropriately be addressed as part of a rate filing.

Comment

Some insurance association commenters noted that the proposed regulation addresses only the employer's knowledge of prior convictions, and not fraudulent or dishonest acts that have not led to a criminal conviction.

Department's Response

The regulation only addresses convictions, in furtherance of the New York public policy set forth in Correction Law Article 23-A. The regulation does not change any current practices where fraudulent or dishonest acts have not led to a criminal conviction.

Comment

Some commenters questioned how an insurer would be able to determine whether the employer has properly engaged in an Article 23-A analysis, and recommended that the insurer be able to review the reasonableness of the employment decision, particularly because it is the insurer who will be bearing the risk of an incorrect determination.

Department's Response

It would defeat the purpose of the Article 23-A analysis to allow the insurer to second-guess the hiring decision and the insurer may have an incentive to do so in hindsight once a claim has been submitted. Insurers may properly audit employers, however, and require them to maintain adequate records to demonstrate that the employer in fact conducted the full Article 23-A analysis.

Comment

Several insurance association commenters noted that the prohibition should only be applied prospectively.

Department's Response

As is generally the case for the Department's regulations regarding policy form requirements, the regulation is prospective and applies only to policies issued, renewed or delivered in New York on and after July 1, 2017. Although the proposal utilized an effective date of 90 days after publication in the State Register, the effective date provision has been extended in order to afford insurers time to make any filings that will be necessitated by this regulation and for the Department to issue any necessary approvals, such as for policy forms.

Comment

One insurance association commenter suggested clarifying the regulation to make clear that the commercial crime exclusion would still apply if the employer was aware of the prior conviction and hired the employee without due consideration of the Article 23-A factors. The coalition suggested language that would clarify that the regulation applies only where the insurer excludes or limits coverage for loss or damage caused by an employee on the basis that the employee was convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer.

Department's Response

The regulation expressly states that the insurer must provide coverage only if the employer made a determination to hire or retain the employee utilizing the factors in Article 23-A. Hence no clarification is necessary. As noted, the insurer will be able to audit the insured to ensure that the determination has in fact been made. The Department has clarified that the regulation applies only where the insurer excluded or limited coverage for loss or damage caused by an employee on the basis that the employee was convicted of one or more criminal offenses in this state or any other jurisdiction prior to being employed by the employer.

Comment

A number of insurance association commenters suggested as an alternative to the regulation the Federal Bonding Program established by the Department of Labor.

Department's Response

While the federal program is laudable and employers should not be discouraged from using it where appropriate, it is an inadequate alternative to address the Correction Law 23-A situation because it provides only six months of free bonding coverage. Although the employer does have the option of purchasing coverage through the program, there would be an additional cost for obtaining a separate policy.

Comment

One insurance association commenter suggested that the concern this proposed regulation seeks to address can be resolved under current commercial crime insurance policy endorsements that are already available in the marketplace, including riders to the effect that certain prior convictions will not exclude a person from coverage, or that prior dishonesty or fraud will not preclude coverage if the offense amounted to less than a certain dollar threshold or was committed prior to a certain time period. Additional questions can be raised at the time of underwriting with new endorsements tailored to the needs of the employer, and other adjustments like a lower limit or higher deductible.

Comment

While such alternative policy provisions may work in some circumstances and should remain available, the Department does not believe that they are available on a scale sufficient to meet the policy concerns addressed by the regulation.

Department of Health

EMERGENCY RULE MAKING

Lead Testing in School Drinking Water

I.D. No. HLT-51-16-00004-E
Filing No. 1106
Filing Date: 2016-12-05
Effective Date: 2016-12-05

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

Action taken: Addition of Subpart 67-4 to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 1370-a and 1110

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

Specific reasons underlying the finding of necessity: Lead exposure is associated with impaired cognitive development in children. The known adverse health effects for children from lead exposure include reduced IQ and attention span, learning disabilities, poor classroom performance, hyperactivity, behavioral problems, and impaired growth. Although measures can be taken to help children overcome any potential impairments on cognition, the effects are considered irreversible.

Lead can enter drinking water from the corrosion of plumbing materials. Facilities such as schools, which have intermittent water use patterns, may have elevated lead concentration due to prolonged water contact with plumbing material. This source is increasingly being recognized as an important relative contribution to a child's overall lead exposure. Recent voluntary testing by school districts in New York State and other jurisdictions demonstrate the need to provide clear direction to schools on the requirements and procedures to sample drinking water for lead.

Every school should supply drinking water to students that meets or exceeds federal and state standards and guidelines. Although the federal Environmental Protection Agency ("EPA") has established a voluntary testing program—known as the "3Ts for Reducing Lead in Drinking Water in Schools"—there is no federal law that requires schools to test their drinking water for lead or that requires an appropriate response, if lead is determined to be present in school drinking water.

To help ensure that children are protected from lead exposure while in school, the Commissioner of Health has determined it necessary to file these regulations on an emergency basis. State Administrative Procedure Act § 202(6) empowers the Commissioner to adopt emergency regulations when necessary for the preservation of the public health, safety or general welfare and that compliance with routine administrative procedures would be contrary to the public interest.

Subject: Lead Testing in School Drinking Water.

Purpose: Requires lead testing and remediation of potable drinking water in schools.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by Public Health Law sections 1370-a and 1110, Subpart 67-4 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is added, to be effective upon filing with the Secretary of State, to read as follows:

SUBPART 67-4: Lead Testing in School Drinking Water

Section 67-4.1 Purpose.

This Subpart requires all school districts and boards of cooperative educational services, including those already classified as a public water system under 10 NYCRR Subpart 5-1, to test potable water for lead contamination and to develop and implement a lead remediation plan, where applicable.

Section 67-4.2 Definitions.

As used in this Subpart, the following terms shall have the stated meanings:

(a) Action level means 15 micrograms per liter (µg/L) or parts per billion (ppb). Exceedance of the action level requires a response, as set forth in this Subpart.

(b) Building means any structure, facility, addition, or wing of a school that may be occupied by children or students. The terms shall not include any structure, facility, addition, or wing of a school that is lead-free, as defined in section 1417 of the Federal Safe Drinking Water Act.

(c) Commissioner means the State Commissioner of Health.

(d) Department means the New York State Department of Health.

(e) Outlet means a potable water fixture currently or potentially used for drinking or cooking purposes, including but not limited to a bubbler, drinking fountain, or faucets.

(f) Potable water means water that meets the requirements of 10 NYCRR Subpart 5-1.

(g) School means any school district or board of cooperative educational services (BOCES).

Section 67-4.3 Monitoring.

(a) All schools shall test potable water for lead contamination as required in this Subpart.

(b) First-draw samples shall be collected from all outlets, as defined in this Subpart. A first-draw sample volume shall be 250 milliliters (mL), collected from a cold water outlet before any water is used. The water shall be motionless in the pipes for a minimum of 8 hours, but not more than 18 hours, before sample collection. First-draw samples shall be collected pursuant to such other specifications as the Department may determine appropriate.

(c) Initial first-draw samples.

(1) For existing buildings in service as of the effective date of this regulation, schools shall complete collection of initial first-draw samples according to the following schedule:

(i) for any school serving children in any of the levels prekindergarten through grade five, collection of samples is to be completed by September 30, 2016;

(ii) for any school serving children in any of the levels grades six through twelve that are not also serving students in any of the levels prekindergarten through grade five, and all other applicable buildings, collection of samples is to be completed by October 31, 2016.

(2) For buildings put into service after the effective date of this regulation, initial first-draw samples shall be performed prior to occupancy; provided that if the building is put into service between the effective date of this regulation but before October 31, 2016, the school shall have 30 days to perform first-draw sampling.

(3) Any first-draw sampling conducted consistent with this Subpart that occurred after January 1, 2015 shall satisfy the initial first-draw sampling requirement.

(d) Continued monitoring. Schools shall collect first-draw samples in accordance with subdivision (b) of this section again in 2020 or at an earlier time as determined by the commissioner. Schools shall continue to collect first-draw samples at least every 5 years thereafter or at an earlier time as determined by the commissioner.

(e) All first-draw samples shall be analyzed by a laboratory approved to perform such analyses by the Department's Environmental Laboratory Approval Program (ELAP).

Section 67-4.4 Response.

If the lead concentration of water at an outlet exceeds the action level, the school shall:

(a) prohibit use of the outlet until:

(1) a lead remediation plan is implemented to mitigate the lead level of such outlet; and

(2) test results indicate that the lead levels are at or below the action level;

(b) provide building occupants with an adequate supply of potable water for drinking and cooking until remediation is performed;

(c) report the test results to the local health department as soon as practicable, but no more than 1 business day after the school received the laboratory report; and

(d) notify all staff and all persons in parental relation to students of the test results, in writing, as soon as practicable but no more than 10 business days after the school received the laboratory report; and, for results of tests performed prior to the effective date of this Subpart, within 10 business days of this regulation's effective date, unless such written notification has already occurred.

Section 67-4.5 Public Notification.

(a) List of lead-free buildings. By October 31, 2016, the school shall make available on its website a list of all buildings that are determined to be lead-free, as defined in section 1417 of the Federal Safe Drinking Water Act.

(b) Public notification of testing results and remediation plans.

(1) The school shall make available, on the school's website, the results of all lead testing performed and lead remediation plans implemented pursuant to this Subpart, as soon as practicable, but no more than 6 weeks after the school received the laboratory reports.

(2) For schools that received lead testing results and implemented lead remediation plans in a manner consistent with this Subpart, but prior to the effective date of this Subpart, the school shall make available such information, on the school's website, as soon as practicable, but no more than 6 weeks after the effective date of this Subpart.

Section 67-4.6 Reporting.

(a) As soon as practicable but no later than November 11, 2016, the school shall report to the Department, local health department, and State Education Department, through the Department's designated statewide electronic reporting system:

(1) completion of all required first-draw sampling;

(2) for any outlets that were tested prior to the effective date of this regulation, and for which the school wishes to assert that such testing was in substantial compliance with this Subpart, an attestation that:

(i) the school conducted testing that substantially complied with the testing requirements of this Subpart, consistent with guidance issued by the Department;

(ii) any needed remediation, including re-testing, has been performed;

(iii) the lead level in the potable water of the applicable building(s) is currently below the action level; and

(iv) the school has submitted a waiver request to the local health department, in accordance with Section 67-4.8 of this Subpart; and

(3) a list of all buildings that are determined to be lead-free, as defined in section 1417 of the Federal Safe Drinking Water Act.

(b) As soon as practicable, but no more than 10 business days after the school received the laboratory reports, the school shall report data relating to test results to the Department, local health department, and State Education Department, through the Department's designated statewide electronic reporting system.

Section 67-4.7 Recordkeeping.

The school shall retain all records of test results, lead remediation plans, determinations that a building is lead-free, and waiver requests, for ten years following the creation of such documentation. Copies of such documentation shall be immediately provided to the Department, local health department, or State Education Department, upon request.

Section 67-4.8 Waivers.

(a) A school may apply to the local health department for a waiver from the testing requirements of this Subpart, for a specific school, building, or buildings, by demonstrating in a manner and pursuant to standards determined by the Department, that:

(1) prior to the publication date of these regulations, the school conducted testing that substantially complied with the testing requirements of this Subpart;

(2) any needed remediation, including re-testing, has been performed; and

(3) the lead level in the potable water of the applicable building(s) is currently below the action level.

(b) Local health departments shall review applications for waivers for compliance with the standards determined by the Department. If the local health department recommends approval of the waiver, the local health department shall send its recommendation to the Department, and the Department shall determine whether the waiver shall be issued.

Section 67-4.9 Enforcement.

(a) Upon reasonable notice to the school, an officer or employee of the Department or local health department may enter any building for the purposes of determining compliance with this Subpart.

(b) Where a school does not comply with the requirements of this Subpart, the Department or local health department may take any action authorized by law, including but not limited to assessment of civil penalties as provided by law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 4, 2017.

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

Regulatory Impact Statement

Statutory Authority:

The statutory authorities for the proposed regulation are set forth in Public Health Law (PHL) §§ 1110 and 1370-a. Section 1110 of the PHL directs the Department of Health (Department) to promulgate regulations regarding the testing of potable water provided by school districts and boards of cooperative education services (BOCES) (collectively, "schools") for lead contamination. Section 1370-a of the PHL authorizes the Department to establish programs and coordinate activities to prevent lead poisoning and to minimize the risk of exposure to lead.

Legislative Objective:

The legislative objective of PHL § 1110 is to protect children by requiring schools to test their potable water systems for lead contamination. Similarly, PHL § 1370-a authorizes the Department to establish programs and coordinate activities to prevent lead poisoning and to minimize the risk of exposure to lead. Consistent with these objectives, this regulation adds a new Subpart 67-4 to Title 10 of the New York Codes, Rules, and Regulations, establishing requirements for schools to test their potable water outlets for lead contamination.

Needs and Benefits:

Lead is a toxic material that is harmful to human health if ingested or inhaled.

Children and pregnant women are at the greatest risk from lead exposure. Scientists have linked lead exposure with lowered IQ and behavior problems in children. It is also possible for lead to be stored in bones and it can be released into the bloodstream later in life, including during pregnancy. Further, during pregnancy, lead in the mother's bloodstream can cross the placenta, which can result in premature birth and low birth weight, as well as problems with brain, kidney, or nervous system development, and learning and behavior problems. Studies have also shown that low levels of lead can negatively affect adults, leading to heart and kidney problems, as well as high blood pressure and nervous system disorders.

Lead is a common metal found in the environment. The primary source of lead exposure for most children is lead-based paint. However, drinking water is another source of lead exposure due to the lead content of certain plumbing materials and source water.

Laws now limit the amount of lead in new plumbing materials. However, plumbing materials installed prior to 1986 may contain significant amounts of lead. In 1986, the federal government required that only "lead-free" materials be used in new plumbing and plumbing fixtures. Although this was a vast improvement, the law still allowed certain fixtures with up to 8 percent lead to be labeled as "lead free." In 2011, amendments to the Safe Drinking Water Act appropriately re-defined the definition of "lead-free." Although federal law now appropriately defines "lead-free," some older fixtures can still leach lead into drinking water.

Elevated lead levels are commonly found in the drinking water of school buildings, due to older plumbing and fixtures and intermittent water use patterns. Currently, only schools that have their own public water systems are required to test for lead contamination in drinking water.

In the absence of federal regulations governing all schools, the Department's regulations require all schools to monitor their potable drinking water for lead. The new regulations: establish an action level of 15 micrograms per liter (equivalent to parts per billion, or ppb) for lead in the drinking water of school buildings; establish initial and future monitoring requirements; require schools to develop remedial action plans if the action level is exceeded at any potable water outlet; conduct public notification of results to the school community; and report results to the

Department. The Environmental Protection Agency's "3Ts for Reducing Lead in Drinking Water in Schools, Revised Technical Guidance" will be used as a technical reference for implementation of the regulation.

Costs:

Costs to Private Regulated Parties:

These regulations only applies to public schools. No private schools are affected.

Costs to State Government and Local Government

These regulations applies to schools, which are a form of local government. There are approximately 733 school districts and 37 BOCES in New York State, which include over 5,000 school buildings that will be subject to this regulation.

The regulations require schools to test each potable water outlet for lead, in each school building occupied by children, unless the building is determined to be lead-free pursuant to federal standards. The cost for a single lead analysis ranges from $20 - $75 per sample. Initial monitoring requires one sample per outlet. The number of outlets will vary from building to building.

If lead is detected above 15 ppb at any potable water outlet, the outlet must be taken out of service and a remedial action plan must be developed to mitigate the lead contamination, at the school's initial expense. Remediation costs can vary significantly depending on the plumbing configuration and source of lead. The school will also incur minor costs for notification of the school community and local health department, posting the information on their website, and reporting electronically to the Department. Recently enacted legislation authorizes schools to receive State Aid through the State Education Department ("SED") to defray these costs.

Local health departments will also incur some administrative costs related to tracking local implementation, reviewing waiver applications, and compliance oversight. These activities will be eligible for State Aid through the Department's General Public Health Work program.

Local Government Mandates:

Schools, as a form of local government, are required to comply with the regulations, as detailed above.

Paperwork:

The regulation imposes recordkeeping requirements related to: monitoring of potable water outlets; notifications to the public and local health department; and electronic reporting to the Department.

Duplication:

There will be no duplication of existing State or Federal regulations.

Alternatives:

There are no significant alternatives to these regulations, which are being promulgated pursuant to recent legislation.

Federal Standards:

There are no federal statutes or regulations pertaining to this matter. However, the Department's regulations are consistent with the Unites States Environmental Protection Agency's guidance document titled 3Ts for Reducing Lead in Drinking Water in Schools, Revised Technical Guidance (available at: www.epa.gov/sites/production/files/2015-09/documents/toolkit_leadschools_guide_3ts_leadschools.pdf). EPA's document will serve as guidance to schools for implementing the program.

Compliance Schedule:

For existing buildings put into service as of the effective date of this regulation, all sampling shall be performed according to the following schedule:

(i) for any school serving children in any of the levels prekindergarten through grade five, collection of samples is to be completed by September 30, 2016;

(ii) for any school serving children in any of the levels grades six through twelve that are not also serving students in any of the levels prekindergarten through grade five, and all other applicable buildings, collection of samples is to be completed by October 31, 2016.

For buildings put into service after the effective date of this regulation, sampling shall be performed prior to occupancy.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

This regulation applies to schools, which are a form of local government. As explained in the Regulatory Impact Statement, the new regulations: establish an action level of 15 micrograms per liter (equivalent to parts per billion, or ppb) for lead in the drinking water of school buildings; establish initial and future monitoring requirements; require schools to develop remedial action plans if the action level is exceeded at any potable water outlet; conduct public notification of results to the school community; and report results to the Department. The Environmental Protection Agency's 3Ts for Reducing Lead in Drinking Water in Schools, Revised Technical Guidance will be used as a technical reference for implementation of the regulation. Local health departments will also incur some administrative costs related to tracking local implementation and oversight of the regulation.

Additionally, the regulations require the services of a laboratory certified by the Department under its Environmental Laboratory Approval Program (ELAP). Some schools may also wish to hire environmental consultants to assist with compliance. Some labs and environmental consultants qualify as small businesses and, at least initially, their services will be in greater demand due to the new regulation.

Compliance Requirements:

As noted above, the new regulations: establish an action level of 15 micrograms per liter (equivalent to parts per billion, or ppb) for lead in the drinking water in school buildings; establish initial and future monitoring requirements; require schools to develop remedial action plans if the action level is exceeded at any potable water outlet; conduct public notification of results to the school community; and requiring reporting of results to the Department.

Reporting and Recordkeeping:

The regulation will impose new monitoring, reporting, and public notification requirements for schools.

Professional Services:

As noted above, the regulations require the services of a laboratory certified by the Department under its Environmental Laboratory Approval Program (ELAP). Some schools may also wish to hire environmental consultants to assist with compliance.

Compliance Costs:

The regulation will require schools to test each potable water outlet for lead, in each school building occupied by children. The cost for a single lead analysis ranges from $20 - $75 per sample. Initial monitoring requires one sample per outlet. The number of outlets will vary from building to building.

If lead is detected above 15 ppb at any potable water outlet, the outlet must be taken out of service and a remedial action plan must be developed to mitigate the lead contamination, at the school's expense. Remediation costs can vary significantly depending on the plumbing configuration and source of lead. The school will also incur minor costs for notification of the school community and local health department, posting the information on their website, and reporting electronically to the Department. Recently enacted legislation authorizes schools to receive State Aid through the State Education Department ("SED") to defray these costs.

Local health departments will also incur some administrative costs related to tracking local implementation, reviewing waiver applications, and compliance oversight. These activities will be eligible for State Aid through the Department's General Public Health Work program.

Cost to Private Parties:

There are no costs to private parties.

Economic and Technological Feasibility:

The technology for lead testing of drinking water is well-established. With respect to schools' costs of compliance, State Aid will be available through the State Education Department to ensure that compliance is feasible. Local health department activities will be eligible for State Aid through the Department's General Public Health Work program.

Minimizing Adverse Impact:

Any school that has already performed testing in compliance with these regulations, as far back as January 1, 2015, does not need to perform sampling again. Further, consistent with the requirements of PHL § 1110, if a school has performed testing that substantially complies with the regulations, the school may apply to the Department for a waiver, so that additional testing is not required. In either case, the requirement to report sample results, and other requirements, remain in place.

School buildings that are determined to be "lead-free," as defined in section 1417 of the Federal Safe Drinking Water Act, do not need to test their outlets. School will be required to make available on their website a list of all buildings that are determined to be lead-free.

Small Business and Local Government Participation:

Although small businesses were not consulted on these specific regulations, the dangers of lead in school drinking water has garnered significant local, state, and national attention. The New York State School Board Association (NYSSBA) requested a meeting with the Department to discuss the impacts of the enabling legislation. NYSSBA provided feedback on testing, prior monitoring, and other matters. The Department took this feedback into consideration when drafting the regulation. The Department will also conduct public outreach, and there will be an opportunity to comment on the proposed permanent regulations. The Department will review all public comments received.

Rural Area Flexibility Analysis

Pursuant to Section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas. The proposed rule will not impose an adverse economic impact on rural areas, nor will it impose any disproportionate reporting, recordkeeping or other compliance requirements on the regulated entities in rural areas.

Job Impact Statement

Nature of Impact:

The Department expects there to be a positive impact on jobs or employment opportunities. Some school districts will likely hire firms or individuals to assist with regulatory compliance. Schools impacted by this amendment will require the professional services of a certified laboratory to perform the analyses for lead, which will create a need for additional laboratory capacity.

Categories and Numbers Affected:

The Department anticipates no negative impact on jobs or employment opportunities as a result of the proposed regulations.

Regions of Adverse Impact:

The Department anticipates no negative impact on jobs or employment opportunities in any particular region of the state.

Minimizing Adverse Impact:

Not applicable.

Assessment of Public Comment

Public comments were submitted to the New York State Department of Health (Department) on the Emergency Regulation, Subpart 67-4 of Title 10 of the New York State Codes, Rules and Regulations (NYCRR), which requires public schools and boards of cooperative educational services (BOCES) to test all potable water outlets for lead contamination and to take responsive actions to remediate outlets that exceed the lead action level. The Department received comments from two school organizations, one private citizen, and one advocacy organization. These comments and the Department's responses are summarized below.

COMMENT: One commenter requested that the permanent regulation clarify whether the regulation applies only to public schools and BOCES or if charter schools are included in the regulation.

RESPONSE: Consistent with the Department's statutory authority and published guidance, these regulations only apply to public schools districts and BOCES. Charter schools are not required to comply with this regulation, although voluntary compliance with the standards is encouraged. This will be clarified in the permanent regulations.

COMMENT: One commenter requested that the regulation include the US Environmental Protection Agency's sampling procedures for follow-up testing to confirm high lead levels.

RESPONSE: Public Health Law § 1110 directs schools to perform periodic first-draw sampling. First-draw sampling yields meaningful lead test results that are representative of water that is being consumed under normal use conditions, and it establishes a baseline for lead concentrations at all consumptive outlets. Although the regulation does not require second-draw or flush samples, schools may choose to conduct such additional sampling to help identify the source of the elevated lead levels.

COMMENT: One commenter questioned why private schools, daycares, and facilities that house after school programs are not required to comply with this regulation. The commenter also asked why buildings that were once used as school buildings but have since been used for alternative purposes are not included in this regulation.

RESPONSE: Public Health Law § 1110 only applies to public school districts and BOCES. However, the Department encourages voluntary compliance with this regulation for all organizations and facilities that house children, whenever possible.

COMMENT: One commenter suggested that the Department should monitor schools' ability to meet testing deadlines and offer technical assistance if necessary.

RESPONSE: The Department and local health departments conduct regular monitoring of school progress relating to completion of sampling and reporting requirements through compliance check reports. During the initial round of testing completed October 31, the Department published Frequently Asked Questions and other guidance documents, performed outreach to school districts with the help of local health departments to offer assistance, and conducted multiple webinars to assist school districts in understanding sampling and reporting requirements. The Department's district offices and staff from the local health departments continue follow up directly with those schools, within their jurisdiction, who have not yet completed the compliance requirements. The Department continues to perform outreach activities to facilitate compliance.

COMMENT: One commenter requested that the Department revise the lead action levels, based on information provided by the commenter.

RESPONSE: The Department continues to evaluate risk assessment information on lead in drinking water as more information and research becomes available. However, Public Health Law § 1110 specifies that the lead level must be consistent with the standard under federal regulations issued pursuant to the Safe Drinking Water Act, which is also 15 ppb.

COMMENT: One commenter requested that the regulations refrain from using the label of "lead-free" with respect to schools.

RESPONSE: Public Health Law § 1110 establishes use of the term "lead free" and provides that this term will have the same meaning as in section 1417 of the federal safe drinking water act. The Department's use of this term and its meaning are governed by state and federal law, respectively.

COMMENT: One commenter suggested that the Department establish clear standards for testing protocols.

RESPONSE: The Department has published on its website several reference documents to assist the schools with implementation of this regulation. The reference materials include: a video illustrating proper sampling protocols; a quick reference guide for the regulation; a Frequently Asked Questions document; example result notification letter to parents and the school community; example signs to be used during remediation activities; instructions for finding a certified laboratory for testing. These reference materials can be found at http://www.health.ny.gov/environmental/water/drinking/lead/lead_testing_of_school_drinking_water.htm.

COMMENT: One commenter suggested that the Department clarify the type of reporting required in this regulation, by providing information on a searchable database and by interpreting the test results posted on the Department's website.

RESPONSE: The Department is currently verifying the integrity of data in the statewide electronic reporting system. In the near future, the Department intends to provide all reported data to the public via its Health Data NY website. This will allow all stakeholders access to information on lead in school drinking water in real time.

COMMENT: One commenter suggested that the Department should reevaluate the requirement that schools retest every 5 years, and suggested the requirement of systematic spot testing.

RESPONSE: While the regulations establish a minimum testing interval of once every five years, the Commissioner retains authority to order additional testing of one or all schools at any time. The Department will consider whether targeted or random testing requirements should be included in the permanent regulation.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Federal Conditions of Participation

I.D. No. HLT-51-16-00003-P

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

Proposed Action: Amendment of Part 405 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Federal Conditions of Participation.

Purpose: To reflect amendments consistent with updated Federal Conditions of Participation.

Text of proposed rule: Paragraph (4) of subdivision (f) of section 405.2 is amended to read as follows:

(4) a physician, or a [registered physician's] *licensed physician* assistant under the general supervision of a physician, or a nurse practitioner in collaboration with a physician, is on duty at all times in the hospital except that the commissioner may approve substitute coverage, for all or part of each day, by each patient's attending physician when these physicians are immediately available to the hospital by telephone, and available in person *or by telemedicine* within [20] *30* minutes as needed, upon a hospital demonstrating to the commissioner that:

(i) all patients are medically stable and patients who become medically unstable are promptly transferred to an appropriate receiving hospital in accordance with section 400.9 of this Title;

(ii) the hospital does not operate an emergency service; and

(iii) the entire hospital has less than 25 approved beds[;].

Paragraph (10) of subdivision (b) of section 405.3 is amended to read as follows:

(10) the provision for a physical examination and recorded medical history for all personnel including all employees, members of the medical staff, contract staff, students and volunteers, whose activities are such that a health impairment would pose a potential risk to patients. The examination shall be of sufficient scope to ensure that no person shall assume his/her duties unless he/she is free from a health impairment which is of potential risk to the patient or which might interfere with the performance of his/her duties, including the habituation or addiction to depressants, stimulants, narcotics, alcohol or other drugs or substances which may alter the individual's behavior. The hospital is required to provide such examination without cost for all employees who are required to have such examination. For personnel whose activities are such that a health impairment would neither pose a risk to patients nor interfere with the performance of his/her duties, the hospital shall conduct a health status assessment in order to determine that the health and well-being of patients are

not jeopardized by the condition of such individuals. The hospital shall require the following of all personnel, with the exception of those physicians who are practicing medicine [form] *from* a remote location [outside of New York State], as a condition of employment or affiliation:

Paragraph (3) of subdivision (b) of section 405.5 is amended to read as follows:

(3) Written nursing care plans shall be kept current. Such plans shall indicate what nursing care is needed, how it is to be provided, and the methods, approaches and mechanisms for ongoing modifications necessary to ensure the most effective and beneficial results for the patient. Patient education and patient/family knowledge of care requirements shall be included in the nursing plan. *The nursing care plan may be integrated into the overall interdisciplinary plan of care.*

Subdivision (c) of section 405.5 is amended to read as follows:

(c) Administration of drugs. All drugs and biologicals shall be administered in accordance with the orders of the practitioner or practitioners responsible for the patient's care as specified under section 405.2 of this Part, and generally accepted standards of practice. They shall be administered by a licensed physician or registered professional nurse, or other personnel in accordance with applicable licensing requirements of title 8 of the New York State Education Law*, except for the self-administration of medications as set forth in paragraphs (4) and (5) of this subdivision,* and in accordance with [approved] hospital policies and procedures. *For purposes of this subdivision, "self-administration" means administration by the patient or the patient's caregiver, including but not limited to a caregiver pursuant to section 2994-ii(3) of the Public Health Law, or a designated caregiver pursuant to section 3360(5) of the Public Health Law.*

(4) Hospitals, in accordance with hospital policies and procedures, may authorize hospital-issued prescription and non-prescription medications to be self-administered, provided that:

(i) a practitioner responsible for the care of the patient in the hospital has issued an order permitting self-administration;

(ii) the capacity of the patient or the patient's caregiver to administer the medication has been assessed;

(iii) the patient or the patient's caregiver has been given instructions for the safe and accurate administration of the medication;

(iv) the security of the medication is addressed; and

(v) documentation is made of the administration of each medication in the patient's record, as reported by the patient or the patient's caregiver.

(5) Hospitals, in accordance with hospital policies and procedures, may authorize a patient to bring in his or her own medications, including prescription medications, non-prescription medications and medical marihuana as defined in section 3360(8) of the Public Health Law, and self-administer such medications, provided that:

(i) a practitioner responsible for the care of the patient in the hospital has issued an order permitting self-administration of the medication the patient brought into the hospital, and in the case of medical marihuana, upon presentation of the patient or designated caregiver's registry identification card issued pursuant to section 3363 of the Public Health Law;

(ii) the capacity of the patient or the patient's caregiver to administer the medication has been assessed;

(iii) a determination is made concerning whether the patient or the patient's caregiver needs instruction on the safe and accurate administration of the medication;

(iv) the medication is identified and visually evaluated for integrity;

(v) the security of the medication is addressed;

(vi) documentation is made of the administration of each medication in the patient's record, as reported by the patient or the patient's caregiver; and

(vii) if a patient dies in the hospital, any unused prescription medication shall be destroyed or disposed of in accordance with all applicable state and federal laws and regulations. Such prescription medications may not be turned over to the patient's caregiver. In the case of medical marihuana, it may be turned over to the deceased patient's designated caregiver or to appropriate law enforcement for destruction or disposal.

Paragraph (8) of subdivision (c) of section 405.10 is amended to read as follows:

(8) The hospital shall implement *policies and* procedures regarding the use and authentication of verbal orders, including telephone orders. [Such orders shall be used sparingly, shall be accepted, recorded and authenticated only in accordance with applicable scope of practice provisions for licensed, certified or registered practitioners, consistent with Federal and State law, and with hospital policies and procedures and shall be authenticated by the prescribing practitioner or, until January 26, 2012, by another practitioner responsible for the care of the patient and authorized to write such an order, within 48 hours, also in accordance with such policies and procedures and Federal and State law.] *Such policies and procedures must:*

(i) Specify the process for accepting and documenting such orders;

(ii) Ensure that such orders will be issued only in accordance with applicable scope of practice provisions for licensed, certified or registered practitioners, consistent with Federal and State law; and

(iii) Specify that such orders must be authenticated by the prescribing practitioner, or by another practitioner responsible for the care of the patient and authorized to write such orders and the time frame for such authentication.

Subparagraph (ii) of paragraph (1) of subdivision (d) of section 405.19 is amended to read as follows:

405.19 Emergency services.

(ii) There shall be at least one emergency service attending physician on duty 24 hours a day, seven days a week. For hospitals that exceed 15,000 unscheduled visits annually, the attending physician shall be present and available to provide patient care and supervision in the emergency service. As necessitated by patient care needs, additional attending physicians shall be present and available to provide patient care and supervision. Appropriate subspecialty availability as demanded by the case mix shall be provided promptly in accordance with patient needs. For hospitals with less than 15,000 unscheduled emergency visits per year, the supervising or attending physician need not be present but shall be available within 30 minutes of patient presentation, *in person or by telemedicine,* provided that at least one physician, nurse practitioner, or licensed physician assistant shall be on duty in the emergency service 24 hours a day, seven days a week. The hospital shall develop and implement protocols specifying when physicians must be present.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The statutory authority for the promulgation of this regulation is contained in Public Health Law (PHL) section 2803. Section 2803 authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection and promotion of the health of the residents of New York State by requiring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost.

Needs and Benefits:

This regulation amends Sections 405.2 (Governing Body), 405.3 (Administration), 405.5 (Nursing Services), 405.10 (Medical Records), and 405.19 (Emergency Services).

The Centers for Medicare and Medicaid Services (CMS) requires hospitals to meet specified Conditions of Participation (CoPs) in order to participate in the federal Medicare and Medicaid programs. The CoPs outline the basic requirements related to a hospital's structure, operations and delivery of patient care. The intent is to protect the health and safety of patients. CMS reviewed the existing CoPs and made numerous changes effective on July 16, 2012. 77 Fed. Reg. 29034 (May 16, 2012). As a result, New York State general hospital regulations are being revised to reflect the federal changes.

Sections 405.2(f)(4) and 405.19(d)(1)(ii) are being amended to create a consistent 30 minute timeframe for a physician to be available to patients, and to clarify that such availability may be provided in person or by telemedicine. Current regulations require this to occur in 20 minutes and do not mention telemedicine. Section 405.3(b)(10) is amended to provide that the existing exemption for immunization requirements applies to remote locations within New York State.

Section 405.5(b)(3) permits a nursing care plan to be integrated into the overall interdisciplinary plan of care.

Consistent with changes to the federal CoPs, section 405.5(c) allows patients to self-administer certain medications. Federal regulations at 42 CFR § 482.23(c)(6) allow hospitals the flexibility to develop and implement policies and procedures for a patient and his or her caregivers/support persons to self-administer specific medications (such as non-controlled drugs and biologicals). See 77 Fed. Reg. 29048 (May 16, 2012). In addition, section 405.10(c)(8) changes the requirements for verbal orders by removing the requirement that verbal orders be authenticated within 48

hours. In addition, these regulations permit self-administration of medical marijuana, subject to appropriate conditions and restrictions.

Costs:

Allowing the supervising or attending physician to be available by telemedicine rather than in person, and within 30 minutes instead of 20 minutes, should not cause hospitals to incur additional costs. No additional costs should be incurred from the provision clarifying that the existing exemption for immunization requirements applies to remote locations within New York State. The provision to permit the nursing care plan to be integrated into the overall interdisciplinary plan of care should incur no additional costs. Authorization for the use and authentication of verbal orders including telephone orders may require updating policies and procedures. The provision authorizing hospitals to develop policies and procedures regarding self-administration is permissive rather than mandatory.

Local Government Mandates:

This provision does not impose any additional mandates on local governments.

Paperwork:

As noted above, policies and procedures will need to be developed and/or updated for authorization for the use and authentication of verbal orders, including telephone orders. Hospitals that authorize medications to be self-administered will need to document the administration of each medication in the patient's record.

Duplication:

This regulation does not duplicate any other State or federal regulation.

Alternatives:

The Department reviewed the federal Conditions of Participation (CoPs) against what is currently in the Part 405 regulations. The related amendments to Part 405 are needed to make State regulation consistent with federal regulation. An alternative of not including medical marijuana as a medication that can be self-administered was considered; however, the Department determined that its inclusion would help facilitate the administration of medical marijuana products in healthcare facilities and ensure continued access for patients.

Federal Standards:

This proposal does not conflict or duplicate federal provisions. These amendments amend the general hospital provisions to reflect the federal CoP.

Compliance Schedule:

This proposed amendment will become effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

The proposed regulation amends Part 405 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, to reflect changes made by the Centers for Medicare and Medicaid Services' (CMS) Conditions of Participation (CoPs) in order to participate in the federal Medicare and Medicaid programs. The proposed regulatory amendments will impact small businesses and local governments that operate hospitals pursuant to Part 405.

Compliance Requirements:

Sections 405.2(f)(4) and 405.19(d)(1)(ii) are being amended to create a consistent 30 minute timeframe for a physician to be available to patients, and to clarify that such availability may be provided in person or by telemedicine. Current regulations require this to occur in 20 minutes and do not mention telemedicine. Section 405.3(b)(10) is amended to provide that the existing exemption for immunization requirements applies to remote locations within New York State.

Section 405.5(b)(3) permits a nursing care plan to be integrated into the overall interdisciplinary plan of care.

Consistent with changes to the federal CoPs, section 405.5(c) allows patients to self-administer certain medications. Federal regulations at 42 CFR § 482.23(c)(6) allow hospitals the flexibility to develop and implement policies and procedures for a patient and his or her caregivers/support persons to self-administer specific medications (such as non-controlled drugs and biologicals). See 77 Fed. Reg. 29048 (May 16, 2012). In addition, section 405.10(c)(8) changes the requirements for verbal orders by removing the requirement that verbal orders be authenticated within 48 hours. In addition, these regulations permit self-administration of medical marijuana, subject to appropriate conditions and restrictions.

Professional Services:

Practitioners who are responsible for the care of patients and the nursing staff will need to adhere to the policies and procedures regarding the use and authentication of verbal orders, including telephone orders, in accordance with applicable scope of practice provisions for licensed, certified or registered practitioners consistent with Federal and State law. To the extent a hospital adopts policies and procedures allowing for medications to be self-administered, practitioners and nursing staff will also need to adhere to such policies and procedures.

Compliance Costs:

Allowing the supervising or attending physician to be available by telemedicine rather than in person, and within 30 minutes instead of 20 minutes, should not cause hospitals to incur additional costs. No additional costs should be incurred from the provision clarifying that the existing exemption for immunization requirements applies to remote locations within New York State. The provision to permit the nursing care plan to be integrated into the overall interdisciplinary plan of care should incur no additional costs. Authorization for the use and authentication of verbal orders including telephone orders may require updating policies and procedures. The provision authorizing hospitals to develop policies and procedures regarding self-administration is permissive rather than mandatory.

Economic and Technological Feasibility:

This proposal is economically and technologically feasible. The amendments provide greater flexibility or require only modest updating to policies and procedures. The provisions regarding self-administration are permissive, rather than mandatory.

Minimizing Adverse Impact:

For the reasons stated above, there is no adverse impact.

Small Business and Local Government Participation:

Outreach to the affected parties is being conducted. Organizations who represent the affected parties and the public can also obtain the agenda of the Codes, Regulations and Legislation Committee of the Public Health and Health Planning Council (PHHPC) and the proposed regulation on the Department's website. The public, including any affected party, is invited to comment during the Codes, Regulations and Legislation Committee meeting.

Dear Chief Executive Officer (CEO) letters will be sent to affected parties explaining the changes proposed as a result of the federal CoPs.

Rural Area Flexibility Analysis

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

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administration Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment, that it will have no impact on jobs and employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medical Use of Marihuana - Chronic Pain

I.D. No. HLT-51-16-00006-P

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

Proposed Action: Amendment of sections 1004.1 and 1004.2 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 3360 and 3369-a

Subject: Medical Use of Marihuana - Chronic Pain.

Purpose: To add any severe debilitating or life-threatening condition causing chronic pain.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by sections 3360 and 3369-a of the Public Health Law (PHL), sections 1004.1 and 1004.2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York are hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

§ 1004.1 Practitioner registration.

(a) No practitioner shall be authorized to issue a patient certification as set forth in section 1004.2 unless the practitioner:

(1) is qualified to treat patients with one or more of the serious conditions set forth in [subdivision 7 of section 3360 of the Public Health Law or as added by the commissioner] *subdivision 1004.2(a)(8) of this Part;*

* * *

§ 1004.2 Practitioner issuance of certification.

(a) Requirements for Patient Certification. A practitioner who is registered pursuant to 1004.1 of this Part may issue a certification for the use of an approved medical marihuana product by a qualifying patient. Such certification shall contain:

* * *

(8) the patient's diagnosis, limited solely to the specific severe debilitating or life-threatening condition(s)[, as defined in subdivision seven of section thirty-three hundred sixty of the public health law and] listed below [as the following];

* * *

(x) Huntington's disease; [or]

(xi) [any other condition added by the commissioner.] *any severe debilitating pain that the practitioner determines degrades health and functional capability; where the patient has contraindications, has experienced intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or more beyond onset; or*

(xii) any other condition added by the commissioner.

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner of Health is authorized pursuant to Section 3369-a of the Public Health Law (PHL) to promulgate regulations necessary to effectuate the provisions of Title V-A of Article 33 of the PHL. The Commissioner of Health is also authorized pursuant to Section 3360(7) of the PHL to add serious conditions under which patients may qualify for the use of medical marihuana.

Legislative Objectives:

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

Needs and Benefits:

The regulatory amendments are necessary to allow registered practitioners to issue certifications for the medical use of marihuana to those patients suffering from severe debilitating pain. This amendment benefits patients with severe debilitating pain which degrades health and functional capability; where the patient has contraindications, has experienced intolerable side effects or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain extending three months or more beyond onset, or the practitioner reasonably anticipates that the pain will last three months or more beyond onset. Permitting the medical use of marihuana for patients suffering from chronic pain will offer an additional treatment option for those patients.

Costs:

Costs to the Regulated Entity:

Patients certified by their practitioner for the medical use of marihuana will have to pay a $50 non-refundable application fee to register with the Medical Marijuana Program and obtain a registry identification card. However, the Department may waive or reduce this fee in cases of financial hardship. Patients will also have a cost associated with the purchase of approved medical marihuana products from registered organizations.

Costs to Local Government:

This amendment to the regulation does not require local governments to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

Costs to the Department of Health:

With the inclusion of this new serious condition, additional patient registrations will need to be processed by the Department. In addition, there may be an increase in the number of practitioners who register with the program to certify patients. This regulatory amendment may result in an increased cost to the Department for additional staffing to provide registration support for patients and practitioners, as well as certification support for registered practitioners. It is anticipated that these additional activities can be accommodated within the existing resources of the Department.

Local Government Mandates:

This amendment does not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

Registered practitioners who certify patients for the program will be required to maintain a copy of the patient's certification in the patient's medical record.

Duplication:

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

Alternatives:

The alternative would be to continue to limit serious conditions solely to those enumerated in Section 3360(7) of the Public Health Law.

Federal Standards:

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

Compliance Schedule:

There is no compliance schedule imposed by these amendments, which shall be effective upon publication of a notice of adoption.

Regulatory Flexibility Analysis

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

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement under the proposed regulation. The regulatory amendment authorizing the addition of this serious condition does not mandate that a practitioner register with the program. This amendment does not mandate that a registered practitioner issue a certification to a patient who qualifies for this new serious condition. Hence, no cure period is necessary.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no other compliance costs imposed on public or private entities in rural areas as a result of the amendments.

Job Impact Statement

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

New York State Joint Commission on Public Ethics

EMERGENCY RULE MAKING

Adjudicatory Proceedings and Appeals Procedures for Matters Under the Commission's Jurisdiction

I.D. No. JPE-37-16-00003-E

Filing No. 1110

Filing Date: 2016-12-05

Effective Date: 2016-12-05

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

Action taken: Amendment of Part 941 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(14)

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

Specific reasons underlying the finding of necessity: Part J of Chapter 286, Laws of 2016, established new adjudicatory procedures for matters falling under the jurisdiction of the Joint Commission on Public Ethics ("Commission"), and provided that these changes shall take effect immediately. This regulation implements those changes to the Commission's procedures. This Emergency Re-Adoption is necessary to ensure that the Commission's new rules remain in effect pending final adoption with the next publication of the State Register, in order to provide proper

notice of the Commission's adjudicatory proceedings to all persons and entities subject to the Commission's jurisdiction. Accordingly, this emergency rule is necessary for the general welfare.

Subject: Adjudicatory proceedings and appeals procedures for matters under the Commission's jurisdiction.

Purpose: To implement legislative changes made to the Commission's adjudicatory proceedings.

Substance of emergency rule: Part J of Chapter 286, Laws of 2016, effected changes to the adjudicatory proceedings conducted by the Joint Commission on Public Ethics ("Commission"). In particular, Part J, Chapter 286, Laws of 2016 provides persons or entities under investigation by the Commission the right to be heard prior to a final determination by the Commission, and the right to be informed of the alleged violations of law and supporting evidence. This rule implements these changes and provides due process notice to persons and entities subject to the Commission's jurisdiction of the Commission's applicable adjudicatory proceedings.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. JPE-37-16-00003-EP, Issue of September 14, 2016. The emergency rule will expire December 21, 2016.

Text of rule and any required statements and analyses may be obtained from: Michael E. Sande, NYS Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: michael.sande@jcope.ny.gov

Regulatory Impact Statement

1. Statutory authority: Executive Law section 94(14) directs the Joint Commission on Public Ethics (the "Commission") to adopt rules and regulations relating to adjudicatory proceedings and appeals for matters arising under the Commission's jurisdiction.

2. Legislative objectives: To provide guidance and procedures regarding the conduct of adjudicatory proceedings and appeals for matters arising under the Commission's jurisdiction.

3. Needs and benefits: In 2012, the Commission amended its regulations regarding adjudicatory proceedings and appeals procedures in Part 941. Part J, Chapter 286, Laws of 2016, which took effect on August 24, 2016, implemented changes to the Commission's adjudicatory proceedings via amendments to the Commission's governing statute. The amended regulation will bring the Commission's regulatory procedures into accordance with its governing statute by effecting substantive changes as follows:

A. Notice to the Respondent and Exchange of Information

In accordance with the statute, as amended, this regulation will impose new disclosure obligations and time restrictions upon the Commission and the Respondent. Upon receipt of a sworn complaint or other information reflecting a possible or alleged violation of law, the Commission will be required to provide initial notice to the Respondent including a description of the allegations, the sections of law alleged to have been violated, and the evidence supporting such allegations. The Commission will be further required to provide to the Respondent, prior to the hearing, any additional evidence supporting the allegations that was not previously provided. The Respondent will be required to provide to the Commission, prior to the hearing, a list of possible witnesses, notice of any defenses to be presented, and supporting evidence.

B. Substantial Investigation Basis Report

In accordance with the statute, as amended, this regulation changes the timing of the Commission's issuance of a Substantial Basis Investigation Report ("SBIR"). Under the statute, and this amended regulation, the Commission shall issue an SBIR if it has found a substantial basis to conclude that the Respondent committed a violation of law after a hearing has been conducted. Currently an SBIR is issued after an investigation but prior to a hearing.

C. Summary of Amended Sections

Part 941.1 provides the purpose of the regulations.

Part 941.2 defines key terms in the regulations. The definitions are not meant to alter the scope of the existing regulations, but are instead designed to clarify those regulations.

Part 941.3 sets forth procedures, in accordance with the statute, as amended, for providing a Respondent notice of the Commission's decision to commence and investigation and conduct a hearing to determine whether a substantial basis exists to conclude a violation of law has occurred. The notice shall contain (1) the alleged violations of law and the factual basis for those allegations; (2) the time and place of the hearing; (3) the identity of the hearing officer and instructions for the submission of filings; (4) a statement concerning the provision of deaf interpretation without charge; and any other information deemed necessary or appropriate.

Part 941.4 addresses the scheduling and adjournment of hearings and the service of filings by a Respondent.

Part 941.5 provides that any person who voluntarily appears in a hearing shall be accorded the right to representation, who need not be an attorney. Any counsel or attorney for a Respondent must file a Notice of Appearance.

Part 941.6 outlines the procedure for selecting a hearing officer.

Part 941.7 outlines the powers and duties of the hearing officer. These shall include the authority to direct the parties to appear for a pre-hearing conference, and to issue findings of fact, conclusions of law, and make recommendations, where appropriate.

Part 941.8 sets forth procedures for an adjournment of a hearing.

Part 941.9 sets forth time limits, in accordance with the statute, for specific filings and submissions prior to a hearing, and for the conduct of the hearing. At least seven (7) days prior to the hearing, the Commission shall provide to the Respondent any additional evidence that was not previously described in the notice discussed in Part 941.3. At least seven (7) days before the hearing, the Respondent shall provide the Commission and hearing officer a list of possible witnesses and notice of any defenses to be presented, and supporting evidence. Any other papers, statements, proofs, and evidence shall be provided to the other party and the hearing officer, in the hearing officer's discretion and at a time to be designated by the hearing officer. The hearing officer, Executive Director or the Commission may grant an extension of time for filing such matters only upon formal request. Generally, except by consent of the parties, every hearing conducted pursuant to these rules shall be concluded within 180 days of the notice discussed in Part 941.3.

Part 941.10 sets forth specific rules for the conduct of hearings. In accordance with the statute, as amended, all hearings and procedures before the hearing officer are to be confidential. A hearing may continue if a Respondent, having been duly served with notice, fails to appear for the hearing. The hearing officer shall conduct all hearings pursuant to these rules, and shall exercise the power and authority of hearing officers as defined in the State Administrative Procedures Act and any other pertinent statute.

Part 941.11 addresses the administration of oaths at hearings.

Part 941.12 provides rules of evidence and proof. The formal rules of evidence shall not apply in hearings under the Commission's jurisdiction, but objections to evidentiary offers may be made and shall be reflected in the record. All evidence appearing in the record shall be deemed to have been validly introduced. Each party shall have the right to give sworn testimony, produce witnesses, present documentary evidence, and to examine opposing witnesses and evidence. The parties may stipulate to facts, and official notice may be taken of facts of which judicial notice could be taken.

Part 941.13 provides rules, in accordance with the statute, as amended, for the preparation and adoption of proposed findings of fact and recommendation, substantial basis investigation report, and notice of civil assessment. The hearing officer shall, within sixty (60) days of the conclusion of the hearing, make findings of fact and a recommendation as to the appropriate penalty. The Respondent shall have the opportunity to respond in writing in the form of a brief addressed to the Commission. The Commission's staff, also, shall have the right to respond in the form of a brief addressed to the Commission, and to submit a proposed Substantial Basis Investigation Report to the Commission. The Commission shall have sixty (60) days thereafter in which to vote on whether to issue a Substantial Basis Investigation Report.

Part 941.14 provides rules for the assessment of penalties and the referral of violations of law to a prosecutor for criminal prosecution.

Part 941.15 provides rules for the record of hearings.

Part 941.16 addresses the privacy and confidentiality of records and documents.

Part 941.17 provides rules for appeals from the Commission's Executive Director's denials of application to delete or exempt certain information from financial disclosure statements.

Part 941.18 provides rules for appeals from a denial of an application for an exemption under Article 1-A of the Legislative Law §§ 1-h, 1-j and 19 NYCRR Part 938.6 (Source of Funding disclosures).

Part 941.19 sets forth rules of general applicability.

Part 941.20 provides that all matters where the Commission has issued a Substantial Basis Investigation Report will be governed by the laws and adjudicatory rules in effect when such Substantial Basis Investigation Report was issued. All other matters and investigations will be governed by the provisions of this Part.

Part 941.21 provides that this Part shall take effect upon the effective date of Part J, S.8160/A.10742 (2016).

4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments.

c. cost information is based on the fact that there will be minimal costs

to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes no new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

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

8. Alternatives: Part J, Chapter 286, Laws of 2016, imposes an affirmative duty on the Commission to implement changes to its adjudicatory proceedings. Therefore there is no alternative to amending the Commission's existing regulation.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Emergency Re-Adoption because the proposed rule will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping, or other affirmative acts on the part of these entities for compliance purposes. The Joint Commission on Public Ethics makes this finding based on the fact that the rule bears potential application only to Statewide elected officials, State officers and employee, members of the legislature and legislative employees, candidates for legislative and statewide offices, political party chairs, and lobbyists and clients engaged in lobbying activity that exceeds a certain monetary threshold.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Emergency Re-Adoption because the proposed rule will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping, or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes this finding based on the fact that the rule bears potential application only to Statewide elected officials, State officers and employee, members of the legislature and legislative employees, candidates for legislative and statewide offices, political party chairs, and lobbyists and clients engaged in lobbying activity that exceeds a certain monetary threshold. Rural areas are not affected in any way.

Job Impact Statement

A Job Impact Statement is not submitted with this Notice of Emergency Re-Adoption because the rule will have a limited impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the rule bears potential application only to Statewide elected officials, State officers and employee, members of the legislature and legislative employees, candidates for legislative and statewide offices, political party chairs, and lobbyists and clients engaged in lobbying activity that exceeds a certain monetary threshold. This regulation does not apply, nor relate to small businesses, economic development or employment opportunities.

Assessment of Public Comment

One entity submitted five comments. The first comment suggested the addition of language to clarify that the Joint Commission on Public Ethics ("Commission") is not responsible for providing or paying the cost of legal representation for respondents in proceedings before the Commission. The Commission omitted this language because there is no question or ambiguity that the Commission bears no legal duty to provide respondents with legal representation. The second comment suggested a small change to the language of Part 941.6(d) for clarification. The Commission considers the proposed language of Part 941.6(d) to be sufficiently clear. The third comment proposed making the use of deposition transcripts at the Commission's hearings to be "subject to the Rules of Evidence." Pursuant to the proposed Part 941, the Rules of Evidence do not apply with respect to any hearings under the Commission's jurisdiction, and therefore this comment was rejected. The fourth comment suggested language regarding requests for the adjournment of a hearing, to clarify that such requests must be made at least five business days before the scheduled hearing date except "for good cause shown." The Commission adopted this suggestion in the proposed Part 941. The fifth comment suggested the provision of a specific effective date. The Commission adopted this suggestion in the proposed Part 941.

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Source of Funding Reporting

I.D. No. JPE-37-16-00002-ERP
Filing No. 1105
Filing Date: 2016-12-02
Effective Date: 2016-12-02

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

Action Taken: Amendment of Part 938 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(9)(c); Legislative Law, sections 1-h(c)(4) and 1-j(c)(4)

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

Specific reasons underlying the finding of necessity: Part D of Chapter 286 of the Laws of 2016, which became effective September 23, 2016, changed the monetary threshold amounts related to requirements to disclose sources of funding with respect to lobbying activities. The formal rulemaking process would have resulted in a period of time during which the Source of Funding regulation of the Joint Commission of Public Ethics ("Commission") would not be in accordance with statutory law. Since due process entitles all persons and entities subject to the Commission's jurisdiction to proper notice of their disclosure requirements under the law this emergency rule is necessary for the public welfare.

Subject: Source of funding reporting.

Purpose: To implement legislative changes made to the source of funding disclosure requirements.

Substance of emergency/revised rule: Part D of Chapter 286 of the Laws of 2016, which was signed into law by the Governor on August 24, 2016, made changes to the source of funding disclosure requirements relating to lobbyists and clients. Specifically, it decreased the filing threshold for total lobbying expenditures to $15,000, from $50,000, and the minimum contribution amount for disclosing a source to $2,500, from $5,000. Further, it excluded funds received for membership dues, fees, and assessments from the contributions that must be disclosed, while continuing to require the donor to be identified as a source. Such changes became effective on September 23, 2016. This rule implements these changes and provides due process notice to persons and entities subject to the Commission's jurisdiction.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on September 14, 2016, I.D. No. JPE-37-16-00002-EP. The emergency rule will expire January 30, 2017.

Emergency rule compared with proposed rule: Substantial revisions were made in section 938.11(a)(1), (2), (b)(1) and (2).

Text of rule and any required statements and analyses may be obtained from: Martin Levine, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3975, email: martin.levine@jcope.ny.gov

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

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

Revised Regulatory Impact Statement

A Revised Regulatory Impact Statement is not required because the revisions to the proposed regulation do not change the substance or conclusions set forth in the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required because the revisions to the proposed regulation do not change the substance or conclusions set forth in the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Revised Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the revisions to the proposed regulation do not change the substance or conclusions set forth in the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

A Job Impact Statement is not required because the revisions to the proposed regulation do not change the substance or conclusions set forth in the previously published Job Impact Statement.

Assessment of Public Comment

The Public Integrity Reform Act of 2011 ("PIRA") amended the Legislative Law to require source of funding disclosure for certain lobbyists and clients who devote substantial resources to lobbying in New York State. PIRA also mandated that the Commission promulgate regulations to implement this new disclosure requirement. Effective September 23, 2016, Part D of Chapter 286 of the Laws of 2016 decreased the source of funding filing threshold for total lobbying expenditures to $15,000, from $50,000, and the minimum contribution amount for disclosing a source to $2,500, from $5,000. Further, it excluded funds received for membership dues, fees and assessments from the contributions that must be disclosed, while continuing to require the donor to be identified as a source.

A Notice of Proposed Rule Making and Emergency Adoption was published in the State Register on September 14, 2016. The Commission received three sets of comments during the public comment period. The comments were from organizations, including membership and non-profit organizations. The comments generally relay four areas of concern with respect to: (1) the potential retroactive effect of Part D's lowered thresholds; (2) the Commission's interpretation of Part D's exclusion of membership dues, fees and assessments from certain disclosure requirements; (3) the definition of "Reportable Amount of Contribution" that carries forward existing language requiring disclosure of all contributions, even those that are not specifically earmarked for lobbying purposes; and (4) the disclosure of in-kind contributions from a 501(c)(3) to a 501(c)(4) organization.

Potential Retroactive Effect of the Lowered Threshold Amounts

The comments expressed two concerns that the proposed regulations purport to regulate prior activity without proper notice; namely, that (1) contributions made prior to September 23, 2016, when the statutory changes to the threshold amounts became effective, could now be disclosed even though the donor, at the time, had no reason to believe the donation would be disclosed; and (2) when reporting is triggered based on either the filer or a source exceeding either of the revised thresholds during the second half of the year, contributions from a source donated during the first half of the year may be disclosed, even though the donor, at the time, had no reason to believe the donation would be disclosed.

The Commission sees the validity of both concerns. As the legislation became effective on September 23, 2016, the Revised Rulemaking amends Sections 938.11(a) and (b) such that the record date for applying the new source of funding reporting thresholds has been reconciled with the effective date of the statutory change, i.e., September 23, 2016.

Membership Dues, Fees and Assessments

Part D established a new exemption from disclosure for membership dues, fees and assessments providing that "the amounts received from each identified source of funding shall not be required to be disclosed if such amounts constitute membership dues, fees, or assessments charged by the reporting entity to enable an individual or entity to be a member of the reporting entity." (Emphasis supplied). Commenters argued that the text of Part D should be interpreted to protect a donating member's identity and personal information, not just the amount they contributed. The Commission disagrees. A plain reading of the statute provides for an exemption of the "amounts received," not the donor's identity.

Reportable Amount of Contribution

The comments expressed a concern that the definition of "Reportable Amount of Contribution" carries forward a substantive error from the current regulations in that it fails to require a reasonable nexus between the donation reported and the filer's lobbying activity. It was suggested that contributions should only be disclosed if they are specifically earmarked for lobbying activities. The Commission continues to reject this proposal. Money is fungible. As the Commission has stated in previous rulemakings, the purpose of the source of funding provisions in PIRA is to provide the public with meaningful information concerning the individuals and entities that provide substantial support to organizations that are engaged in significant lobbying activities in New York. Tying disclosure to the express intent of the donor thwarts this purpose, and has no basis in the statutory language. Rather, the statute focuses on the use of funds by the Client Filer.

501(c)(3) In-kind Contributions to 501(c)(4) Organizations

One set of comments addressed the provisions that relate to in-kind donation of staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources from a 501(c)(3) organization to a 501(c)(4) organization. It was suggested that the scope of any disclosure of such in-kind donations be limited only to donations made for lobbying purposes. The Commission notes that: (1) the proposed regulation, at 938.10, is taken verbatim from the statute; and (2) the rationale articulated in the paragraph above ("Reportable Amount of Contribution") also applies to this provision. As a result, the Commission will not be making any changes to this section. Any resulting required disclosure by 501(c)(3) organizations of its sources will be administered by the Department of Law.

NOTICE OF ADOPTION

Adjudicatory Proceedings and Appeals Procedures for Matters Under the Commission's Jurisdiction

I.D. No. JPE-37-16-00003-A
Filing No. 1109
Filing Date: 2016-12-05
Effective Date: 2016-12-21

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

Action taken: Amendment of Part 941 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(14)

Subject: Adjudicatory proceedings and appeals procedures for matters under the Commission's jurisdiction.

Purpose: To implement legislative changes made to the Commission's adjudicatory proceedings.

Substance of final rule: Part J of Chapter 286, Laws of 2016, effected changes to the adjudicatory proceedings conducted by the Joint Commission on Public Ethics ("Commission"). In particular, Part J, Chapter 286, Laws of 2016 provides persons or entities under investigation by the Commission the right to be heard prior to a final determination by the Commission, and the right to be informed of the alleged violations of law and supporting evidence. This rule implements these changes and provides due process notice to persons and entities subject to the Commission's jurisdiction of the Commission's applicable adjudicatory proceedings.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 941.1, 941.4(b) and 941.8(b).

Text of rule and any required statements and analyses may be obtained from: Michael E. Sande, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: michael.sande@jcope.ny.gov

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

A Revised Regulatory Impact Statement is not submitted with this Notice of Adoption because the revisions made to the proposed rule were not substantive and do not necessitate revision of the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

One entity submitted five comments. The first comment suggested the addition of language to clarify that the Joint Commission on Public Ethics ("Commission") is not responsible for providing or paying the cost of legal representation for respondents in proceedings before the Commission. The Commission omitted this language because there is no question or ambiguity that the Commission bears no legal duty to provide respondents with legal representation. The second comment suggested a small change to the language of Part 941.6(d) for clarification. The Commission considers the proposed language of Part 941.6(d) to be sufficiently clear. The third comment proposed making the use of deposition transcripts at the Commission's hearings to be "subject to the Rules of Evidence." Pursuant to the proposed Part 941, the Rules of Evidence do not apply with respect to any hearings under the Commission's jurisdiction, and therefore this comment was rejected. The fourth comment suggested language regarding requests for the adjournment of a hearing, to clarify that such requests must be made at least five business days before the scheduled hearing date except "for good cause shown." The Commission adopted this suggestion in the proposed Part 941. The fifth comment suggested the provision of a specific effective date. The Commission adopted this suggestion in the proposed Part 941.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition to Submeter Electricity

I.D. No. PSC-51-16-00008-P

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

Proposed Action: The Public Service Commission is considering the petition, filed by 172 Madison Condominium, to submeter electricity at 172 Madison Avenue, New York, New York.

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

Subject: Petition to submeter electricity.

Purpose: To consider the petition of 172 Madison Condominium to submeter electricity at 172 Madison Avenue, New York, New York.

Substance of proposed rule: The Commission is considering the petition, filed by 172 Madison Condominium, on October 17, 2016, to submeter electricity at 172 Madison Avenue, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

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

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

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

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

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

(16-E-0576SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Notice of Intent to Submeter Electricity

I.D. No. PSC-51-16-00009-P

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

Proposed Action: The Public Service Commission is considering the Notice of Intent, filed by 111 Murray Street Condominium, to submeter electricity at 111 Murray Street, New York, New York.

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

Subject: Notice of Intent to submeter electricity.

Purpose: To consider the Notice of Intent of 111 Murray Street Condominium, to submeter electricity at 111 Murray Street, New York, NY.

Substance of proposed rule: The Commission is considering the Notice of Intent, filed by 111 Murray Street Condominium, on October 24, 2016, to submeter electricity at 111 Murray Street, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

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

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

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

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

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

(16-E-0613SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Use of the Aclara KV2c EPS Meter with Silver Spring Network Interface Card 510 in Electric Metering Applications

I.D. No. PSC-51-16-00010-P

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

Proposed Action: The Public Service Commission is considering a petition filed on June 14, 2016, by Aclara Technologies LLC to use the Aclara kV2c EPS meter with the Silver Spring Network Interface Card 510 in electric metering applications.

Statutory authority: Public Service Law, section 67(1)

Subject: Use of the Aclara kV2c EPS meter with Silver Spring Network Interface Card 510 in electric metering applications.

Purpose: To consider use of the Aclara kV2c EPS meter with Silver Spring Network Interface Card 510 in electric metering applications.

Substance of proposed rule: The Public Service Commission is considering a petition filed on June 14, 2016, by Aclara Technologies, LLC to use the Aclara kV2c EPS meter with the Silver Spring Networks Network Interface Card 510, in electric metering applications. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

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

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

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

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

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

(16-E-0366SP1)

Department of Taxation and Finance

EMERGENCY/PROPOSED
RULE MAKING
NO HEARING(S) SCHEDULED

Metropolitan Transportation Business Tax Surcharge

I.D. No. TAF-51-16-00002-EP

Filing No. 1082

Filing Date: 2016-12-02

Effective Date: 2016-12-02

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

Proposed Action: Amendment of section 9-1.2 of Title 20 NYCRR.

Statutory authority: Tax Law, section 171, subdivision First; section 209-B, subdivision First; and L. 2014, ch. 59, part A, section 7

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

Specific reasons underlying the finding of necessity: The Commissioner is required, pursuant to section 209-B(1)(f) of the Tax Law, to annually adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2016. The rate is to be adjusted as necessary to ensure that the receipts attributable to the surcharge will meet and not exceed the financial projections for each state fiscal year, as reflected in the enacted budget for that fiscal year.

This rule is being adopted on an emergency basis in order to have the rates for Tax Year 2017 in place by January 1, 2017, to enable taxpayers to properly estimate the taxes due for Tax Year 2017 and reflect these estimated taxes in their financial statements.

Subject: Metropolitan Transportation Business Tax Surcharge.

Purpose: To provide metropolitan transportation business tax rate for tax year 2017.

Text of emergency/proposed rule: Section 1. Subchapter A of Title 20 of the Codes, Rules and Regulations of the State of New York is amended to add a new subdivision (c) of section 9-1.2 of Part 9 read as follows:

(c) The metropolitan transportation business tax surcharge will be computed at the rate of 28.3 percent of the tax imposed under section 209 of the Tax Law for taxable years beginning on or after January 1, 2017 and before January 1, 2018. The rate used to compute the metropolitan transportation business tax surcharge, as determined by the Commissioner, will remain the same in any succeeding taxable year, unless the Commissioner, pursuant to the authority in paragraph (f) of subdivision (1) of section 209-B of the Tax Law, determines a new rate.

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 1, 2017.

Text of rule and any required statements and analyses may be obtained from: Kathleen D. O'Connell, Tax Regulations Specialist 1, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: Kathleen.OConnell@tax.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 209-B of the Tax Law generally imposes a tax surcharge on every corporation subject to section 209 of the Tax Law, other than a New York S corporation, for the privilege of exercising the corporation's corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the metropolitan commuter transportation district, for all or any part of the corporation's taxable year. Tax Law section 209-B(1)(f) requires the Commissioner to adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2016. The rate is to be adjusted as necessary to ensure that the receipts attributable to the surcharge will meet and not exceed the financial projections for each state fiscal year, as reflected in the enacted budget for that fiscal year.

2. Legislative objectives: New subdivision (c) of section 9-1.2 of Part 9 of 20 NYCRR complies with the mandate of section 209-B(1)(f), setting forth the rate for taxable years beginning on or after January 1, 2017 and before January 1, 2018, and follows subdivision (b), which set the rate for taxable years beginning on or after January 1, 2016 and before January 1, 2017. As required by section 209-B(1)(f), the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner, has computed the metropolitan transportation business tax surcharge, using the state fiscal year 2017-2018 fiscal projections, at the rate of 28.3 percent of the tax imposed under section 209 of the Tax Law for taxable years beginning on or after January 1, 2017 and before January 1, 2018.

3. Needs and benefits: This rule sets forth amendments to the Business Corporation Franchise Tax regulations required by Tax Law section 209-B(1)(f). This rule benefits taxpayers by putting in place the metropolitan transportation business tax surcharge effective January 1, 2017 for Tax Year 2017.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: There is no additional cost or burden to comply with this amendment. There is no additional time period needed for compliance. (b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to make amendments to the New York State Business Corporation Franchise Tax regulations under Article 9-A of the Tax Law arises due to a statutory mandate that the Commissioner adjust the metropolitan transportation business tax surcharge, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule. (c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, Bureau of Tax and Fiscal Studies, Office of Budget and Management Analysis, Management Analysis and Project Services Bureau, and the Division of Budget.

5. Local government mandates: There are no costs or burdens imposed on local governments to comply with this amendment.

6. Paperwork: This rule will not require any new forms.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since section 209-B(1)(f) requires the Commissioner to adjust, under certain circumstances, the metropolitan transportation business tax surcharge, there are no viable alternatives to providing such rate using the methodology prescribed in Tax Law section 209-B.

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

10. Compliance schedule: The required rate information is being made available to regulated parties, by means of the emergency adoption of new subdivision (c) of section 9-1.2 of Part 9 of the Business Corporation Franchise Tax regulations on December 2, 2016, in sufficient time to implement the rate effective January 1, 2017. This rule establishes the rate for the 2017 tax year as an emergency measure and proposes it as a permanent rule.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because the rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or other compliance requirement on small businesses or local governments.

The purpose of the rule is to add a new subdivision (c) to section 9-1.2 of Part 9 of 20 NYCRR, to adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2017 and before January 1, 2018, as required by section 209-B(1)(f) of the Tax Law.

Section 209-B of the Tax Law generally imposes a tax surcharge on every corporation subject to section 209 of the Tax Law, other than a New York S corporation, for the privilege of exercising the corporation's corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the metropolitan commuter transportation district, for all or any part of the corporation's taxable year.

The Commissioner is required, pursuant to section 209-B(1)(f) of the Tax Law, to annually adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2016. The rate is to be adjusted as necessary to ensure that the receipts attributable to the surcharge will meet and not exceed the financial projections for each state fiscal year, as reflected in the enacted budget for that fiscal year.

Subdivision (c) of section 9-1.2 of Part 9 complies with the mandate of Tax Law section 209-B(1)(f), setting forth the rate for taxable years beginning on or after January 1, 2017 and before January 1, 2018, and follows subdivision (b), which set the rate for taxable years beginning on or after January 1, 2016 and before January 1, 2017. As required by Tax Law section 209-B(1)(f), the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner, has computed the metropolitan transportation business tax surcharge, using the state fiscal year 2017-2018 fiscal projections, at the rate of 28.3 percent of the tax imposed under section 209 of the Tax Law for taxable years beginning on or after January 1, 2017 and before January 1, 2018.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because the rule will not impose any adverse impact on any rural areas. The purpose of the rule is to add a new subdivision (c) to section 9-1.2 of Part 9 of 20 NYCRR, to adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2017 and before January 1, 2018, pursuant to section 209-B(1)(f) of the Tax Law.

Section 209-B of the Tax Law generally imposes a tax surcharge on every corporation subject to section 209 of the Tax Law, other than a New York S corporation, for the privilege of exercising the corporation's corporate franchise, or of doing business, or of employing capital, or of

owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the metropolitan commuter transportation district, for all or any part of the corporation's taxable year.

The Commissioner is required, pursuant to section 209-B(1)(f) of the Tax Law, to annually adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2016. The rate is to be adjusted as necessary to ensure that the receipts attributable to the surcharge will meet and not exceed the financial projections for each state fiscal year, as reflected in the enacted budget for that fiscal year.

Subdivision (c) of section 9-1.2 of Part 9 complies with the mandate of Tax Law section 209-B(1)(f), setting forth the rate for taxable years beginning on or after January 1, 2017 and before January 1, 2018, and follows subdivision (b), which set the rate for taxable years beginning on or after January 1, 2016 and before January 1, 2017. As required by Tax Law section 209-B(1)(f), the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner, has computed the metropolitan transportation business tax surcharge, using the state fiscal year 2017-2018 fiscal projections, at the rate of 28.3 percent of the tax imposed under section 209 of the Tax Law for taxable years beginning on or after January 1, 2017 and before January 1, 2018.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that the rule will have no adverse impact on jobs and employment opportunities. The purpose of the rule is to add a new subdivision (c) to section 9-1.2 of Part 9 of 20 NYCRR, to adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2017 and before January 1, 2018, pursuant to section 209-B(1)(f) of the Tax Law.

Section 209-B of the Tax Law generally imposes a tax surcharge on every corporation subject to section 209 of the Tax Law, other than a New York S corporation, for the privilege of exercising the corporation's corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the metropolitan commuter transportation district, for all or any part of the corporation's taxable year.

The Commissioner is required, pursuant to section 209-B(1)(f) of the Tax Law, to annually adjust the rate of the metropolitan transportation business tax surcharge for taxable years beginning on or after January 1, 2016. The rate is to be adjusted as necessary to ensure that the receipts attributable to the surcharge will meet and not exceed the financial projections for each state fiscal year, as reflected in the enacted budget for that fiscal year.

Subdivision (c) of section 9-1.2 of Part 9 complies with the mandate of Tax Law section 209-B(1)(f), setting forth the rate for taxable years beginning on or after January 1, 2017 and before January 1, 2018, and follows subdivision (b), which set the rate for taxable years beginning on or after January 1, 2016 and before January 1, 2017. As required by Tax Law section 209-B(1)(f), the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner, has computed the metropolitan transportation business tax surcharge, using the state fiscal year 2017-2018 fiscal projections, at the rate of 28.3 percent of the tax imposed under section 209 of the Tax Law for taxable years beginning on or after January 1, 2017 and before January 1, 2018.

This rule merely complies with the mandates of section 209-B of the Tax Law, as amended, by adding a new subdivision (c) to section 9-1.2 of Part 9 of 20 NYCRR, setting forth the rate for the metropolitan business transportation tax surcharge for Tax Year 2017.