

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.

Office of Alcoholism and Substance Abuse Services

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Problem Gambling Treatment and Recovery Services

I.D. No. ASA-12-18-00001-RP

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

Proposed Action: Repeal of Part 857; and addition of new Part 857 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 32.01, 32.02 and 32.07

Subject: Problem Gambling Treatment and Recovery Services.

Purpose: Repeals existing gambling regulation; replaces with substantially updated provisions.

Text of revised rule: 14 NYCRR Part 857 is repealed and a new Part 857 is added to read as follows:

PROBLEM GAMBLING TREATMENT AND RECOVERY SERVICES 857.1 Background and intent.

(a) Regulation of compulsive gambling (also known as “gambling disorder” or “problem gambling” as such terms are defined herein) was transferred by statute in 2005 from the Office of Mental Health (OMH) to OASAS.

(b) OASAS is directed to define treatment, develop access to prevention, treatment and recovery services, develop minimum standards for treatment, establish core competencies for treatment professionals and service providers, and educate providers of other addictive disorder treatment and mental health services.

857.2 Legal authority.

(a) Section 19.07(a) of the Mental Hygiene Law charges the Office of Alcoholism and Substance Abuse Services (OASAS or “Office”) with assuring the development of comprehensive plans, programs and services for research, prevention, care, treatment, rehabilitation, education and training related to substance use disorder and compulsive gambling.

(b) Section 19.09 (b) of the Mental Hygiene Law allows the commissioner to adopt regulations necessary and proper to implement any matter under the commissioner’s jurisdiction.

(c) Section 19.20 of the Mental Hygiene Law authorizes the Office to receive and review criminal history information from the Justice Center related to employees or volunteers of treatment facilities certified, licensed or operated by the Office.

(d) Section 19.20-a of the Mental Hygiene Law authorizes the Office to receive and review criminal history information from the Justice Center related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.

(e) Section 32.01 of the Mental Hygiene Law states the commissioner may adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the Mental Hygiene Law.

(f) Section 32.02 of the Mental Hygiene Law states the commissioner may adopt regulations necessary to ensure quality services to those suffering from compulsive gambling.

(g) Section 32.07 of the Mental Hygiene Law states the commissioner may adopt regulations to effectuate the provisions and purposes of article 32 of the Mental Hygiene Law.

857.3 Applicability

(a) The provisions of this Part apply to providers certified and/or funded or otherwise authorized by the Office that:

(1) provide gambling treatment as a secondary diagnosis to a substance use disorder; or

(2) have received a waiver to provide gambling-only treatment services prior to the effective date of this regulation; or

(3) have received a “designation” pursuant to the provisions of this Part to provide gambling only treatment services.

857.4 Definitions

(a) “Addiction disorder” means substance use disorder, as defined in Part 800 of this Title, gambling disorder as defined in the most recent edition of the Diagnostic and Statistical Manual (DSM), or problem gambling as defined in this Part.

(b) “Addiction services” means services delivered by a certified or authorized provider or program for the prevention, treatment and recovery from an addiction disorder.

(c) “Designated program” means an OASAS certified program that has been designated pursuant to the requirements of this Part to provide “gambling-only treatment.”

(d) “Problem gambling” means gambling behavior meeting less than four (4) of the DSM criteria for gambling disorder.

(e) “Gambling treatment” means treatment for gambling disorder or problem gambling as a secondary diagnosis to substance use disorder, or if context indicates, “gambling-only treatment” without a primary diagnosis of substance use disorder.

(f) “Qualified Problem Gambling Professional (QPGP)” means any of the following professionals who can document either a minimum of one year of experience in the treatment and/or clinical research of problem gambling, or have completed a formal training program in the treatment of problem gambling as required by the Office and available on the Office website:

(1) Qualified Health Professional (QHP) as listed in Part 800 of this Chapter; for purposes of this subdivision only such QHP is not required to meet the minimum one year of experience in substance use disorders;

(2) Credentialed Alcoholism and Substance Abuse Counselor with a Gambling designation (CASAC-G);

(3) Credentialed problem gambling counselor (CPGC) who has a current valid credential issued by the Office;

- (4) National Certified Gambling Counselor (Level I and II);
 (5) Board Approved Clinical Consultant who is currently registered as such by the National Council on Problem Gambling;
 (6) Pastoral Counselor certified by the American Association of Pastoral Counselors or is a Fellow of the American Association of Pastoral Counselors.

857.5 Designation to provide gambling-only treatment services

(a) OASAS certified providers seeking to provide gambling-only treatment services must receive authorization pursuant to the requirements of this section.

(b) Designation. (1) Requests for designation to provide gambling-only treatment services shall be in the form of an application submitted to the Bureau of Certification and to the appropriate Regional Office.

(2) Office approval will be based on a review of the written plan addressing the following criteria available on the Office website and including, but not limited to:

- (i) Admission criteria and screening tools;
- (ii) confidentiality;
- (iii) staffing, supervision and staff training;
- (iv) reporting and recordkeeping;
- (v) programming specific to gambling-only treatment services, such as financial counseling and planning; individual, group and family counseling;
- (vi) policies and procedures addressing potential conflicts of interest involving staff with outside employment.

(c) Regulatory compliance. "Designated providers" are subject to all regulations applicable to their operating certificate. If terms of such regulation conflict with corresponding terms of the approved designation plan related to the provision of gambling-only services, the terms of the designation plan and the provisions of this Part applicable to gambling-only services shall govern.

(d) Previous waivers. Providers who have previously received a waiver to provide gambling-only treatment services must apply for designation pursuant to this Part.

857.6 Medicaid/Insurance claims

(a) Third Party Reimbursement.

(1) No Medicaid claim may be submitted by an OASAS program for gambling-only services (addiction services) unless such program has been approved to provide such services and the service has been approved by CMS.

(2) Private insurance may be billed for gambling disorder services.

857.7 General Program Standards

(a) Policies and Procedures. In addition to the policies and procedures required by a program's certification, programs offering gambling treatment (as secondary to SUD or as gambling-only) must develop policies and procedures specific to the level of gambling treatment provided including, but not limited to:

(1) Standards of conduct for staff related to providing clinical treatment, self-help support or any other professional service in another independent program, community and/or private practice setting;

(2) provisions to admit without a full diagnosis for a gambling disorder;

(3) Services must include financial counseling and planning (on site or by referral);

(b) Staffing. (1) Programs providing gambling treatment must have a clinical supervisor and designated counseling staff deemed qualified to provide gambling treatment services. If at any time a program does not meet the staffing requirements the program must immediately report this to their Field Office manager.

(2) Staffing requirements include:

(i) Clinical Supervisor. The Clinical Supervisor must be a Qualified Problem Gambling Professionals (QPGP) as defined in section 857.4 of this Part and be currently acting in a clinical supervisory role. If the Clinical Supervisor is not a QPGP at the time of the application, they must document they are pursuing the requirements and submit proof of completion within one year of application approval. During this time, the direct counseling staff providing gambling treatment must be receiving supervision as approved by OASAS.

(ii) Counselors. Counselors providing direct gambling treatment must be a QPGP.

(iii) Training. All clinical staff should be provided with, and document, training related to gambling disorder and problem gambling.

(iv) Continuing education. Qualified Health Professionals (QHP) as defined in Part 800 of this Chapter, and Pastoral Counselors, must submit documentation of ten (10) hours of advanced clinical problem gambling training every three years.

(c) Admission, initial services, transfers and readmissions. (1) The program must document that the individual is determined to have met the criteria for problem gambling (meets 1-4 criteria of Gambling Disorder) or Gambling Disorder based on the criteria in the most recent version of

the Diagnostic and Statistical Manual (DSM) or the International Classification of Diseases (ICD).

(2) The program must have used a gambling screening tool that has been approved by the Office.

(3) The decision to admit an individual must be made by the clinical supervisor defined in subdivision (b) of this section, and must be documented by such supervisor's dated signature (physical or electronic signature) and include the basis for admitting the patient.

(d) Case Records and Confidentiality. (1) The following must be included in records for patients admitted for gambling treatment: A completed gambling screening tool approved by OASAS;

(2) If admitted for gambling as a secondary diagnosis, patient records can be kept together subject to all federal and state confidentiality laws and regulations. If admitted for gambling-only treatment services, patient records must be kept separate from records for patients receiving substance use disorder treatment.

857.8 Severability

Severability. If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part which can be given effect without the invalid provision or application, and to this end the provisions of this Part are declared to be severable.

Revised rule compared with proposed rule: Substantial revisions were made in sections 857.3(a), 857.5(b), (d), 857.7(b)(2)(iv) and 857.8.

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

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

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

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

An amended Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because the revisions made to the text at the initiative of the Office of Alcoholism and Substance Abuse Services do not affect the overall impact of the proposed rulemaking.

Assessment of Public Comment

The agency received no public comment.

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

Credentialing of Addictions Professionals

I.D. No. ASA-21-18-00025-RP

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

Proposed Action: Repeal of Part 853; addition of new Part 853 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.40, 32.01 and 32.07

Subject: Credentialing of Addictions Professionals.

Purpose: Repeal obsolete rules; update process of credentialing addictions professionals.

Substance of revised rule (Full text is posted at the following State website: www.oasas.ny.gov): The Proposed Rule repeals Part 853 and replaces with a new Part 853 relating to credentialing of addiction professionals. The proposed rule streamlines credentialing regulations to a more accessible page length by posting lists of required coursework on the agency website and consolidating repetitive provisions; clarifies the role of the Credentials Board; adds an option to hold a credential in inactive status for a period of years; clarifies the process of reviewing complaints and subsequent investigations; addresses issues regarding status of credentials during investigation, hearing and penalty processes; updates descriptions of misconduct and ethical violations; and discontinues the gambling counselor credential in the context of staffing changes due to the increase in State Education Department licensed professionals completing the gambling treatment training approved by the Office and the NYS Council on Problem Gambling.

§ 853.1 Legal base. Sets forth the legal basis for the provisions of this Part.

§ 853.2 Applicability. Any person who initiates an application for a new credential or designation, or to renew or re-activate an existing or inactive credential or designation.

§ 853.3 Definitions. Definitions significant to this Part include “active application period,” “approved work setting,” “credentialed professional,” “dual relationship,” “addiction services,” “qualified prevention supervisor,” “renewal period,” “scope of practice” and “staff exclusion list.”

§ 853.4 Credentials Board. Scope and functions of the credentials board consistent with statutory role of advising commissioner on the process of credentialing and representing range of credentialed persons and consumers.

§ 853.5 Minimum qualifications for all credentials. Includes age (18), NY state residency, minimum educational requirements, and criminal history review.

§ 853.6 Credentialing applications. Minimum application criteria for all types or stages (initial, renewal, extension, inactive) of credential applications regarding character evaluations, education and work experience, contact information, fees/fines, and circumstances under which an application may be denied.

§ 853.7 Additional qualifications to become a Credentialed Alcoholism and Substance Abuse Counselor (CASAC) or CASAC-Trainee. Core competencies, education, training and work experience, and examination.

§ 853.8 Additional qualifications to become a Credentialed Prevention Professional (CPP) or Credentialed Prevention Specialist (CPS). Performance domains, education, training and work experience, and examination.

§ 853.9 Additional qualifications to receive a Gambling designation. Requirements for a CASAC, CPP or CPS to acquire an additional “designation”; defines “qualified problem gambling professional”; status of previously credentialed problem gambling counselors (CPGC).

§ 853.10 Issuance and registration of credentials. Date of issue, expiration dates, registry maintained by the Office, and required criminal history information review.

§ 853.11 Credential renewal; inactive status. Requirements and process for renewal; status of expired credentials or inactive status; waivers for active military service.

§ 853.12 Reciprocity. Applicable only to CASAC and CPS credentials; issuance and renewal of credential based on reciprocity.

§ 853.13 Misconduct. All credentialed professionals must abide by the Canon of Ethical Principles or Professional Code and Ethical Standards applicable to their professions as well as the Justice Center’s Code of Conduct for Custodians (when employed). Defines what constitutes misconduct subject to penalties or other remedial actions consistent with statute, scope of practice, and codes of conduct.

§ 853.14 Complaints and investigations. Process for Office receipt and review of complaints; subsequent investigations; relationship to Justice Center investigations; notice provisions.

§ 853.15 Penalties. Options available to the commissioner include administrative reprimand, suspension or revocation, and fines; criteria for consideration of penalty.

§ 853.16 Summary action and other remedial actions. Consistent with statutory authority the commissioner may take summary action to suspend any credential in the interest of public safety and may revoke credentials issued to persons who have been placed on the staff exclusion list. Other remedial actions include dismissal with guidance or annulment of erroneously issued credentials.

§ 853.17 Notifications; right to a hearing. Due process provisions.

§ 853.18 Application following revocation. Criteria to request permission to apply for a new credential after a credential has been revoked; request may not be submitted until five (5) years or more after the effective date of the revocation.

§ 853.19 Canons of Ethical Principles, Ethical Standards, and Code of Conduct. Canons of Ethical Principles applies to CASACS and prevention professionals; Ethical standards applies to Gambling credentials and designations; Code of Conduct is a Justice Center requirement for custodians in OASAS programs.

§ 853.20 Severability. Declares provisions of this Part to be severable.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

Revised rule compared with proposed rule: Substantive revisions were made in sections 853.1(k), 853.3(j)(2), 853.4(a), 853.6 and 853.11(d).

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

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

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

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

An amended Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not

required because the revisions made to the text in response to comments received do not affect the overall impact of the proposed rulemaking.

Assessment of Public Comment

Notice of Proposed Revised Rule Making was published in the New York State Register on May 23, 2018. The Office of Alcoholism and Substance Abuse Services (OASAS) received comments during the public comment period from the NYS Assembly (Assembly Committee on Veterans’ Affairs, Committee on Alcoholism and Drug Abuse, Administrative Regulations Review Commission). OASAS also made one change on its own initiative. Substantive revisions made as a result of these comments require publication of a Revised Proposed Rulemaking.

Concern: 853.11(d). Proposed provision does not account for statutory amendments to Military Law sections 308-a and 308-b related to credentialing of veterans and persons on active military duty.

Response: OASAS amended text to conform to requirements of Military Law so that waivers and pro rata adjustments of certain licensure requirements are no longer at the discretion of the Office. OASAS also added citation in 853.1(k) to Military Law.

Concern: 853.4(a). Proposed text would have permitted no members of the Credentials Board to be consumers or members of the public, inconsistent with a requirement that the Board be representative of the diverse field of addiction services.

Response: OASAS amended text clarifying that the composition of the Credentials Board shall include membership representative of the diverse field of addiction services including at least three members to be consumers or members of the general public.

Concern: 853.6(g). Proposed text removed a fee schedule from regulation and indicated fees would be posted on the OASAS website. SAPA sections 102(2)(a)(i) 102(2)(b) define a “rule” for purposes of public notice to be a fee exceeding \$100 or resulting in an aggregate collection by the agency of more than \$1000.00 annually. Therefore, fees should be included in a proposed regulation.

Response: OASAS returned the fee schedule to the proposed regulation to conform to public notice requirements of statute.

On its own initiative OASAS has added Certified Health Education Specialist to the list of licensed persons who can be considered a “Qualified Prevention Supervisor” in 853.3(j).

No other comments were received related to the Proposed Rulemaking.

State Commission of Correction

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Necessary Age for Admission to an Adult Lockup

I.D. No. CMC-42-18-00001-EP

Filing No. 944

Filing Date: 2018-09-26

Effective Date: 2018-10-01

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

Proposed Action: Amendment of section 7501.1(c) of Title 9 NYCRR.

Statutory authority: Correction Law, section 45(6) and (15)

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

Specific reasons underlying the finding of necessity: On April 10, 2017, Governor Cuomo signed into law what is commonly known as “Raise the Age” legislation (Part W of Chapter 59 of the Laws of 2017), which generally serves to prohibit the detention of 16 and 17 year old offenders in adult correctional facilities, makes substantive changes to the procedures and mechanisms used to process 16 and 17 year old offenders in the criminal and youth justice systems, provides for additional services for youth, and alters the types of detention or placement they may receive.

Specifically, the legislation creates a new category of offender, known as an “adolescent offender,” defined as a person 16 years old (effective October 1, 2018) or 17 years old (effective October 1, 2019) at the time such person is alleged to have committed a felony offense. While an adolescent offender’s case is adjudicated in the Youth Part Court, he or she

may be detained in the newly-created specialized secure juvenile detention facilities for older youth (SSDs).

The legislation generally prohibits the detention of anyone under 17 years of age in an adult lockup, effective October 1, 2018. Consequently, the proposed rulemaking is immediately necessary to conform with the statutory amendments and to provide local governments with the rules necessary to comply with the current legislation.

For the aforementioned reasons, SCOC finds that immediate adoption of the rule is necessary for the preservation of public safety and general welfare, and that compliance with the rulemaking procedures set forth in State Administrative Procedure Act section 202(1) would be contrary to the public interest. By immediately adopting these regulations, SCOC will be able to ensure that individuals under 17 years old are not detained in adult lockups. Given the upcoming statutory deadline, emergency adoption is needed to require timely compliance with the legislation. Thus, SCOC finds that the regulation must be adopted and implemented effective October 1, 2018 on an emergency basis, and compliance with the minimum periods of notice, public comment and other requirements of State Administrative Procedure Act section 202(1) would be contrary to the public interest.

Subject: Necessary age for admission to an adult lockup.

Purpose: To ensure that individuals under 17 years old are not admitted to an adult lockup.

Text of emergency/proposed rule: Subdivision (c) of section 7501.1 of Title 9 NYCRR is amended to read as follows:

(c) Lockup shall mean a place where individuals [16] 17 years of age and over are temporarily detained while awaiting disposition of their cases in the courts, before arraignment in court, or for a brief period after arraignment or sentence while awaiting transfer to another correctional facility. An individual who has not reached his or her [16]17th birthday shall not be detained in any adult lockup except in accordance with section 304.1 of the Family Court Act or section 510.15 of the Criminal Procedure Law.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 24, 2018.

Text of rule and any required statements and analyses may be obtained from: Deborah Slack-Bean, Senior Attorney, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Deborah.Slack-Bean@scoc.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority:

Subsection (6) of section 45 of the Correction Law authorizes the Commission to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all person confined in the correctional facilities of New York State. Subdivision (15) of section 45 of the Correction Law allows the Commission to adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of its functions, powers and duties.

2. Legislative objectives:

By vesting the Commission with this rulemaking authority, the Legislature intended the Commission to maintain minimum age standards for adult lockup admission, which align with statute.

3. Needs and benefits:

On April 10, 2017, Governor Cuomo signed into law what is commonly known as "Raise the Age" legislation (Part WWW of Chapter 59 of the Laws of 2017), which generally serves to prohibit the detention of 16 and 17 year olds in adult correctional facilities, makes substantive changes to the procedures and mechanisms used to process 16 and 17 year old offenders in the criminal and youth justice systems, and allows for additional services for youth and alters the types of detention and/or placement they may receive.

The legislation generally prohibits the detention of anyone under 17 years of age in an adult lockup, effective October 1, 2018. Consequently, the proposed rulemaking is immediately necessary to conform with the statutory amendments and to provide local governments with the rules necessary to comply with the current legislation.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. As set forth above, prohibiting the admission of individuals under the age of 17 to adult lockups was required by recent legislation. Compliance with the proposed rule will not result in any additional costs to county and municipal agencies operating such lockups.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The regulation does not apply to state agencies or governmental bodies. As set forth above in subdivision (a), there would not be any additional costs to local governments.

c. This statement detailing the projected costs of the rule is based upon the Commission's oversight and experience relative to the operation and function of adult lockups.

5. Local government mandates:

The regulation mirrors recent legislation that generally prohibits the admission of an individual under 17 years of age to an adult lockup, effective October 1, 2018.

6. Paperwork:

The rule does not require any additional paperwork on regulated parties.

7. Duplication:

The rule conforms to recent legislation raising the minimum age at which an individual may be admitted to an adult lockup.

8. Alternatives:

Given the statutory amendment prohibiting admission of an individual under 17 years old to an adult lockup, the Commission did not see any alternative to promulgating conforming regulations.

9. Federal standards:

There are no applicable minimum standards of the federal government.

10. Compliance schedule:

Each local jurisdiction is expected to be able to achieve compliance with the proposed rule effective October 1, 2018.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to amend the minimum age at which an individual may be admitted to an adult lockup, in order to comport with "Raise the Age" legislation. Consequently, it will not have an adverse impact on small businesses or local governments, nor impose any additional significant reporting, record keeping, or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to amend the minimum age at which an individual may be admitted to an adult lockup, in order to comport with "Raise the Age" legislation. Consequently, it will not impose an adverse economic impact on rural areas, nor impose any additional significant record keeping, reporting, or other compliance requirements on private or public entities in rural areas.

Job Impact Statement

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to amend the minimum age at which an individual may be admitted to an adult lockup, in order to comport with "Raise the Age" legislation. As such, there will be no impact on jobs and employment opportunities.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Sanitary Condition of Shellfish Lands

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

Filing No. 943

Filing Date: 2018-09-26

Effective Date: 2018-09-26

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

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

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

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

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

Some shellfish growing areas will require reclassification as certified year-round and seasonally uncertified. Recent evaluations of current water quality data also indicate that the bacteriological standards for other shellfish growing areas are being met and those areas can be reclassified as certified year-round or seasonally uncertified for the harvest of shellfish. Technical changes are also needed to clarify descriptions for enforcement purposes, to correct inconsistent spellings of similar names and to remove unnecessary ordinal indicators in the description of closure dates.

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

Subject: Sanitary Condition of Shellfish Lands.

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

Text of emergency rule: Clause 41.2(b)(1)(ii)(‘e’) is amended to read as follows:

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

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

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

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

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

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

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

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

(‘a’) During the period May [15th] 1 through [October 15th]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ENV-21-18-00028-P, Issue of May 23, 2018. The emergency rule will expire November 24, 2018.

Text of rule and any required statements and analyses may be obtained from: Matthew Richards, NYS Department of Environmental Conservation, 205 N. Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0491, email: matt.richards@dec.ny.gov

Additional matter required by statute: Pursuant to Article 8 of the Environmental Conservation Law, the State Environmental Quality Review Act and Title 6 Part 617.5, this action is listed as Type II and no further review is required.

Regulatory Impact Statement

1. Statutory authority:

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

2. Legislative objectives:

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

3. Needs and benefits:

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

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

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

and the ability to make use of a natural resource readily available to the public.

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

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

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

4. Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The department cannot provide an estimate of potential lost income to shellfish harvesters when areas are classified as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

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

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

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

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

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

5. Local government mandates:

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

6. Paperwork:

No new paperwork is required.

7. Duplication:

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

8. Alternatives:

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

9. Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides

guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary, but participating states agree to follow NSSP water quality standards. Each state adopts its own regulations to implement a shellfish sanitation program consistent with the NSSP. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA, including removal of the state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's shellfish products from interstate commerce.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

As of December 31, 2017, there were 1,727 licensed shellfish diggers in New York State for the year 2017. The numbers of permits issued for areas in the State are as follows: Town of Babylon, 49; Town of Brookhaven, 274; Town of East Hampton, 242; Town of Hempstead, 111; Town of Huntington, 152; Town of Islip, 132; Town of North Hempstead, 7; Town of Oyster Bay, 107; Town of Riverhead, 75; Town of Shelter Island, 55; Town of Smithtown, 40; Town of Southampton, 175; Town of Southold, 258; New York City, 41; and Other, 9.

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

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

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

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

2. Compliance requirements:

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

3. Professional services:

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

4. Compliance costs:

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

5. Economic and technological feasibility:

There is no reporting, recordkeeping, or affirmative actions that small businesses or local governments must undertake to comply with the proposed rules. Similarly, small businesses and local governments will not

have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with this rule.

6. Minimizing adverse impact:

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

7. Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the department, is comprised of representatives of local baymen's associations, shellfish shippers and local town officials. Through their representatives, shellfish harvesters and shippers can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, state legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rulemaking. The department will consider any such comments prior to filing a Notice of Adoption with the Department of State.

8. Cure period or other opportunity for ameliorative action:

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

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

The rule will be reviewed in three years.

Rural Area Flexibility Analysis

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

Job Impact Statement

1. Nature of impact:

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

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

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

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

2. Categories and numbers affected:

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

3. Regions of adverse impact:

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

4. Minimizing adverse impact:

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

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

5. Self-employment opportunities:

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

Assessment of Public Comment

The agency received no public comment.

Section 98.6(a)(1), (7), (b)(1)(ii) and (2) are amended to specify that the reserve methodology specific to varying premium term life insurance policies may only be applied for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected subject to the conditions set forth in section 98.6(a)(1)(iii).

Section 98.7(b)(1)(iv) and (v) are amended to specify that mortality improvement for universal life insurance policies that guarantee coverage will remain in force as long as the accumulation of premiums paid satisfies the secondary guarantee requirement may only be recognized for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected.

Section 98.9(c)(2)(viii)(b)(2) and (e) are amended to specify that the lapse rate assumption of no more than two percent for the first five years, followed by a rate of no more than one percent for the remaining life of the contract for universal life insurance policies that guarantee coverage will remain in force as long as the accumulation of premiums paid satisfies the secondary guarantee requirement may only be assumed for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected subject to the conditions set forth in section 98.9(c)(2)(viii)(b)(2)(iii).

Section 100.6(a)(2), (3), (7) and (8) are amended to specify that mortality improvement for varying premium term life insurance policies may only be recognized for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected.

Section 100.11(a), (b) and (c) are amended to specify that mortality improvement for varying premium term life insurance policies may only be recognized for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected subject to the conditions set forth in section 100.11(b).

Section 100.12(a), (b) and (c) are amended to specify that mortality improvement for universal life insurance policies that guarantee coverage will remain in force as long as the accumulation of premiums paid satisfies the secondary guarantee requirement may only be recognized for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected subject to the conditions set forth in section 100.12(b).

Text of proposed rule and any required statements and analyses may be obtained from: Amanda Fenwick, New York State Department of Financial Services, One Commerce Plaza, Albany, New York 12257, (518) 474-7929, email: amanda.fenwick@dfs.ny.gov

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

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

Consensus Rule Making Determination

This proposed consolidated rulemaking modifies current Insurance Regulations 147 and 179 to specify that two prior amendments to the regulations (i.e., the Fifth and Sixth Amendments to Insurance Regulation 147 and the Third and Fourth Amendments to Insurance Regulation 179) shall only apply to policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 with written notification provided to the Superintendent by December 31, 2018. The proposed concurrent amendments to Insurance Regulations 147 and 179 allow insurers to apply these two prior amendments, if optionally elected, for one additional year of policy issues. Legislation impacting minimum reserve standards has been under consideration by the Legislature. If the legislation is enacted and no extension is provided, insurers may be subjected to updating their reserve procedures in consecutive years. With this extension, insurers are granted the additional time necessary for updating administrative and valuation systems prior to these possible forthcoming changes to minimum reserve standards.

The Department of Financial Services had implemented the Fifth and Sixth Amendments to Insurance Regulation 147 and the Third and Fourth Amendments to Insurance Regulation 179 to reflect the emerging mortality experience that had significantly improved since the implementation of the 2001 CSO Mortality Table. The mortality improvement included in those amendments is no longer needed because the improvement is directly incorporated into the 2017 CSO table, which was adopted in the most recent amendment to the regulations (i.e., the Seventh Amendment to Regulation 147 and Fifth Amendment to Regulation 179). Allowing the Fifth and Sixth Amendments to Insurance Regulation 147 and the Third and Fourth Amendments to Insurance Regulation 179 to co-exist with the adoption of the 2017 CSO Mortality Table would, in essence, cause double counting of the mortality improvement. As such, the proposed concurrent amendments to Insurance Regulations 147 and 179 are not expected to have a material impact on the minimum reserve standards or costs to consumers. For this reason, no person or entity is likely to object to the adoption of this rulemaking.

Department of Financial Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Valuation of Life Insurance Reserves; Recognition of the 2001 CSO Mortality Table and the 2017 CSO Mortality Table, et al

I.D. No. DFS-42-18-00003-P

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

Proposed Action: This is a consensus rule making to amend Parts 98 (Regulation 147) and 100 (Regulation 179) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 302; Insurance Law, sections 301, 1304, 1308, 4217, 4218, 4221, 4224, 4240 and 4517

Subject: Valuation of Life Insurance Reserves; Recognition of the 2001 CSO Mortality Table and the 2017 CSO Mortality Table, et al.

Purpose: To recognize mortality improvement for applicable policies issued prior to 1/1/2019 if optionally elected.

Substance of proposed rule (Full text is posted at the following State website: <https://www.dfs.ny.gov/insurance/rproindx.htm>): Section 98.4(b)(5)(ii), (iii) and (vii)(b)(2) are amended to specify that mortality improvement for varying premium term life insurance policies and universal life insurance policies that guarantee coverage will remain in force as long as the accumulation of premiums paid satisfies the secondary guarantee requirement may only be recognized for policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 if optionally elected.

Accordingly, this rulemaking is determined to be a consensus rulemaking, as defined in State Administrative Procedure Act (“SAPA”) § 102(11), and is proposed pursuant to SAPA § 202(1)(b)(i). Therefore, this rulemaking is exempt from the requirement to file a Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, or a Rural Area Flexibility Analysis.

Job Impact Statement

The proposed amendments to Insurance Regulations 147 and 179 should have no impact on jobs and employment opportunities. The amendments modify current Insurance Regulations 147 and 179 to specify that two prior amendments to the regulations (i.e., the Fifth and Sixth Amendments to Regulation 147 and the Third and Fourth Amendments to Regulation 179) shall only apply to policies issued on or after January 1, 2015 and prior to January 1, 2017, or on or after January 1, 2015 and prior to January 1, 2019 with written notification provided to the Superintendent by December 31, 2018. The proposed concurrent amendments to Insurance Regulations 147 and 179 allow insurers to apply these two prior amendments, if optionally elected, for one additional year of policy issues. Insurers should not need to hire additional employees or independent contractors to comply with these amendments.

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Permit Greater Purse-to-Price Ratio in Thoroughbred Claiming Races

I.D. No. SGC-42-18-00015-P

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

Proposed Action: Amendment of section 4038.2 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1) and (19)

Subject: Permit greater purse-to-price ratio in Thoroughbred claiming races.

Purpose: To advance the best interests of Thoroughbred racing and protect the safety of the race horses.

Text of proposed rule: Section 4038.2 of 9 NYCRR would be amended, as follows:

§ 4038.2. Minimum price for claim.

The minimum price for which a horse may be entered in a claiming race shall not be less than 50 percent of the value of the purse for the race, *unless the commission approves a request from an association for a lower minimum price for all or a portion of a race meeting. The commission shall not approve such a request unless such association has implemented increased measures to ensure close examination of the competitiveness, soundness and safety of each horse entered in such race.*

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3332, email: gamingrules@gaming.ny.gov

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

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

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: The New York State Gaming Commission (“Commission”) is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law (“Racing Law”) Sections 103(2) and 104 (1, 19). Under Section 103(2), the Commission is responsible for supervising, regulating and administering all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities.

2. Legislative objectives: To advance the best interests of Thoroughbred racing and protect the safety of the race horses.

3. Needs and benefits. This rule making proposes to allow an increase in the ratio of the purse to the claiming price in appropriate circumstances in Thoroughbred claiming races.

The current rule requires that the claiming price, the price at which a horse entered in a claiming race may be purchased by another owner, shall not be less than 50 percent of the purse a horse could win. This limitation was adopted in 2012. At the time, an increase in claiming-race purses at Aqueduct Racetrack had caused an increase in racing injuries and horse fatalities, as trainers more freely entered horses in the hope of winning an unusually high purse for the class of horse. The limitation reduced the incentive of an owner or trainer to enter a potentially lame or uncompetitive horse in a claiming race.

The proposal would allow a Thoroughbred racetrack operator, with the approval of the Commission, to depart from this limitation under certain circumstances. The Commission has added the requirement that its approval to depart from the limitation will not be granted unless the track implements enhanced measures to ensure close examination of the competitiveness, soundness and safety of each horse in such races.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: The amendment will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendment will not add any new costs. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: N/A.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel Thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: No relevant rules or other legal requirements of the state and/or federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered and rejected not adding this exception to the current rules. The proposed rule changes were drafted in consideration of the improvements made to Thoroughbred horse safety since 2012 and in consultation with NYRA.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas or jobs.

The proposed amendment is a revision to the Commission’s Thoroughbred racing rules to enhance the ability of racetracks to fill claiming races by offering a competitive purse that causes the claiming price to be less than 50 percent of the value of the purse for the race.

This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Durable Medical Equipment; Medical/Surgical Supplies; Orthotic and Prosthetic Appliances; Orthopedic Footwear

I.D. No. HLT-42-18-00006-P

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

Proposed Action: Amendment of section 505.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 363-a(2); Public Health Law, section 201(1)(v)

Subject: Durable Medical Equipment; Medical/Surgical Supplies; Orthotic and Prosthetic Appliances; Orthopedic Footwear.

Purpose: To amend the Department's regulation governing Medicaid coverage of orthopedic footwear and compression and support stockings.

Text of proposed rule: Paragraph (4) of subdivision (a) of section 505.5 is amended to read as follows:

(4) Orthopedic footwear means shoes, shoe modifications, or shoe additions which are used [as follows: in the treatment of children,] to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; [in the treatment of children,] or to support a weak or deformed structure of the ankle or foot [; as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace]. Orthopedic shoes must have, at a minimum, the following features:

Subdivision (g) of section 505.5 is amended to read as follows:

(g) Benefit limitations. The department shall establish defined benefit limits for certain Medicaid services as part of its Medicaid State Plan. The department shall not allow exceptions to defined benefit limitations. The department has established defined benefit limits on [the following services: (1) Compression and surgical stockings are limited to coverage during pregnancy and for venous stasis ulcers.

(2) Orthopedic footwear is limited to coverage in the treatment of children to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; in the treatment of children to support a weak or deformed structure of the ankle or foot; as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace.

(3) *enteral nutritional formulas*. Enteral nutritional formulas are limited to coverage for:

[(i)] (1) tube-fed individuals who cannot chew or swallow food and must obtain nutrition through formula via tube;

[(ii)] (2) individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means;

[(iii)] (3) children under age 21 when caloric and dietary nutrients from food cannot be absorbed or metabolized; and

[(iv)] (4) persons with a diagnosis of HIV infection, AIDS, or HIV-related illness, or other disease or condition, who are oral-fed and who:

[(a)] (i) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 18.5 as defined by the Centers for Disease Control, up to 1,000 calories per day; or

[(b)] (ii) require supplemental nutrition, demonstrate documented compliance with an appropriate medical and nutritional plan of care, and have a body mass index under 22 as defined by the Centers for Disease Control and a documented, unintentional weight loss of five percent or more within the previous six month period, up to 1,000 calories per day; or

[(c)] (iii) require total nutritional support, have a permanent structural limitation that prevents the chewing of food, and the placement of a feeding tube is medically contraindicated.

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

Social Services Law ("SSL") § 363-a(2) and Public Health Law § 201(1)(v) empower the Department to adopt regulations, not inconsistent with law, necessary to implement the State's Medical Assistance ("Medicaid") program.

Legislative Objectives:

The proposed regulations would amend the Department's regulations governing Medicaid coverage of orthopedic footwear and compression and support stockings (collectively referred to as "compression stockings") consistent with recent judicial case law: the permanent injunction order in the federal class action, *Davis et al. v. Shah* ("Davis"), W.D.N.Y.

(12-CV-6134-CJS-MWP, July 1, 2016.). The proposed regulations are thus consistent with the Legislature's objective in enacting the statutory authority for the State's Medicaid program.

Needs and Benefits:

The proposed regulations are necessary to align the Department's regulations to the July 1, 2016, permanent injunction order in *Davis*.

Prior to April 2011, the Medicaid program covered orthopedic footwear for any physical deformity, range of motion malfunction, or foot or ankle weakness. It also covered compression stockings to treat clinically significant medical conditions, such as open wounds, and complications in pregnancy as well as for relatively less serious purposes, such as circulatory improvement and wound prevention.

As part of the Medicaid Redesign Team initiatives adopted in April 2011, the Legislature limited the Medicaid program's coverage of orthopedic footwear and compression stockings. Under the new State law, Medicaid payment for these items could be made only for orthopedic footwear and compression stockings furnished to Medicaid recipients who had certain specified medical conditions or diagnoses. Orthopedic footwear was covered only when used as an integral part of a lower limb orthotic appliance, as part of a diabetic treatment plan, or to address growth and development problems in children. [Social Services Law ("SSL") § 365-a(2)(g)(iii)]. Compression stockings were covered only for pregnancy or treatment of venous stasis ulcers. [SSL § 365-a(2)(g)(iv)]. The Department adopted conforming amendments to its Medicaid regulations at 18 NYCRR § 505.5.

The Legislature adopted the benefit limitations on orthopedic footwear and compression stockings during a period of State and national fiscal crisis. It was felt that the State must establish priorities for Medicaid coverage, particularly with regard to optional Medicaid services, such as orthopedic footwear and compression stockings, that federal law permits, but does not require, states to include in their Medicaid programs. Accordingly, the Legislature determined to give priority, in the allocation of public Medicaid monies, to the intensive medical needs of recipients with serious medical conditions, including children; pregnant women; and persons afflicted with serious conditions such as venous stasis ulcers and complications related to diabetes. A consequence of these benefit limits, however, was that Medicaid recipients with non-covered medical conditions or diagnoses could no longer obtain these items through Medicaid, even when these items were medically necessary for their particular conditions or diagnoses.

In 2012, a proposed class of Medicaid recipients sued in *Davis* to overturn the 2011 benefit limitations as violating various provisions of the federal Medicaid Act and the Americans with Disabilities Act. In January 2013, the federal district court certified the case as a class action and, in December 2013, permanently enjoined the Department from enforcing the new State law and regulations. In March 2016, the U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling that the State's benefit limits violated the Medicaid Act's comparability provisions (requiring that any services to any categorically needy recipient are not less in amount, duration and scope than services available to any categorically or medically needy recipients), while remanding the matter to the district court for further proceedings. (*Davis et al. v. Shah*, 821 F.3d. 231). The district court's July 1, 2016 order permanently enjoins the Department from enforcing the benefit limits on orthopedic shoes and compression stockings set forth in SSL § 365-a(2)(g)(iii) and (iv) and in 18 NYCRR § 505.5. The Department is further directed to make necessary amendments to such regulations consistent with the July 1, 2016, permanent injunction order.

The proposed regulations would amend the Department's regulations governing reimbursement for orthopedic footwear and compression stockings consistent with the court-ordered July 1, 2016, permanent injunction in *Davis*.

Costs:

Costs to Regulated Parties:

Regulated parties include enrolled providers that actively bill the Medicaid program for orthopedic footwear and enrolled providers that actively bill the Medicaid program for compression stockings. The proposed regulations would not affect these providers' costs. During the approximately 20 months that the Department applied these benefit limits (April 2011 to December 2013), these Medicaid providers could not claim Medicaid reimbursement for orthopedic footwear and compression stockings sought by Medicaid recipients with non-covered conditions or diagnoses. However, after the district court enjoined the Department's enforcement of these benefit limits in December 2013, Medicaid providers were able to resume claiming for orthopedic shoes and compression stockings pursuant to the standards in effect prior to April 2011.

Costs to State Government:

The proposed regulations will not affect the State's share of Medicaid costs. They merely amend the Department's regulations so that these regulations are consistent with the federal district court's July 1, 2016,

permanent injunction order in Davis. In April 2011, when the benefit limits were adopted, it was anticipated that State share Medicaid savings would be approximately \$14.6 million for State Fiscal Year 2011-12. However, the Department has not realized such savings since on or about December 2013, when the federal district court first enjoined the Department from enforcing the benefit limits.

Costs to Local Government:

Social services districts would not incur any additional expense as a result of the proposed regulations. State law limits the amount that districts must pay for Medicaid services provided to district recipients.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed regulations do not impose any mandates on social services districts or any other unit of local government.

Paperwork:

The proposed regulations do not impose any reporting or paperwork requirements.

Duplication:

The proposed regulations do not duplicate any existing federal, state or local regulations.

Alternatives:

There are no alternatives to the proposed regulations. The Department's regulations governing orthopedic shoes and compression stockings must be consistent with the district court's permanent injunction in Davis.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

Regulated parties will be able to comply with the regulations when they become effective.

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, recordkeeping or other compliance requirements on small businesses or local governments.

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, recordkeeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed 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 regulations, that they would not have a substantial adverse impact on jobs and employment opportunities.

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

Stroke Services

I.D. No. HLT-42-18-00007-P

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

Proposed Action: Addition of section 405.34 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Stroke Services.

Purpose: NYS criteria for stroke center designation as part of an accrediting process for certification by nationally recognized accrediting agencies.

Text of proposed rule: Pursuant to the authority vested in the Public Health and Health Planning Council and subject to the approval of the Commissioner of Health by Section 2803 of the Public Health Law, a new Section 405.34 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby added, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 405.34 Stroke services.

(a) *Definitions.* The following terms when used in this section shall have the following meanings:

(1) "Stroke patient" means a patient exhibiting the signs and symptoms of a suspected stroke.

(2) "Certifying organization" means an accrediting organization ap-

proved by The Centers for Medicare and Medicaid Services (CMS), that has applied to the Department and has been approved by the Department to certify that a hospital meets the criteria to provide advanced stroke care.

(3) "Certified stroke center" means a general hospital that has successfully completed a stroke center certification with a certifying organization.

(4) "Designated stroke center" means a certified stroke center approved by the Department to operate as a designated stroke center under this section.

(b) *General Provisions.*

(1) General hospitals may choose to participate in the designated stroke center program under this section.

(2) Only a certified stroke center may apply for stroke center designation from the Department.

(3) No hospital shall hold itself out to the public as having a stroke center designation unless it has a stroke center designation under this section.

(c) *Certifying Organization Application.* Accrediting organizations may apply, in a format determined by the Department, to be approved as certifying organizations. Upon review of the application, the Department may approve certifying organizations to perform stroke center certification.

(d) *Stroke Center Designation.* Hospitals seeking stroke center designation shall:

(1) Obtain and maintain continuous stroke center certification from a certifying organization. The Department may participate in any onsite visits conducted by the certifying organization during certification and recertification.

(2) Submit an application to the Department with a copy of the certifying organization's certification and supporting documents. When determining whether to approve a certified stroke center as a designated stroke center, the Department may take other criteria into consideration, including but not limited to investigations by federal or state oversight agencies.

(e) *Issuing Authority.* The Department shall make the final determination on all applications for stroke center designation. The Department shall provide written notification to a hospital when an application for a stroke center designation is approved. If an application for stroke center designation is denied, the Department shall provide written notification and a rationale for the denial, and shall allow additional opportunities for the hospital to apply for a stroke center designation.

(f) *Withdrawal of Stroke Center Designation.*

(1) The Department may withdraw a hospital's stroke center designation upon notice to a designated stroke center if:

(i) The designated stroke center does not comply with state or federal regulations relating to stroke centers.

(ii) The designated stroke center fails to comply with its certifying organization's certification requirements and certification lapses.

(iii) The designated stroke center requests withdrawal of stroke center designation.

(2) Before withdrawing a stroke center designation pursuant to subdivision (f)(1)(i) or (ii) of this section, the Department shall provide the designated stroke center with a written notice containing a statement of deficiencies. If the designated stroke center fails to adopt a plan of correction acceptable to the Department within thirty (30) days, the Department may withdraw the hospital's stroke center designation.

(3) If a hospital no longer maintains stroke center designation, the hospital shall immediately notify affected parties and provide the Department with a written plan describing specific measures it has taken to alter its arrangements and protocols under subdivision (i) of this section within thirty (30) days of a withdrawal of stroke center designation.

(g) *Transition Period.*

(1) Hospitals designated as stroke centers by the Department prior to the effective date of this section shall have two years from the effective date of this section to initiate the stroke center certification process with a certifying organization approved by the Department. The process is initiated when a hospital enters into a contractual agreement with a certifying organization. Once the hospital has entered into a contractual agreement with a certifying organization, the hospital shall have one year to complete the certification process.

(2) Any hospital that does not initiate the stroke center certification process with a certifying organization within two years of the effective date of this section shall no longer maintain a stroke center designation and may no longer hold themselves out as a designated stroke center.

(h) *Coordination Agreement.* Designated stroke centers shall communicate and coordinate with one another to ensure appropriate access to care for stroke patients, in accordance with a written coordination agreement. The Department may issue guidance to specify the provisions of coordination agreements. Designated stroke centers shall have policies

and procedures in place for timely transfer and receipt of stroke patients to and from other hospitals consistent with section 405.19 of this Part. Transport of stroke patients to the appropriate receiving hospital shall be in accordance with State Emergency Medical Advisory Committee (SEMAG) approved EMS protocols developed and adopted pursuant to subdivision two of section 3002-a of the Public Health Law.

(i) *Emergency Medical Services Providers; Assessment and Transportation of Stroke Patients to Designated Stroke Centers.* Designated stroke centers shall work with Emergency Medical Services agencies to ensure that stroke center destination protocols are consistent with protocols adopted by the State Emergency Medical Advisory Committee, the State Emergency Medical Services Council (SEMSCO), the Regional Emergency Medical Advisory Committee (REMAC), and the Regional Emergency Medical Services Council (REMSCO).

(j) *The Department shall maintain and post on its public web page a list of designated stroke centers. The Department shall notify the State EMS advisory bodies and EMS regions via established communication networks whenever there is a change to a hospital stroke center designation, including but not limited to a new designation or a withdrawal of designation.*

(k) *Reporting of Data and Quality of Care Initiatives.*

(1) *Each designated stroke center shall submit data, as requested by the Department, that shall be sufficient to determine the performance of the hospital and the system of care on at least an annual basis and in a format determined by the Department.*

(2) *The Department shall define the data elements to be reported.*

(3) *Each designated stroke center shall conduct stroke quality improvement activities including, but not limited to:*

(i) *evaluation of the quality and appropriateness of care provided;*

(ii) *participation in regional and statewide quality improvement activities, including but not limited to activities conducted by the Regional Emergency Medical Advisory Committee, consistent with section 3006 of the Public Health Law;*

(iii) *analysis of data to identify opportunities for improvement; and*

(iv) *integration of these activities with the hospital's quality assurance program, as required by section 405.6 of this Part.*

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

PHL Section 2803 authorizes the Public Health and Health Planning Council ("PHHPC") to adopt rules and regulations 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 objectives of PHL Article 28 include the protection of the health of the residents of the State by promoting the efficient provision and proper utilization of high quality health services at a reasonable cost.

Needs and Benefits:

This proposed regulation will create a tiered voluntary stroke designation program and stroke system of care for hospitals in New York State.

Stroke, also known as brain attack, is a medical emergency. It occurs when a vessel in the brain is either ruptured (hemorrhagic stroke) or blocked by a clot (ischemic stroke), arresting the blood supply to the brain. Stroke is a deadly condition, and it is the fifth leading cause of death and a major cause of disability in the United States. Each year, about 795,000 people in the United States develop a stroke, producing an enormous economic and healthcare burden. It is estimated that there are almost three million survivors of stroke living with a long-term disability in the United States, with a societal cost of approximately \$34 billion.

Since stroke treatment is complex and time sensitive, advanced hospital care is crucial. Evidence has shown that a standardized approach to hospital care for patients with acute stroke improves outcomes by increasing survival and minimizing disability.

The current New York State Department of Health (NYSDOH) stroke designation program began as a demonstration pilot program in select areas of the state in 2002 and was later expanded in 2004 to the entire state. The designation program is voluntary. Since 2004, NYSDOH has only recognized one level of stroke center designation: The Primary Stroke Center. As of June 2018, there are 120 designated Primary Stroke Centers among 213 hospitals in New York State. According to the Centers for Disease Control, New York State has the second lowest stroke mortality rate

in the United States, demonstrating the success of the current program. NYSDOH data shows that the mortality rate (risk-adjusted, 30-day, all cause) for stroke patients is lower in Primary Stroke Centers versus non-designated hospitals (13.76 vs. 16.08 deaths per 100 admissions).

Stroke care guidelines and clinical evidence have evolved, and these stroke regulations align with the latest guidelines to ensure patients continue receiving high quality advanced stroke care. A consensus statement from the Brain Attack Coalition in 2005 cited evidence that integration of a new level of stroke center, called a Comprehensive Stroke Center, into stroke systems of care would likely improve outcomes of patients who require these services. Nationally recognized accrediting organizations began certifying Comprehensive Stroke Centers in 2012. In 2015, the American Heart Association issued a Class 1A recommendation for endovascular therapy for eligible ischemic stroke patients with large vessel occlusion, and recommended that access to endovascular therapy should be incorporated into stroke systems of care. Because the current NYSDOH stroke designation program has remained static, some NYS hospitals have sought Comprehensive Stroke Center certification from outside organizations.

The current NYSDOH stroke center designation program requires interested hospitals to submit an application demonstrating that they meet or exceed a set of 14 criteria that are based on "The Brain Attack Coalition Guidelines for Primary Stroke Centers," originally published in the Journal of the American Medical Association in 2000 and updated in 2011. The application is then reviewed by the Office of Quality and Patient Safety (OQPS) in NYSDOH, and an on-site evaluation is done by a nurse and a medical director from NYSDOH at no charge to the applying hospital. Once the hospital passes all requirements, the NYSDOH designates the hospital as a New York State Primary Stroke Center.

Representatives from the NYSDOH began engaging stakeholders and soliciting comments and feedback internally and externally in the fall of 2017 from the following affected parties: Healthcare Association of New York State, Regional stroke coordinators from hospitals across the state, Stroke Advisory Committee, Greater New York Hospital Association, Iroquois Healthcare, American College of Physicians, The Medical Society of the State of New York, The Joint Commission/American Heart Association, DNV GL Healthcare, the Healthcare Facilities Accreditation Program, the Center for Improvement in Healthcare Quality, South Carolina stroke designation program, Fire Department of NY, Fort Drum Regional Health Planning Organization, and the State Emergency Medical Services Council (SEMSCO). The input received was the impetus for the proposed regulation.

This proposed regulation will create a tiered voluntary stroke designation program and stroke system of care for hospitals in New York State. During the transition period, EMS should continue to operate within their existing framework and per their protocols.

NYSDOH will designate nationally recognized accrediting organizations to certify the ability of hospitals to provide care to stroke patients. Currently, Primary, Thrombectomy Capable or Comprehensive levels are among levels of programs certified by nationally recognized certifying organizations. Certifying organizations will be required to adhere to evidence-based standards provided by the Department.

The regulation also gives the NYSDOH the authority to withdraw designation from a hospital for non-compliance and the failure to maintain or adhere to criteria for stroke designation. Pursuant to the proposed regulations, NYSDOH will continue to collect data and require stroke centers to maintain quality improvement efforts.

With this regulation, the NYSDOH will leverage the experience and resources of the certifying organizations and improve the quality of stroke care, using a multi-tiered system of stroke care that aligns with the latest evidence.

Costs:

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

The proposed regulation will create costs for hospitals seeking stroke center designation. The certifying organizations each charge a fee for stroke certification, which includes the following services: a consultation visit, onsite survey, ongoing monitoring, data collection and reporting to NYSDOH. The cost of certification for hospitals varies by organization, and by level of stroke center certification, but ranges from \$2,500 - 55,000 every two years. However, the proposed regulation does not require hospitals to be fully accredited by the accreditation organization to receive stroke center designation. Instead, the proposed regulation only requires hospitals to be certified by the accreditation organization for their disease-specific stroke program. This provision makes the stroke certification costs significantly less expensive than acquiring a full hospital accreditation.

A hospital may also incur infrastructure and staffing costs associated with meeting certification requirements. Stroke center designation could increase the volume of patients that a hospital receives, and consequently revenue, since patients are transported to designated stroke centers by

EMS agencies, and community awareness of stroke center designation may increase patient self-referral.

Costs to Local and State Government:

The proposed regulations are not expected to impose any costs upon local or state governments. If a hospital operated by a State or local government chooses to apply to become a designated stroke center, it would have the same costs as hospitals that are not operated by a State or local government.

Costs to the Department of Health:

There will be little to no additional costs to the Department associated with the proposed regulations. The Department will monitor the certifying organizations and will supervise the stroke designation process with existing staff.

Local Government Mandates:

There are no local government mandates.

Paperwork:

Hospitals that participate in the stroke designation program must enter into a contractual agreement with an accreditation organization to initiate the stroke center certification process. Certified stroke centers applying for stroke center designation must submit an application to the Department.

Each hospital with stroke center designation will be required to submit data electronically for performance measurement.

Duplication:

These regulations do not duplicate any State or Federal rules, since there are no existing stroke regulations.

Alternative Approaches:

The Department could continue the existing stroke designation program. However, proposed regulations will ensure access to the highest standard of evidence-based care for stroke patients in New York.

Federal Requirements:

Currently there are no federal requirements regarding the stroke regulation.

Compliance Schedule:

These regulations will take effect upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

Only general hospitals may apply to become a designated stroke center. There are no general hospitals in NYS that are classified as a small business. There are several hospitals run by local governments. There is a total of six hospitals operated by NYS counties.

Compliance Requirements:

The stroke designation program is a voluntary program, so there is no mandate for a hospital to participate. Those choosing to apply for stroke center designation will be expected to comply with NYSDOH stroke center requirements and certifying agency standards. These standards include maintenance of a stroke log and registry as well as reporting requirements for performance measures.

Professional Services:

A hospital choosing to participate in the stroke designation program will be required to receive certification from a nationally recognized accrediting organization with stroke center certifying authority.

Compliance Costs:

The proposed regulation will create costs for hospitals seeking stroke center designation. The certifying organizations each charge a fee for stroke certification, which includes the following services: a consultation visit, onsite survey, ongoing monitoring, data collection and reporting to NYSDOH. The cost of certification for hospitals varies by organization, and by level of stroke center certification, but ranges from \$2,500 - 55,000 every two years.

Economic and Technological Feasibility:

This regulation establishes a voluntary stroke designation program, and as such there is no mandate for compliance. Hospitals seeking stroke center designation shall have the resources, both economic and technological to meet requirements and standards of the program.

Minimizing Adverse Impact:

This regulation will not have any adverse economic impact on small businesses or local governments. Hospitals with stroke center designation will preferentially receive suspected stroke patients from EMS providers, increasing volume and having a positive economic impact.

Small Business and Local Government Participation:

NYSDOH has included various stakeholders in the development of this regulation, including general hospitals run by local governments through in person presentations and hospital association engagement.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to § 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendments will not impose an adverse impact on facilities in rural areas, and will not impose any significant new reporting, record keeping or other compliance requirements on facilities in rural areas.

Job Impact Statement

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

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

Office-Based Surgery Practice Reports

I.D. No. HLT-42-18-00008-P

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

Proposed Action: Amendment of Part 1000 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 230-d(5)

Subject: Office-Based Surgery Practice Reports.

Purpose: Requires accredited Office-Based Surgery practices to submit adverse event and practice information which includes procedural data.

Text of proposed rule: The title of Chapter IX is amended to read as follows:

Chapter IX [Physician Profiling] *Private Practice Reporting*

The title of Part 1000 is amended to read as follows:

Part 1000 [Physician Profiles] *Private Practice Reports*

A new title Subpart 1000-1 is added and the section numbers of the sections in the existing Part 1000 are amended to read as follows:

Subpart 1000-1 Physician Profiles

Sec.

[1000.1] *1000-1.1* Definitions.

[1000.2] *1000-1.2* Criminal convictions.

[1000.3] *1000-1.3* Malpractice awards, judgments and settlements.

[1000.4] *1000-1.4* Collection of initial profile information.

[1000.5] *1000-1.5* Updating self-reported information.

Paragraph (4) of subdivision (a) of section 1000-1.3 is amended to read as follows:

(4) place(s) of each award, judgment or settlement as specified by the department in accordance with section [1000.1(f)] *1000-1.1(f)* of this [Part] *Subpart*; and

Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 1000-1.3 is amended to read as follows:

(b) Additional clinical information provided by a physician must be received by the department postmarked within 30 days of the date of the letter transmitting the physician's medical malpractice review copy as specified in section [1000.4(c)] *1000-1.4(c)* of this [Part] *Subpart*. Requests for an extension of the 30-day period will be considered only if they: ...

Subdivision (c) of section 1000-1.4 is amended to read as follows:

(c) Subsequent to receiving the physician's review copy, if returned within the time frame required by subdivision (b) of this section, the department will provide to the physician a copy of any medical malpractice information in the form to be used for public dissemination, hereafter referred to as the medical malpractice review copy. Physicians shall correct any factual inaccuracies on the medical malpractice review copy and return it to the department postmarked within 10 days of the date of the letter transmitting the medical malpractice review copy to the physician, or, in the instance where the physician has two or fewer medical malpractice settlements over the most recent 10-year period and opts to access the panel review process, shall provide additional factual clinical information pursuant to section [1000.3(b)(2)(ii)] *1000-1.3(b)(2)(ii)* of this [Part] *Subpart*. If the physician does not respond in accordance with the timeframes set forth in this subdivision, the department will publicly disseminate the physician's medical malpractice information provided on the medical malpractice review copy.

A new Subpart 1000-2 and new sections 1000-2.1 and 1000-2.2 are added to read as follows:

Subpart 1000-2 Office-Based Surgery Practice Reports

Section 1000-2.1 Definitions. Words or phrases defined in Public Health Law § 230(d) shall have the same meanings in this Subpart.

Section 1000-2.2 Office-Based Surgery Reporting. Licensees shall submit data deemed necessary by the Department for the interpretation of adverse events. Data shall be submitted in a format specified by the Department. Such data shall include, but shall not be limited to:

(a) Practice and procedural information reporting. Licensee practices shall report practice and procedural information data for the interpretation of adverse events in a form and format specified by the Department and on a schedule determined by the Department. The data reporting schedule, not to exceed twice per year, shall be made available to licensee practices. The data to be reported shall include, but shall not be limited

to: practice identifiers, types of procedures, and number of each type of procedure performed in office-based surgery practices.

(b) *Adverse event reporting.* Licensee practices shall report adverse events as required by Public Health Law § 230(d). Adverse event reports shall be submitted to the Department in a form and format specified by Department. The data to be reported shall include, but shall not be limited to: when the event occurred, where the event occurred, the nature of the event, and the identity of the individuals involved in the event.

(c) *Reporting of additional data.* Licensee practices shall report additional data deemed necessary by the Department for the interpretation of adverse events, as specified by the Department.

(d) *The Department may use the data gathered under this part to develop and implement guidelines and criteria for quality improvement pursuant to section 2998-e of the Public Health Law.*

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

Section 230-d(4)(b) of the Public Health Law (PHL) authorizes the New York State Department of Health (Department) to require licensees who perform office-based surgery (OBS) to report data, such as procedural information as needed for the interpretation of adverse events.

Section 230-d(5) of the Public Health Law authorizes the Commissioner of Health to adopt rules and regulations to effectuate the purposes of section 230-d, under which the Department oversees OBS practices.

Legislative Objectives:

The Legislature's objective in enacting PHL § 230(d)(4)(b) was to provide the Department with more information about the number and types of procedures, complications sustained and other quality indicators occurring in OBS practices other than that derived from reported adverse event data, in order to provide context to the adverse event reports and to permit the Department to better assess the quality of care provided in OBS practices.

Current Requirements:

Pursuant to PHL §§ 230-d and § 2998(e), OBS practices must report adverse events and suspected health care disease transmission originating in their practices. OBS practices are not currently required to report general practice and procedure information. Guidance on current reporting requirements for OBS practices is provided on the Department's website but currently there are no applicable regulations.

Needs and Benefits:

PHL § 230(d)(4)(a) requires Office Based Surgery (OBS) practices to report adverse events to the Department within three business days of such adverse event, and PHL § 230(d)(4)(b) authorizes the Department to require licensees to report additional data such as procedural information as needed for the interpretation of adverse events. The Department is currently lacking a framework for understanding the quality of the care that is being provided in OBS practices, because the only data currently reported to the Department are adverse events.

The proposed regulations would require OBS practices to report the number and types of procedures that are performed by OBS practices. This will assist the Department in determining whether quality of care issues exist in certain OBS practices, or with specific types of procedures. This information is important to provide context to the adverse event reports and allow comparison of adverse event report rates to national benchmarks and rates from other settings. For example, ambulatory surgery centers and other health care facilities licensed under PHL Article 28. In addition, this information will assist with the accomplishment of the Department's responsibilities related to ensuring patient safety. For example, the Department will be able to better assess the quality of an OBS practice if the Department knows the total number of procedures performed by the practice. The Department can currently ascertain the number of adverse events (numerator), but the Department needs to know the total number of procedures (denominator) to assess overall quality of care.

Additionally, the proposed changes would allow the Department to request additional information as needed to interpret adverse events. In the event the Department identifies a trend or opportunities for quality improvement through the collection of data, the proposed regulations would allow the Department to develop and implement guidelines and/or criteria for quality improvement related to the issues identified.

COSTS:

Costs to Private Regulated Parties:

The proposed regulation will result in minimal costs to OBS practices. Costs may include: maintaining a database to be able to report procedural information (if a database is not already maintained by the practice); staff time for completing practice reports; and the purchase of reference materials for determining applicable procedure codes to be reported to the Department, though no-cost reference materials are available on the internet.

Costs to Local Government:

The Department is not aware of any OBS practices operated by local governments.

Costs to the Department of Health:

The proposed regulations will require the Department to facilitate additional data collection, to maintain additional datasets and to perform additional data analyses. The Department intends to perform these functions with existing staff.

Costs to Other State Agencies:

There are no OBS practices operated by other State agencies.

Local Government Mandate:

The proposed regulations impose no new mandates on any county, city, town or village government.

Paperwork:

The proposed regulations will require OBS practices to report additional data to the Department under PHL § 230(d)(4)(b) as described above. The reporting will be electronic; no paper reports will be required.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

An alternative considered by the Department was to continue without adopting regulations that mandate OBS practice reporting of practice and procedural information. However, this would hinder the Department's ability to enforce PHL § 230(d), which obligates the Department to collect information about the scope of adverse events in the context of all procedures performed in OBS settings. The Department recognizes the importance of ensuring patient safety and quality of care and it has determined that regulations are necessary to implement section 230-d.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the Federal government.

Compliance Schedule:

The proposed regulation will take effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

The proposed regulations will apply to all Office Based Surgery (OBS) practices in New York State. This proposal will not impact local governments or small business unless they operate such OBS practices. Although the Department doesn't track the size of OBS practices, the agency understands that many will be small businesses under the definition of the State Administrative Procedure Act (SAPA). In such case, the flexibility afforded by the regulations is expected to minimize any costs of compliance as described below.

Compliance Requirements:

This regulatory amendment would require OBS practices to report the number and types of office based surgical procedures performed by such practices.

Professional Services:

This proposal is not expected to require any additional use of professional services.

Compliance Costs:

The proposed regulation will result in minimal costs to OBS practices that are small businesses. Costs may include: maintaining a database to be able to report procedural information (if a database is not already maintained by the practice); staff time for completing practice reports; and the purchase of reference materials for determining applicable procedure codes to be reported to the Department, though no-cost reference materials are available on the internet.

Economic and Technological Feasibility:

This proposal is economically and technically feasible. The costs associated with reporting procedural information not more than twice per year will not place an undue burden on OBS practices and many practices already maintain databases containing the information required by this regulation.

Minimizing Adverse Impact:

The impact of this proposal is expected to be minimal. This proposal will require minimal staff time to report procedural information as the proposal requires a reporting frequency of no more than twice per year, many practices have established methods of collecting and maintaining the information requested by the proposal, and the required information will be submitted using the Department's pre-existing Health Commerce System available to all prescribing providers in NYS at no cost.

Small Business and Local Government Participation:
 The Department engaged the following entities prior to and during the development of this proposed regulation: The Medical Society of the State of New York (MSSNY), The New York State Society of Plastic Surgeons, the New York Chapter of the American College of Physicians and the OBS Advisory Committee, which is comprised of clinicians actively involved in OBS practices. These entities are generally in support of the proposed regulation.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:
 This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<http://quickfacts.census.gov>). Approximately 22.4% of Office Based Surgery (OBS) practices are located in rural areas.

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

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

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

There are 206 OBS practices in rural areas.
 Reporting, Recordkeeping, Other Compliance Requirements and Professional Services:
 Any impact is minimal, as this proposal can be incorporated into existing processes, and is not expected to substantially increase administrative burden or require additional use of professional services upon OBS practices as many practices already maintain the information requested by the proposed regulations in existing databases.

Costs:
 The proposed regulation will result in minimal costs to OBS practices in rural areas. Costs may include: maintaining a database to be able to report procedural information (if a database is not already maintained by the practice); staff time for completing practice reports; and the purchase of reference materials for determining applicable procedure codes to be reported to the Department, though no-cost reference materials are available on the internet.

Minimizing Adverse Impact:
 The impact of this proposal is expected to be minimal. This proposal will require minimal staff time to report procedural information as the proposal requires a reporting frequency of no more than twice per year, many practices have established methods of collecting and maintaining the information requested by the proposal, and the required information will be submitted using the Department's pre-existing Health Commerce System available to all prescribing providers in NYS at no cost.

Rural Area Participation:
 The proposed regulation will have a 60-day public comment period.

Job Impact Statement

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. No adverse impact on jobs and

employment opportunities is expected as a result of these proposed regulations.

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

Emergency Medical Services (EMS) Initial Certification Eligibility Requirements

I.D. No. HLT-04-18-00010-RP

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

Proposed Action: Amendment of sections 800.6 and 800.12 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3002

Subject: Emergency Medical Services (EMS) Initial Certification Eligibility Requirements.

Purpose: To reduce the EMS certification eligibility minimum age from 18 to 17 years of age.

Text of revised rule: Section 800.6(b) is amended to read as follows:
 (b) be at least [18] 17 years of age prior to the last day of the month in which he/she is scheduled to take the written certification examination for the course in which they are enrolled, except that an applicant for certified first responder must be at least 16 years of age prior to the last day of the month in which he/she is scheduled to take the written certification examination;

Section 800.12(b)(8) is amended as follows:

(8) be at least [18] 17 years of age.

Revised rule compared with proposed rule: Substantive revisions were made in section 800.12(b)(8).

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

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

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

Revised Regulatory Impact Statement

Statutory Authority:

Article 30 of the Public Health Law, section 3002 (2) grants the New York State EMS Council (SEMSCO) the power, by an affirmative vote of a majority of those present, subject to approval by the commissioner, to enact and, from time to time, amend and repeal rules and regulations establishing minimum standards for ambulance services, ambulance service certification, advanced life support first response services, the provision of prehospital emergency medical care, public education, the development of a statewide emergency medical services system, the provision of ambulance services outside the primary territory specified in the ambulance services' certificate and the training, examination, and certification of certified first responders, emergency medical technicians, and advanced emergency medical technicians; provided, however, that such minimum standards must be consistent with the staffing standards established by section 3005-a of the Public Health Law.

Legislative Objectives:

The legislative objective of PHL Article 30 includes establishing minimum standards for ambulance services and to promote appropriate staffing standards for the provision of EMS care.

Needs and Benefits:

At present, there is a dearth of individuals participating in the EMS system across the state. In order to be a Certified First Responder (CFR), an individual must be at least 16 years of age. However, this level of certification does not meet the minimum staffing requirements for the transport of a patient in an ambulance. Approximately 2% of all certified EMS providers in New York State are under the age of twenty (20). Lowering the minimum age for initial EMT certification to 17 would enable high school age individuals who are currently in school to be certified through structured, school based programs and complete the certification process prior to graduating. At present, the age requirement of 18 precludes many students from being certified before graduation. There may be employment and volunteer opportunities for people who are 17 years old who complete the training and achieve initial EMT certification. These opportunities will now be available to those people who are 17 years old and certified in another state.

Costs:

Costs to Regulated Parties:

The rule does not impose any new compliance costs on regulated parties.

Costs to the Agency and to the State and Local Governments Including this Agency:

The rule does not impose any new compliance costs to the Agency, the State or Local Governments.

Local Government Mandates:

This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

Paperwork:

The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties.

Duplication:

There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

Alternatives:

The alternative is to maintain the current regulatory requirement that an individual must be eighteen (18) years of age prior to the last day of the month in which he/she is scheduled to take the written certification examination for the course in which they are enrolled. As stated above, this requirement precludes many students from being certified before graduation.

Federal Standards:

The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

Compliance Schedule:

The amendment will take effect when the Notice of Adoption is published in the State Register.

Revised Regulatory Flexibility Analysis

No regulatory flexibility analysis is required. 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. At present the regulations require an individual to be eighteen (18) years of age prior to the last day of the month in which he/she is scheduled to take the written certification examination for the course in which they are enrolled. This proposed amendment would reduce the minimum age to seventeen (17) years of age in order to enable training programs to be offered in high schools and BOCES programs so that young people would be able to work or volunteer as EMS providers. This proposed amendment would also allow for those persons who are 17 years old and certified in another state to receive reciprocity.

Revised Rural Area Flexibility Analysis and Job Impact Statement

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

Assessment of Public Comment

Public comments were submitted to the NYS Department of Health (Department) in response the proposed addition to Title 10 NYCRR Part 800.6. These comments and the Department's responses are summarized below:

COMMENT: The Department received two (2) comments that raised concerns regarding the lowering of the minimum age for certification as an emergency medical technician (EMT) from 18 to 17 years of age. The commenters raised concerns over the maturity of 17-year-old persons and their competence to act as an EMT. Specifically, a commenter raised concerns as to whether a minor (17 years old) can legally administer medication, invoke consent, or fill out relevant documents associated with their duties as EMTs.

RESPONSE: Changing the minimum age for certification as an EMT, from 18 to 17 years of age, will allow more potential new EMS providers to complete the requirements for initial certification while they are still enrolled in high school. The Department believes that the training and certification requirements will prepare EMTs to sufficiently carry out the duties of an EMT, including administering medication, invoking consent, and completing all relevant paperwork associated with performing their duties.

EMS agencies are free to adopt rules governing the age of their members or employees, so long as those rules are in compliance with State and Federal laws and regulations. Any EMS agency employing an EMT who is 17 years-of-age would be required to comply with the laws governing the employment of minors in NYS.

COMMENT: The Department received eight (8) comments in support of the proposed regulations including from the County of Wyoming Fire/EMS Coordinator, the chief Emergency officer for Pioneer High School, and the New York American College of Emergency Physicians.

RESPONSE: The Department acknowledges the letters of support.

COMMENT: The Department received a comment in support of the proposed regulation from Assembly Members Richard Gottfried and Dan Quart. Additionally, the Assembly Members proposed that an additional

revision to 10 NYCRR 800.12(b)(8) should be made for consistency. Currently, 10 NYCRR 800.12(b)(8) requires that a candidate for reciprocal certification as an EMT must be at least 18 years of age. They recommend that the Department also amend that minimum age limit to 17 years of age.

RESPONSE: The Department agrees and will seek to amend 10 NYCRR 800.12(b)(8) to reflect the new minimum age requirement.

Division of Homeland Security and Emergency Services

NOTICE OF ADOPTION

New York State Volunteer Firefighter Enhanced Cancer Disability Benefits Program

I.D. No. HES-25-18-00001-A

Filing No. 948

Filing Date: 2018-10-02

Effective Date: 2018-10-17

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

Action taken: Addition of Part 210 to Title 9 NYCRR.

Statutory authority: General Municipal Law, section 205-cc

Subject: Volunteer Firefighter Enhanced Cancer Disability Benefits Program.

Purpose: Establish claims process for eligible volunteer firefighters with certain cancers to receive disability and death benefits.

Text or summary was published in the June 20, 2018 issue of the Register, I.D. No. HES-25-18-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kenneth Bruno, Deputy Counsel, Division of Homeland Security and Emergency Services, 1220 Washington Avenue, Building 7A, Albany, New York 12226, (518) 474-6746, email: Kenneth.Bruno@DHSES.NY.GOV

Additional matter required by statute: Incorporation By Reference Certification.

Initial Review of Rule

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

Assessment of Public Comment

This assessment responds to the comments received on the draft regulations for Part 210 of Title 9 of the New York Codes, Rules and Regulations (NYCRR) which were published in the State Register on June 20, 2018.

On May 20, 2018, the Division of Homeland Security and Emergency Services adopted and released for public comment draft regulations relating to the New York State Volunteer Firefighter Enhanced Cancer Disability Benefits Act pursuant to Chapter 334 of the Laws of 2017. No public hearings were conducted related to the regulations. The Public Comment period ended on August 18, 2018.

In total the Division received 5 comments on the regulations via email and U.S. Mail.

The Division processed every comment and all comments received equal consideration. The comments received were from a NYS county fire coordinator, a former NYS firefighter of 52 years, a fire district located in the Capitol District area and two New York statewide fire associations.

This Assessment of Public Comment (APC) presents and responds to all of the comments on the proposed regulations.

Comment 1. "With regard to the subject NYS Volunteer Firefighter Enhanced Cancer Disability Benefits Program, Section 210.8(b) & (c) (Annual Reports), I offer the following view and comment:

The annual roster of interior firefighters to be reported to the OFPC should be copied to the office of County Fire Coordinators annually and (b), and "the information related to interior firefighters and applicable training available to be made to fire districts, departments, or companies upon request" (c) should also be made available to the county fire coordinator.

The Coordinators are a routine point of contact and information for local AHJs and others and are integral both to the assessment of local firefighting resources and in determination of training needs in concert with OFPC and its respective officers. These proposed regulations will provide a valuable data component in validating and strengthening the mutual aid and related training programs that the Coordinators are charged with, and have responsibilities for, under NYS County Law, Article 5, Section 225-a.

Response 1. Training information is currently provided to County Fire Coordinators, upon request. Further, the interior firefighter roster information collected by OFPC will be made available, consistent with the Freedom of Information Law, Public Officers Law Article 6.

Comment 2. "As mentioned in my telephone conversation with you on 08/01/18 with regard to coverage of Volunteer Fire Department members not mandating a 01/01/19 status as an Interior Firefighter.

The proposed regulations follow the law carefully and I have no recommendations for changes.

I would, however, find a way to verify that the "rumored" requirement be debunked. It might be as simple as stating that in the draft of the regulations."

Response 2. The law and the regulations clearly define the eligibility requirements for receipt of the benefit, and neither requires that the firefighter be an interior firefighter as of January 1, 2019.

Comment 3. The comments and questions which follow were developed after a review of the Part 201 of Title 9 of the New York State Codes, Rules and Regulations:

1. Section 210.3(a)(3) requires "Successful completion of a firefighter physical examination prior to commencement of duties as an interior firefighter, which failed to reveal evidence of cancer..."

Many of the District firefighters who otherwise meet the definition for eligibility for the benefit joined, and were designated as interior firefighters, prior to the requirement of having a physical examination. A strict interpretation of this section of regulation would seem to make these firefighters ineligible for this benefit, even if they meet all of the other requirements of this section. The Board suggests that this be changed to require successful completion of a firefighter physical examination in conjunction with the required five annual fit tests that failed to reveal evidence of cancer.

Similar concerns regarding this language may be found in Section 210.4(c)(6), Section 210.6(d)(4). It is felt that this language, especially in Section 201.6(d)(4) could have a negative impact on many firefighters who joined the department, and became interior firefighters, before physical examinations were commonplace."

Response 3.1 The requirement for fit tests and the physical examination/questionnaire has been in place for the last twenty (20) years (OSHA 29 CFR 1910.134). OFPC is aware that many fire departments did not require physical examinations upon a firefighter's entry into the fire service. The regulations allow documentation establishing successful completion of the physical examination prior to commencement of duties as an interior firefighter as sufficient to comport with the intent of the law.

2. The requirement within Section 201.3(a)(3) that physical examination failed to reveal evidence of cancer is problematic.

Many of the types of cancer covered by the Enhanced Cancer Disability Benefits would only be uncovered through advanced testing techniques not considered part of the initial or annual firefighter physical examination, such as colonoscopies, and would not be found through the normal questions posed by our District's physicians, who are in fact qualified to conduct OSHA approved fit testing and related commercial physicals. Will this type of screening be sufficient to "reveal evidence of cancer"?

Response 3.2 The law requires that a firefighter have proof of a physical examination, prior to performing duties as an interior firefighter, that failed to reveal cancer. The physical examination questionnaire required by 29 CFR 1910.134 is an objective means to ascertain this eligibility requirement.

3. Section 210.2(j) states that the physical examination "shall include the completion of the mandatory OSHA Respiratory Medical Evaluation Questionnaire contained in 29 CFR 1910.134, Appendix C".

Are alternatives to this questionnaire permitted to be used: if the alternative contains all the information of the questionnaire identified at a minimum?

Are benefits not available to the firefighter if the specified questionnaire is not used (small fire companies may use physicians that are unaware of the OSHA questionnaire)?

If changes are made to begin use of the OSHA questionnaire, or an alternative, after the January 1, 2019 implementation date, does that delay the availability of benefits until 5 annual physicals, and fit tests, have been completed using this questionnaire?

Response 3.3 See Response 3.1 and 3.2 above. Currently there is no alternative to the questionnaire that is permitted. If the physical and fit tests are conducted after January 1, 2019 then the firefighter would not

qualify for the benefit until 5 annual fit tests have been successfully completed, notwithstanding other eligibility requirements, established by this regulation.

4. Section 210.2(j) defines "Physical Examination", but makes no mention of "revealing evidence of cancer", as required in Section 210.3(a)(3).

It is quite possible firefighters have had a physical examination with no information collected to determine whether there is evidence of cancer. It is unclear whether this would disqualify them for coverage under this benefit.

Response 3.4 The law requires that the physical examination "failed to reveal any evidence of cancers...". The regulation requires successful completion of a physical examination prior to the commencement of duties as an interior firefighter, which failed to reveal evidence of cancer.

5. Section 210.4(c), concerning Documentation, requires "This form must be signed by the head of the department or company, ..."

- There is no definition of "head of the department or company".

- The District recommends that the form be signed by the head of the Authority Having Jurisdiction (AHJ). The AHJ is responsible for setting or approving the standards that interior firefighters in the organization(s) must meet to be an interior firefighter within their jurisdiction, designating or approving the interior firefighters for their organization(s) in their jurisdiction, and obtaining and maintaining the disability insurance coverage for the eligible firefighters within their jurisdiction. Further, the AHJ is required to maintain the medical records of the firefighters in their jurisdiction in a safe and secure place, to protect the firefighters Protected Health Information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA).

If the item above is approved, the "head" of the AHJ would still need to be defined.

Response 3.5 The Law places the obligation on the fire district, department or company to provide and maintain the coverage for its eligible firefighters. The certification of eligibility form is required to be submitted by the head of the fire district, department or company as it is that entity that will possess the required information related to the eligible interior firefighter. OFPC finds that there is no need for further definition or clarification.

6. Section 210.6(a)(2) states "The benefit provider shall have the right and opportunity to examine the person of the eligible volunteer firefighter when and as often as the benefit provider may reasonably require during the pendency of claim and also the right and opportunity to make an autopsy in case of death where it is not prohibited by law."

While the Board understands that such examinations are a normal part of the disability claims process, it is felt limitations or some appeal process to the number and frequency of such examinations should exist to allow the firefighter to focus on their recovery from the disease.

The Board is also concerned about the "right and opportunity" afforded the benefit provider to make an autopsy of a firefighter. There may be religious, or other objections to having an autopsy required. Further, Section 210.5(b)(4) provides that "... a death benefit is payable "upon acceptable proof by a board-certified physician that the firefighter's death resulted from complications associated with cancer." It seems that if a board-certified physician provides such proof, it would be sufficient to substantiate the claim, and negate the need for an autopsy, unless requested by the firefighter's beneficiary(ies).

The language in Section 210.5(b)(4) is " ... complications from cancer." This does not reference the covered cancers identified in Section 210.2(d), and should be clarified to do so if that is the intent.

It is not clear how the benefit provider would use information from an autopsy or examination of a firefighter diagnosed with an eligible cancer. From the Board's review of Section 210.6 it does not appear that these "rights and opportunities" are relevant to consideration of approval or denial of a claim.

Response 3.6 The regulation provides, rather than requires, that the benefit provider has the right to make an autopsy in the case of a death. However, the benefit provider may accept the board-certified physician certification that the firefighter's death was from complications associated with cancer. The covered cancers are clearly defined in both the law and the regulations.

7. Section 210.8 requires an annual report to the Office of Fire Prevention and Control, by "no later than December 1, 2019, and annually thereafter".

- The disability coverage goes into effect January 1, 2019. However, Section 210.2(k) defines the "Reporting Year" to be December 1st through November 30th. Does this mean that the first reporting year will only contain eleven (11) months of information?

Response 3.7 The first reporting year will be eleven months. The December 1st date was chosen to enable OFPC to have time to collect the information and prepare its annual report to the Governor and Legislature by the January 1st deadline.

8. Section 210.8 further states that the annual report is to collect infor-

mation on “the claims and benefits payments for the reporting year using forms prescribed by the office of fire prevention and control”.

- As identified in # 5 above, the first reporting period appears to be less than one year. The Board is unsure if this is an issue, but wants to point out this inconsistency.

- The Board assumes that such reporting forms will not require the reporting of a firefighters PHI. If such information is required, the reporting entity would need to obtain, and maintain, authorizations from firefighters, or their beneficiaries, to release such information. Further, guidance would need to be provided to ensure this information is protected at all times, from collection, through transmission and in the Office of Fire Prevention and Control files.

Response 3.8 The reporting forms will not require the disclosure of any personal information pertaining to individual firefighters.

9. Section 210.8(a)(l) requires that the Annual Claims Report”... must be signed by the head of the department or company, ...”.

In most cases, the AHJ will be the entity that has secured, or self-insured, the insurance coverage for this benefit, and therefore would either maintain the records on any claims if selfinsured or would get an annual statement from the insurance carrier for such coverage as well as having received information when a determination on a claim is made. The Board recommends that the Annual Claims Report be signed by the head of the AHJ, after having been properly defined as previously stated in # 4 above.

Response 3.9 The regulations require the head of the department or company to sign the annual claims report because that entity will have access to information on the firefighter(s) and claim(s) filed

10. The regulations are not clear as to whether the evidence of cancer must be revealed as part of the firefighter physical examination to be eligible for benefits. If the cancer was not revealed during the firefighter physical, either upon joining or annually thereafter, but was diagnosed by the firefighter’s personal physician at some other time, would the firefighter be eligible for benefits?

Response 3.10 See Response 3.4 above. The law and regulations require that the required physical examination prior to the commencement of duties as an interior firefighter failed to reveal any evidence of cancers

11. The emergency / proposed rulemaking does not define pre-existing conditions, and how cancer diagnosed prior to January 1, 2019 may, or may not be covered. Several scenarios are envisioned that need clarification within the regulations:

- The rulemaking does not define whether an otherwise eligible firefighter who may have had a covered cancer prior to the enactment of the statute authorizing the disability coverage, which was in remission as of January 1, 2019, and then re-occurred at some date in the future would be eligible for coverage upon the re-occurrence of the cancer.

- The regulations also do not address whether coverage is available should firefighter have a diagnosis for one type of covered cancer prior to January 1, 2019 and is diagnosed with a second form of covered cancer after January 1, 2019. For example, if the firefighter was diagnosed with melanoma prior to January 1, 2019, and then found to have cancer affecting the digestive system after the enactment date, would the firefighter be eligible for benefits under the benefits?

The Board feels this situation must be addressed in the final rulemaking.

Response 3.11 See Response 3.4 and 3.10 above.

The Board recommends that the regulations provide further clarification on eligibility of firefighters who may no longer be interior firefighters (i.e.; they have not received clearance as an interior firefighter as part of an annual firefighter physical and they are not designated as an interior firefighter by the AHJ), but remain an active volunteer firefighter as defined by Part 210.2(b). In most fire companies there is a significant cohort of firefighters that have many years of interior firefighting experience, with documented fit testing meeting the five-year standard, but who no longer serve as an interior firefighter, although remain active firefighters. These may include individuals that may be solely apparatus drivers, exterior firefighters or fire police, all vital functions in the volunteer fire service. In discussion among the members of the Board regarding the proposed rulemaking, there was a great deal of disagreement about whether these individuals were eligible for coverage. If such disagreement exists, it should be corrected in the final rulemaking.

Response 3.12 The law and regulations require the physical examination and five years of interior firefighting service as necessary elements of the benefit eligibility. Eligibility extends for 60 months after the firefighter is no longer an active volunteer firefighter.

Comment 4. The Executive Board of the Directors of the Association (intentionally redacted) has requested that I submit comments in its behalf with regard to the above purposed rulemaking by your agency.

The following is the identifying information for the proposed rulemaking published on June 20, 2018 on which the Association would like to comment:

DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES;

EMERGENCY PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED
NEW YORK STATE VOLUNTEER FIREFIGHTER ENHANCED
CANCER DISABILITY BENEFITS PROGRAM
I.D. NO. HES-25-18-00001-EP
FILING NO. 511
FILING DATE: 2018-05-30
EFFECTIVE DATE: 2018-05-30
PURSUANT TO THE PROVISIONS OF THE STATE ADMINISTRATIVE
PROCEDURE ACT, NOTICE IS HEREBY GIVEN OF THE FOLLOWING ACTION:

PROPOSED ACTION: ADDITION OF PART 210 TO TITLE 9 NYCRR.

STATUTORY AUTHORITY: GENERAL MUNICIPAL LAW, SECTION 205-CC

The regulations drafted by the Office of Fire Prevention and Control [“OFPC”] provide for procedures to be implemented in order to give effect to the Volunteer Firefighter Enhanced Cancer Disability Benefit Insurance Program provided for under General Municipal Law § 205- cc. The statute provides a method for determining the eligibility for benefits for active volunteer firefighters who were assigned duties as interior structural firefighters and faithfully performed those duties for at least five years.

The statute and the proposed regulations both utilize the result of an entry level physical examination conducted on the firefighter prior to such service which did not reveal a cancer and proof of the firefighter completing five annual mask fit tests.

The statute and regulations anticipate that all volunteer fire departments and fire companies or the jurisdiction having authority would have performed the entry level physical examinations and the mask fit tests and have in their position records as proof of same.

What procedure should be followed if the volunteer fire departments and fire companies and the jurisdiction having authority either failed to conduct the exam or fit tests on a particular firefighter or are unable to local records related to the examination and fit tests?

No one is questioning that each volunteer fire department and fire company should conduct entry level and periodic physical examinations of candidates to become or continue to serve as interior structural firefighters and that annual mask fit tests should be conducted, but if there is a past defect in procedure or currently missing records, the present officials that must sign the certification provided for under the proposed 9 NYCRR 210.4 are placed in a very difficult position.

We would ask that officials be permitted to sign a certification in which they rely upon other records in the absence of the record of the entry level physical examination and/or the records of annual mask fit tests in order to submit the required certification that the volunteer firefighter did in fact provide “five or more years of faithful and actual service in the protection of life and property from fire in the interior of buildings.” An entry level physical examination report may not be available, but a more recent periodic physical examination report that did not detect cancer may be available. Fit testing records may not be available, but attendance records may be available which establish interior firefighting service. We are asking that officials that must file the certification be given more discretion so that deserving firefighters are not denied benefits.

We are requesting consideration of the following amendments

9 NYCRR 210.3

Eligibility

(a) A volunteer firefighter must meet the following criteria to be eligible for enhanced cancer disability benefits:

(1) Five or more years of faithful and actual firefighting service as an interior firefighter;

(2) Has submitted proof of five years of interior structural firefighting service by providing verification that he or she has passed at least five annual fit tests or in the absence of records of fit tests, proof of such service through the review of attendance records at emergency responses, training activities and drills at which interior firefighting service would have been undertaken;

(3) Successful completion of a physical examination prior to the commencement of duties as an interior firefighter, which failed to reveal evidence of cancer or in the absence of a record of such entry level exam, a record of a subsequent periodic physical examination which resulted in qualifying the firefighter to perform interior structural firefighting which failed to reveal evidence of cancer; and

(4) Diagnosis of cancer.

(b) A volunteer firefighter shall remain eligible for enhanced cancer disability benefits specified in General Municipal Law section 205-cc(2)(a), (b), and (d) for 60 months after the formal cessation of the volunteer firefighter’s status as an active volunteer firefighter.

9 NYCRR 210.4

Documentation

(a) Fire districts, departments and companies shall provide information

on the enhanced cancer disability benefit to all its members and make available such information upon request.

(b) Upon request, the fire district, department or company shall provide a claim form and instructions to its member or their beneficiary(ies) detailing how to file a claim for enhanced cancer benefits with the benefits provider.

(c) As part of any claim submitted and filed with the benefit provider, fire districts, departments and companies shall provide a certification of eligibility for enhanced cancer disability benefits using a form prescribed by the office of fire prevention and control. This form must be signed by the head of the department or company, sworn to under penalty of perjury as true, correct and complete, notarized and contain, at a minimum, the following information:

- (1) The full legal name of the eligible volunteer firefighter;
- (2) The full legal name of the fire district, department or company;
- (3) The dates the eligible volunteer firefighter was an active volunteer firefighter of the fire district, department or company;
- (4) The number of years of firefighting service as an interior firefighter;
- (5) A statement that the eligible volunteer firefighter performed interior structural firefighting duties inside a building; and
- (6) A statement that the eligible volunteer firefighter successfully completed a physical examination, prior to the commencement of duties as an interior firefighter or during the years during which he or she was performing such duties, which failed to reveal any evidence of cancer;

We believe that these amendments will assist volunteer firefighters with valid claims to avoid being denied benefits because of prior procedural omissions or faulty record keeping and provide for greater flexibility will regard to processing claims. No fire district, fire department or fire company official should be placed in a position where he or she cannot in good faith sign the certification because of such defects in prior procedures or records. We appreciate the work which your agency has done on these regulations and would respectfully request consideration of our suggestions.

Response 4. The law requires five (5) years of fit tests and successful completion of a physical examination documentation as the only acceptable proof to satisfy the requirement of the eligibility. In the absence of such records, no substitute documentation is acceptable. The law requires the physical examination upon entry to the fire services and the regulations allow documentation establishing successful completion of the physical examination prior to commencement of duties as an interior firefighter as sufficient to comport with the intent of the law.

Comment 5. In general, the (INTENTIONALLY REDACTED) believes that the proposed regulations conform with the law and provide significant and adequate guidance for compliance.

We would however agree with comments submitted by the (Intentionally Redacted) that there needs to be some clarification regarding the entry level physical. We have participated in several workshops over the last several weeks regarding implementation of the program and the question of what do you do if there was no physical required upon entry or none was offered? Also, how do you handle the issue if there are no records available of physicals that took place a number of years ago.

As noted in comments submitted by (Intentionally Redacted):

The statute and the proposed regulations both utilize the result of an entry level physical examination conducted on the firefighter prior to such service which did not reveal a cancer and proof of the firefighter completing five annual mask fit tests. The statute and regulations anticipate that all volunteer fire departments and fire companies or the jurisdiction having authority would have performed the entry level physical examinations and the mask fit tests and have in their position records as proof of same.

What procedure should be followed if the volunteer fire departments and fire companies and the jurisdiction having authority either failed to conduct the exam or fit tests on a particular firefighter or are unable to locate records related to the examination and fit tests?

No one is questioning that each volunteer fire department and fire company should conduct entry level and periodic physical examinations of candidates to become or continue to serve as interior structural firefighters and that annual mask fit tests should be conducted, but if there is a past defect in procedure or currently missing records, the present officials that must sign the certification provided for under the proposed 9 NYCRR 210.4 are placed in a very difficult position.

We would ask that officials be permitted to sign a certification in which they rely upon other records in the absence of the record of the entry level physical examination and/or the records of annual mask fit tests in order to submit the required certification that the volunteer firefighter did in fact provide "five or more years of faithful and actual service in the protection of life and property from fire in the interior of buildings."

An entry level physical examination report may not be available, but a more recent periodic physical examination report that did not detect cancer may be available. Fit testing records may not be available, but attendance records may be available which establish interior firefighting

service. We are asking that officials that must file the certification be given more discretion so that deserving firefighters are not denied benefits. In addition to the comments submitted by (intentionally redacted) we would also ask that a new paragraph (c) be added to 9 NYCRR 210.3 to allow for the certification of eligibility if records are not available.

We are requesting consideration of the following amendments

9 NYCRR 210.3

Eligibility

(a) A volunteer firefighter must meet the following criteria to be eligible for enhanced cancer disability benefits:

- (1) Five or more years of faithful and actual firefighting service as an interior firefighter; and
- (2) Has submitted proof of five years of interior structural firefighting service by providing verification that he or she has passed at least five annual fit tests or in the absence of records of fit tests, proof of such service through the review of attendance records at emergency responses, training activities and drills at which interior firefighting service would have been undertaken; and
- (3) Successful completion of a physical examination prior to the commencement of duties as an interior firefighter, which failed to reveal evidence of cancer or in the absence of a record of such entry level exam, a record of a subsequent periodic physical examination which resulted in qualifying the firefighter to perform interior structural firefighting which failed to reveal evidence of cancer; and
- (4) Diagnosis of cancer.

(b) A volunteer firefighter shall remain eligible for enhanced cancer disability benefits specified in General Municipal Law section 205-cc(2)(a), (b), and (d) for 60 months after the formal cessation of the volunteer firefighter's status as an active volunteer firefighter.

(c) In the absence of contemporaneously prepared documentation evidencing the proof required under subdivision (a) of this section, a certification signed by the Chief of the department or the chief administrative officer of the authority having jurisdiction attesting to the firefighter's compliance with the eligibility requirements set forth in subdivision (a) paragraphs (1), (2), and (3) shall be deemed to be sufficient proof of eligibility.

9 NYCRR 210.4

Documentation

(a) Fire districts, departments and companies shall provide information on the enhanced cancer disability benefit to all its members and make available such information upon request.

(b) Upon request, the fire district, department or company shall provide a claim form and instructions to its member or their beneficiary(ies) detailing how to file a claim for enhanced cancer benefits with the benefits provider.

(c) As part of any claim submitted and filed with the benefit provider, fire districts, departments and companies shall provide a certification of eligibility for enhanced cancer disability benefits using a form prescribed by the office of fire prevention and control. This form must be signed by the head of the department or company, sworn to under penalty of perjury as true, correct and complete, notarized and contain, at a minimum, the following information:

- (1) The full legal name of the eligible volunteer firefighter;
- (2) The full legal name of the fire district, department or company;
- (3) The dates the eligible volunteer firefighter was an active volunteer firefighter of the fire district, department or company;
- (4) The number of years of firefighting service as an interior firefighter;
- (5) A statement that the eligible volunteer firefighter performed interior structural firefighting duties inside a building; and
- (6) A statement that the eligible volunteer firefighter successfully completed a physical examination, prior to the commencement of duties as an interior firefighter or during the years during which he was performing such duties, which failed to reveal any evidence of cancer.

We believe that these amendments will assist volunteer firefighters with valid claims to avoid being denied benefits because of prior procedural omissions or faulty record keeping and provide for greater flexibility will regard to processing claims. No fire district, fire department or fire company official should be placed in a position where he or she cannot in good faith sign the certification because of such defects in prior procedures or record keeping.

Finally, we believe that there needs to be some clarification of eligibility for a career firefighter who is also a volunteer. The issue is ensuring that the career FF becomes eligible for the Enhanced Volunteer Firefighter Disability Benefit as long as they are not collecting or are no longer collect as a career firefighter, providing they meet all of the other eligibility requirements.

Response 5. The law is also clear that a paid firefighter is ineligible for the benefits if they are already provided paid firefighter benefits under Article 10 of the General Municipal Law. If they are no longer receiving such benefits, then they would be eligible for the benefit under the Volun-

teer Firefighter Cancer Disability Benefits Act, subject to the monthly benefit offset limitations contained in the law.

After having assessed and considered all of the above comments received, OFPC has determined that the regulations as proposed are reasonable and necessary to implement the provisions of the law as they provide the process by which a firefighter or beneficiary can file a claim for benefits, a process to appeal from a denial of benefits and establish the proof required to qualify for the benefits. Based upon the foregoing, the proposed regulations are adopted without change.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

FOIL - Denials to Access of Records

I.D. No. MTV-42-18-00004-P

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

Proposed Action: This is a consensus rule making to amend section 160.7(a) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 215(a); Public Officers Law, sections 87(1)(b) and 89(4)

Subject: FOIL - denials to access of records.

Purpose: To permit the Commissioner to designate another person to hear FOIL appeals other than the Chair of the Appeals Board.

Text of proposed rule: Subdivision (a) of section 160.7 is amended to read as follows:

(a) The Chair of the Administrative Appeals Board, Swan Street Building, Empire State Plaza, Albany, NY 12228, and/or such other designee of the Commissioner, shall hear appeals for denial of access to records under the Freedom of Information Law.

Text of proposed rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

Data, views or arguments may be submitted to: Christine Legorius, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

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

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

Consensus Rule Making Determination

The proposed amendment to subdivision (a) of section 160.7 is necessary to facilitate the consideration and determination of administrative appeals regarding denials of requests for access to records under New York State's Freedom of Information Law ("FOIL"), which is set forth in Article 6 of the Public Officers Law (POL).

Under both FOIL and the regulations of the Committee on Open Government, the head, chief executive or governing body of a governmental entity subject to FOIL, or a person designated by such head, chief or body, must hear appeals regarding denials of access to records under FOIL and issue a determination within ten business days of the receipt of the appeal.

Currently, Part 160.7(a) provides that appeals of denials of requests for access to records shall be heard by the Chair of the Administrative Appeals Board. Thus, only a single individual is currently authorized to hear FOIL appeals. This limitation rule is unduly restrictive and, in the event of the Chair's unavailability, can jeopardize the Department of Motor Vehicle's compliance with the relatively short time frames provided by statute for determining FOIL appeals.

The proposed amendment, while keeping the designation and authority of the Chair of the Administrative Appeals Board in place, provides that the Commissioner may designate another individual to hear FOIL appeals as well, thereby enhancing the flexibility and efficiency of the FOIL administrative appeal process.

Job Impact Statement

A Job Impact Statement is not submitted with this proposed rule because it would not have an adverse impact on job development in New York State.

Power Authority of the State of New York

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rates for the Sale of Power and Energy

I.D. No. PAS-42-18-00005-P

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

Proposed Action: Decrease in Production Rates.

Statutory authority: Public Authorities Law, section 1005, 3rd undesignated paragraph and (6)

Subject: Rates for the Sale of Power and Energy.

Purpose: To align rates and costs.

Public hearing(s) will be held at: 11:00 a.m., Nov. 20, 2018 at Power Authority of the State of New York, 123 Main St., White Plains, NY.

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

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

Substance of proposed rule: The Power Authority of the State of New York (the "Authority") proposes to decrease the production rates for its Westchester County Governmental Customers. The Authority provides electricity to governmental customers in Westchester County, including the County of Westchester, school districts, housing authorities, cities, towns and villages. Under the proposal, the overall 2019 production rates will decrease by 17.98% when compared with the 2018 rates. The decrease, which is based on a pro forma Cost-of-Service for 2019, is largely due to expected decreases in energy and capacity prices for electricity purchased from the New York Independent System Operator market to serve these customers. The new production rates will become effective with the January 2019 billing period.

Text of proposed rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, email: secretarys.office@nypa.gov

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

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

Regulatory Impact Statement, 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.

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Disposition of a Refund from NYPA to the Village of Solvay of \$733,000 for Overcharge for Electricity Over Several Years

I.D. No. PSC-42-18-00014-P

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

Proposed Action: The Commission is considering a proposal filed by the Village of Solvay regarding the disposition of a refund of \$733,000 from the New York Power Authority (NYPA).

Statutory authority: Public Service Law, section 113(2)

Subject: Disposition of a refund from NYPA to the Village of Solvay of \$733,000 for overcharge for electricity over several years.

Purpose: To determine whether the proposed disposition of the NYPA refund is just and reasonable.

Public hearing(s) will be held at: 10:00 a.m., Dec. 12, 2018 and continuing daily as needed at Department of Public Service, Agency Bldg. 3, 3rd Fl. Hearing Rm., Albany, NY (Evidentiary Hearing)*

*On occasion there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.ny.gov) under Case 18-E-0606.

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

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

Substance of proposed rule: The Public Service Commission is considering a petition filed by the Village of Solvay (Village) on July 19, 2018, requesting to use funds from a New York Power Authority (NYPA) refund of \$733,000, reflecting overcharges for hydropower over several years.

According to the Village, the majority of the \$733,000 refund (\$503,000) would be received as a credit on its NYPA hydropower bill in equal amounts over a five-month period. The remainder of the refund (\$230,000) would be used to purchase a new bucket truck to replace its currently in-service truck, which is approximately 10 years old. The Village states that its proposal benefits village taxpayers by avoiding the additional interest cost it would incur if it had to issue a bond to purchase the new bucket truck.

The full text of the petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

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

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

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

(18-E-0606SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Notice of Intent to Submeter Electricity

I.D. No. PSC-42-18-00009-P

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

Proposed Action: The Commission is considering the notice of intent of Landing A Associates LLC to submeter electricity at 50 Bridge Park Drive, Brooklyn, 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 ensure adequate submetering equipment and consumer protections are in place.

Substance of proposed rule: The Commission is considering the notice of intent filed by Landing A Associates LLC on July 25, 2018, to submeter electricity at 50 Bridge Park Drive, Brooklyn, New York located in the service territory of Consolidated Edison Company of New York, Inc. (Con Edison).

By stating its intent to submeter electricity, Landing A Associates LLC has requested authorization to take electric service from Con Edison and

then distribute and meter that electricity to tenants. Submetering of electricity to residential tenants is allowed so long as it complies with the protections and requirements of the Commission's regulations at 16 NYCRR Part 96.

The full text of the notice of intent and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

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

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

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

(18-E-0479SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rehearing and/or Reconsideration of the Tax Charges Rate Treatment Order

I.D. No. PSC-42-18-00010-P

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

Proposed Action: The Commission is considering the New York State Telecommunications Association, Inc. petition for rehearing and/or reconsideration of the August 9, 2018 Order Determining Rate Treatment of Tax Charges.

Statutory authority: Public Service Law, sections 22, 91 and 92

Subject: Rehearing and/or reconsideration of the Tax Charges Rate Treatment Order.

Purpose: To determine if the Commission was correct to require small telecom utilities to defer ongoing tax savings.

Substance of proposed rule: The Public Service Commission is considering the New York State Telecommunications Association, Inc. (NYSTA) petition, filed on September 21, 2018, for rehearing and/or reconsideration of the Commission's August 9, 2018 Order Determining Rate Treatment of Tax Charges.

In its August 9, 2018 Order, the Commission instructed "telephone utilities, with the exception of Verizon New York Inc., and Frontier Telecommunications of Rochester, Inc., ...[to] preserve on their books any excess accumulated deferred federal income taxes from the Tax Cuts and Jobs Act of 2017 for future disposition by the Commission." Aside from this requirement, these small telecommunication utilities were not subject to any other requirements relating to the tax changes because of the competitive nature of the telecommunications industry and the utilities' established history of financial challenges. The Order provides that when a NYSTA member files for new rates, the Commission would determine the disposition of any remaining deferred amounts as part of the rate proceeding.

NYSTA's petition argues that the Commission should not have required NYSTA's members to preserve these tax benefits because these companies face an increasingly competitive environment, having lost 62% of their access lines since 2001, and are largely failing to achieve their authorized return on equity, or profit in general. NYSTA requests that its members be exempted from this requirement, or in the alternative they be allowed to begin amortizing their excess accumulated deferred federal income taxes starting January 1, 2018, consistent with IRS accounting rules, essentially taking the deferred amounts as income as they become available under the accounting rules.

The full text of the petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page at www.dps.ny.gov. The Commission may approve or reject, in whole or in part, the action proposed and may resolve related matters.

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

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

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

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

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

(17-M-0815SP3)

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

Voluntary Residential Beneficial Electrification Rate Design

I.D. No. PSC-42-18-00011-P

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

Proposed Action: The Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid to amend its electric tariff schedule, P.S.C. No. 220, to establish a voluntary residential beneficial electrification rate structure.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Voluntary residential beneficial electrification rate design.

Purpose: To provide efficient rate design for beneficial technologies in New York State that is equitable for all residential customers.

Substance of proposed rule: The Public Service Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) on September 18, 2018 to amend its electric tariff schedule, P.S.C. No. 220. National Grid proposes a voluntary residential rate structure to further adoption of beneficial electrification technologies including electric vehicles and cold climate electric heat pumps. The Commission's March 15, 2018 Order Adopting Terms of Joint Proposal and Establishing Electric and Gas Rate Plans in Case 17-E-0238 et al. required that National Grid develop and make such a proposal.

National Grid proposes to implement a beneficial electrification rate design based on: (a) the "2 Demand" delivery rate design proposed by the New York Joint Utilities in another ongoing proceeding before the Commission, Case 15-E-0751, Value of Distributed Energy Resources; and (b) a volumetric time-of use and critical peak pricing supply rate structure, which is identical to that currently under consideration in the on-going Advanced Metering Infrastructure Collaborative in this proceeding. "Demand" means the maximum amount of electrical energy a consumer uses during a particular limited time period. Demand impacts costs incurred by the utility, which are generally paid by customers, as it must design its system to allow it to meet customers' peak demands. The volumetric time-of-use and critical peak pricing rate structures would have customers pay more for electricity, when that electricity costs more to produce, and pay less when the electricity costs less to produce.

National Grid also proposes to waive incremental customer charges for qualified customers, that would ordinarily be charged for interval meeting costs and telecommunications necessary for customers to participate in the proposed beneficial electrification rate. National Grid also requests authority to defer the costs associated with this proposed waiver.

National Grid states that it designed the proposed beneficial electrification rate to encourage adoption of beneficial technologies to promote New York State's greenhouse gas reduction goals. National Grid proposes to offer the beneficial electrification rate to all residential customers on an opt-in basis.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject, or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

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

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

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

(17-E-0238SP3)

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

Notice of Intent to Submeter Electricity

I.D. No. PSC-42-18-00012-P

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

Proposed Action: The Commission is considering the notice of intent of Alfa Gramercy Park LLC to submeter electricity at 200 East 21st 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 ensure adequate submetering equipment and consumer protections are in place.

Substance of proposed rule: The Commission is considering the notice of intent, filed by Alfa Gramercy Park LLC on June 29, 2018, to submeter electricity at 200 East 21st Street, New York, New York located in the service territory of Consolidated Edison Company of New York, Inc. (Con Edison).

By stating its intent to submeter electricity, Alfa Gramercy Park LLC has requested authorization to take electric service from Con Edison and then distribute and meter that electricity to tenants. Submetering of electricity to residential tenants is allowed so long as it complies with the protections and requirements of the Commission's regulations at 16 NYCRR Part 96.

The full text of the notice of intent and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the action proposed and may resolve related matters.

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

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

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

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

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

(18-E-0392SP1)

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

Petition for Clarification and Rehearing of the Smart Solutions Program Order

I.D. No. PSC-42-18-00013-P

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

Proposed Action: The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. for clarification and rehearing of the July 12, 2018 Smart Solutions Program Order.

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

Subject: Petition for clarification and rehearing of the Smart Solutions Program Order.

Purpose: To address the increased demand for natural gas in the Con Edison's service territory and the limited pipeline capacity.

Substance of proposed rule: The Public Service Commission (PSC) is considering a petition for clarification and rehearing, filed on August 13, 2018 by Consolidated Edison Company of New York, Inc. (Con Edison or Company), regarding the implementation of Smart Solutions for Natural Gas Customers Program (Smart Solutions Program).

The Company's petition seeks clarification and rehearing of the PSC's July 12, 2018 Order Approving in Part, with Modification, and Denying in Part Smart Solutions Program in two respects: the Company would like the Commission to consider (1) deferring as a regulatory asset any incremental costs of the Gas Energy Efficiency program; and (2) a future request for recovery of contract-specific development costs or cancellation fees for pipeline development. The Commission may grant or deny, in whole or in part, the Petition for Clarification/Rehearing.

The underlying July 12, 2018 PSC order addressed a Con Edison petition to the PSC for approval of its proposed Smart Solutions Program. The Smart Solutions Program included an Enhanced Gas Energy Efficiency Program, a new Gas Demand Response Program (Gas DR Program), a new innovation program to encourage renewable alternatives to natural gas heating technologies (Gas Innovation Program), and a new Market Solicitation for Non-Pipeline Solutions (Non-Pipeline RFI). The Company also proposed to recover incurred pipeline development costs for a planned gas pipeline project in the event such project is terminated. In its July 12, 2018 order, the PSC: (1) approved, with modification, Con Edison's request for an Enhanced Gas Energy Efficiency Program; (2) established criteria for continued development of the Gas Innovation Program; and (3) denied the Company's request to recover costs associated with parallel pipeline development efforts, thereby maintaining customer protections associated with unsuccessful pipeline development projects.

The full text of the petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. Upon conducting its evaluation of the request, the Commission may reaffirm its initial decision or adhere to it with additional rationale in denying the request, modify or reverse the decision in granting the request in whole or in part, or take such other or further action as it deems necessary with respect to the request. However, the Commission will limit its review to the issues raised by the above-referenced request.

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: 60 days after publication of this notice.

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

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

(17-G-0606SP3)

Workers' Compensation Board

ERRATUM

The Notice of Adoption, I.D. No. WCB-21-18-00038-A, pertaining to Workers' Compensation Board Legal Internship Program, published in the October 3, 2018 issue of the *State Register* was published with the incorrect Assessment of Public Comment. Following is the correct assessment for the rule:

I.D. No. WCB-21-18-00038-A

Subject: Workers' Compensation Board Legal Internship Program

Assessment of Public Comment:

The Chair and the Board received 30 formal written comments via email and regular mail in response to the proposed adoption of section 302-1.6 of 12 NYCRR. The public comment period remained open through July 27, 2018.

Three commenters expressed dissatisfaction with the extent of the Board's consultation with the private bar and two opined that Board underestimated the number of claimants who would be affected by this regulation. The Board has considered these comments and finds that no changes are needed to the regulation as a result. The Board can confirm

that members of the bar were consulted about the proposed regulation. Additionally, the projected number of unrepresented claimants who may benefit from the proposed regulation was based upon a review of cases in which a hearing had been scheduled on a medical-only claim, only. In comparison, the statistics referenced by the commenters concerned all medical-only cases, regardless of whether a hearing had been scheduled. In any event, the statistics provided by these commenters show that there are numerous unrepresented claimants in pending medical-only claims who may need legal assistance. The Board thus believes these statistics only highlight the benefits that a law school clinic program could offer.

A number of commenters suggested that the legal work involved in workers' compensation claims is too complicated for law students to manage, and gaps in the students' knowledge will cause harm to claimants. The Board has considered this comment and finds that no changes are necessary, given that the law students will be supervised, both directly and indirectly, by an admitted attorney with two years of practice experience. As such, the admitted attorney will ensure that students fully comprehend the legal issues raised in their cases and will be professionally responsible for the students' work.

The Board received a comment from a worker advocacy group, recommending that the proposed regulation be narrowed to only allow legal interns to represent claimants in medical-only claims. Although the Board intends to assign legal interns to medical-only cases the Board believes that such a limitation would be an unnecessary abridgment of the current law clinic regulation. Section 302-1.6(b) of 12 NYCRR, currently permits certain legal interns to appear before the Board in a variety of cases, not limited to medical-only. The proposed rule does not expand the types of cases that may be handled by a legal intern, but rather expands those who may qualify as law school and legal interns to represent claimants in Board proceedings. Accordingly, no changes have been made to the proposed regulation as a result of this comment.

An attorney recommended that the regulation require law student interns to take the licensed representative test before representing claimants. As law students will be supervised, both directly and indirectly, by an admitted attorney with two years of practice experience, there is no need for them to pass an exam permitting to represent claimants on their own without supervision. As such, no changes have been made to the proposal as a result of this comment.

The Board received several comments opining that it is unethical for the Board to employ and supervise law student interns given that the Board is the adjudicatory agency and the legal intern will represent a party of interest in the Board proceeding. The Board cannot, and will not, provide any representation of injured workers in formal proceedings. The Board's role would be limited to helping clinics to get off the ground by volunteering to provide some supervision in medical-only cases, in the context of informal proceedings. For all broader clinical models, the Board would have no role in retaining or supervising law students or recent graduates to represent injured workers. For both the informal and broader clinical models, the only way to establish a clinic would be for outside lawyers to volunteer to participate to provide this service.

When a law school is interested in incorporating a workers' compensation component into a new or existing law school clinic, the Board's involvement will be limited to having a Board attorney (who is not an employee of counsel's office or adjudication) supervise the legal externs, where the advice and actions "are solely within the context of informal resolution." In short, the Board understands the conflict of interest concerns raised by these commenters, and trusts that this explanation establishes that the Board's conduct under the proposed regulation will be consistent with the Public Officers Law and the Judiciary Law.

Several commenters asserted that the proposed regulation is unnecessary because there are existing opportunities under the Workers' Compensation Law to allow non-attorneys to represent workers' compensation claimants, insofar as the Workers' Compensation Law allows licensed representatives to represent claimants. Licensed hearing representatives represent claimants for fees. Legal interns will work on cases pro bono. A licensed attorney with two years of practice experience will be required to supervise the law student interns; as such, the legal interns will have guidance from a practicing attorney, who will be professionally responsible for the interns' work product. Therefore, the Board finds that no changes are necessary due to this comment.

The Board received a comment from an attorney opining that the proposed regulation violates Workers' Compensation Law section 24. That statute concerns the costs and fees that may be awarded in workers' compensation cases; it does not limit to who may appear before the

Board. Further, the Board notes that 12 NYCRR section 302-1.6(b) currently permits certain law student interns to represent parties of interest in Board proceedings; this proposal therefore does not add new categories of persons who may appear in Board proceedings. The Board therefore has not made any changes to the proposed regulation as a result of this comment.

Several commenters opposed the proposed rule on the ground that claimants may need representation for issues outside of their workers compensation claim, but the legal interns would not be able to represent the claimant in all related matters, which will harm claimants. As an initial matter, the Board notes that 12 NYCRR section 302-1.6(b) currently permits certain law student interns to represent parties of interest in Board proceedings. Second, legal interns will only be assigned to cases in which the claimant has been unable to retain private legal counsel. As such, although the legal intern may not be able to assist with non-workers' compensation matters, the alternative for the claimant would be lack of representation on their Board case. Third, the claimant will be informed about the limited scope of representation through the retainer agreement, and therefore will make an informed choice before agreeing to the legal intern's representation. Therefore, no changes have been made to the proposal as a result of this comment.

Several commenters opined that the Board lacks authority to promulgate this regulation because the New York State Appellate Division has authority under the Judiciary Law to control the appearance of law students before an agency. The proposed regulation acknowledges that the four Appellate Division courts have authority to regulate legal internship programs, insofar as the proposed rule provides that law school graduates and senior law students must be "permitted to practice law pursuant to the Judiciary Law under a program of activities approved by the appellate division of the supreme court of the department within which such activities are taking place[.]" The proposed regulation thus does not detract from the Appellate Division's authority, but rather requires that the legal interns be approved through a Board program, as well as by the appropriate Appellate Division. Therefore, no changes have been made as a result of this comment.

Several commenters suggested that the Board consider alternatives to the proposed regulation that would encourage more attorneys or licensed representatives to represent indigent claimants. Specifically, they recommended that the Board change its rules to require a carrier or medical provider to separately pay a claimant's legal fees if the claimant succeeds on a medical-only claim, or allow the Board to draw from Workers' Compensation Law section 151 fund to pay a claimant's legal fees. The Board has considered these recommendations and finds that no changes are necessary to the regulation as a result. The Board provides for attorney fees pursuant the Workers' Compensation Law section 24. Additionally, the proposed regulation will allow members of the Bar to fulfill pro-bono requirements, and provide a further means to serve the public interest. As such, the Board finds that the proposed regulation is the most expeditious method for increasing opportunities for certain unrepresented claimants to find legal representation.

The Board received several comments recommending that the proposed regulation be withdrawn because legal interns would be unable to take medical testimony, inasmuch as Workers' Compensation Law section 121, incorporating CPLR Article 31, requires medical testimony to be taken in the form of a deposition, and only attorneys and pro se litigants can take depositions. While it is certainly true that an attorney would need to conduct such depositions, legal interns may assist in all aspects of the deposition and in matters where a deposition is not required. As such, no changes have been made to the regulation as a result of this comment.

In addition to the aforementioned individual comments, the Board also received form letters from a law firm, which asked that the proposed regulation be withdrawn on several grounds. First, the commenters asserted that the legal work involved in workers' compensation claims is too complicated for law students, and gaps in the students' knowledge will cause harm to claimants and burden others involved in the handling of workers' compensation claims. Second, the commenters noted that legal interns are not subject to disciplinary action if they mishandle a claim, which may result in more mistakes without accountability. Third, the commenters stated that law students cannot take part in depositions, so they will be unable to take medical testimony at hearings. Fourth, they asserted that the proposed regulation presents an unethical conflict of interest, as the Board plans to supervise the law students who are representing claimants before the Board, and as a result, the students may not zealously advocate for the claimants out of concern that their

employer would react negatively when Board rules and processes are challenged. These comments reflect those concerns of the individual commenters, discussed above. Generally, the Board finds these concerns to be without merit for the particular reasons detailed previously. Accordingly, no changes have been made as a result of these comments.

The Notice of Revised Rule Making, I.D. No. WCB-23-18-00005-RP, pertaining to Medical Fee Schedules, published in the October 3, 2018 issue of the State Register was published with the incorrect Assessment of Public Comment. Following is the correct assessment for the revised rule:

Subject: Medical Fee Schedules

I.D. No. WCB-23-18-00005-RP

Assessment of Public Comment:

The Chair and Board received approximately 130 unique formal written comments, and approximately 627 additional form letters, as well as 262 postcards. In the unique comments received, there were a number of requests for information or clarification. These communications have been responded to individually and are not summarized here. Based on the comments received, the Board has revised its proposed Medical Fee Schedules. The comments received are summarized below.

Medical Fee Schedule

The Board received a comment opining that Ground Rule 10 increasing fees for testimony and eliminating the daily cap on fees for multiple appearances to testify will create many disputes. The testimony fees proposed are proportionate increases for all providers. The daily cap was eliminated as it is seldom used and difficult to apply fairly. Accordingly, no changes were made to this Ground Rule.

The Board received a comment from an insurance company supporting Ground Rule 11.

The Board received a comment from an insurance company objecting to the removal of a reference to Medicare in the definition of "physician-employer" in the Surgery Ground Rules as it is perceived to change the meaning of Surgery Ground Rule 12 (F). No change is intended to Surgery Ground Rule 12 (F) in the Proposed Fee Schedule. Language has been added to Ground Rule 11 to clarify that it does not affect application of Surgery Ground Rule 12 (F) and that the supervising physician for surgical assistants must be the physician performing the surgery.

The Board received a number of comments from individual physicians, companies, and practices, objecting to limiting the type and amount of drug testing allowed by providers, especially limiting such testing to urine drug tests and point of care screening. Some of the comments also opined that this proposed change will negatively affect all no-fault patients, as well as NYS workers' compensation patients. The changes to the Ground Rules for drug testing are directly copied from the Board's current Non-Acute Pain Medical Treatment Guidelines and incorporate the treatment requirements therein. However, in response to these comments, the Board has added two additional available codes for urine drug testing and point of care screening (80306 and 80307) to permit more precise in-office testing.

The Board received a comment from an insurance company supporting the proposed instructions for reporting drug screening services.

The Board received a number of comments from physicians supporting the overall increases in reimbursement and objecting to the change in the CPT codes that will result in a reduction in reimbursement for EMG studies and EDX testing. As the changes in the rates for reimbursement for EMGs and EDX are not the result of an actual decrease in reimbursement rates but rather reflect changes to the CPT codes themselves as created by the American Medical Association, no changes have been made to the Fee Schedule as a result of these comments. The Board has added missing codes for electrodiagnostic testing to the Chiropractic Fee Schedule (95885-95887) as they were inadvertently omitted in the initial proposal.

The Board received many form letters from physical therapists and physical therapy patients, as well as several other comments from individuals and organizations, supporting the proposed rate increase for physical therapists, but objecting to an 8 RVU cap, requesting it be doubled to 16 or, in some comments, eliminated altogether. Following review of these comments, the Board proposes an increase in the cap to 12 RVUs per patient. The Board has also increased the available RVUs for initial evaluations and reevaluations.

Chiropractic Fee Schedule

The Board received a number of form letters from chiropractors, objecting to omission of CPT codes for massage therapists, non-surgical decompression tables, reduction in fees for injections, elimination of scope of practice for drug testing, and objection to chiropractic ground

rule 10 generally. These objections relate to codes that were not part of the Chiropractic Fee Schedule. Ground Rule 10 clarifies that Chiropractors must bill using the Chiropractic Fee Schedule. This is a clarification that has been made to the Podiatry and Psychology Fee Schedules as well. It is not a new rule as chiropractors are currently prohibited from billing outside of the Chiropractic Fee Schedule in Workers' Compensation cases. Accordingly, no changes have been made as a result of these comments. It is noted that the Board's initial proposal increases chiropractors' overall RVUs and this will result in higher reimbursement.

The Board also received comments from chiropractors objecting to the omission of a number of CPT codes from the Chiropractic Fee Schedule. The Board notes that most of the identified codes were never part of the Chiropractic Fee Schedule. CPT code 97750 governing range of motion testing has been removed from every fee schedule. Such testing generally has been and should be included as part of the medical examination and not billed separately. CPT code 96002 has been removed as surface EMGs are not recommended under the MTG. The Board has added missing codes for electrodiagnostic testing to the Chiropractic Fee Schedule (95885-95887) as they were inadvertently omitted in the initial proposal.

The Board received a comment from an insurance company supporting ground rule 10, as well as assigning some of the Category III CPT codes an RVU.

The Board received several comments from chiropractors objecting to decreases in reimbursement rates, generally. As mentioned previously, the Board did not decrease reimbursement rates and has increased the RVUs for chiropractors. To the extent that any fees have declined, the changes are due to modification in the CPT codes themselves since 2012 and earlier. The Board also notes that in its new proposal the number of RVUs available for an initial evaluation, a reevaluation and those available each day, have all been increased from the 2012 Medical Fee Schedule. Code 99243 has been added for non-schedule permanency evaluations.

The Board received a number of form letters, as well as individual letters, from chiropractors and several patients, objecting to the proposed changes impacting manipulation under anesthesia (MUA). Manipulation under anesthesia is not recommended under the Medical Treatment Guidelines. Accordingly, no changes have been made in response to these comments.

The Board also received several form letters objecting to the proposed changes eliminating/reducing spinal decompression. Spinal decompression is not recommended under the Medical Treatment Guidelines. Accordingly, no changes have been made in response to these comments.

The Board received several comments from individuals, a law firm, and an association, objecting to the proposed changes to the chiropractic fee schedule as a whole, as well as 262 postcards from a law firm. As these comments did not address any substantive aspect of the fee schedule, no changes were made as a result of these comments.

Behavioral Health Fee Schedule

The Board received comments on behalf of multiple psychology practices objecting to the proposed changes to the Behavioral Health Fee Schedule. Specifically, the comments objected to precluding psychologists from supervising other mental health providers. The Standard of Practice of Behavioral Health Services has been modified to clarify what has been an area of confusion in the community. The Standard now clarifies that the Workers' Compensation Law (WCL) only permits supervision of non-authorized providers by physicians (see WCL § 13-b[1][c]). There is no corollary provision in WCL § 13-m that would permit psychologists to supervise non-authorized providers. As only the legislature may amend the WCL, no change has been made to this Standard in the current proposal. Finally, the Standard clarifies that psychologists who wish to treat a workers' compensation claimant must be Board authorized as contemplated by WCL § 13-m.

The Board received several other comments from providers and associations objecting to the use of code 97127. Behavioral Medicine Ground Rule 7 limits use of CPT code 97127 to 1 unit when reported with CPT code 97533 to clarify that overlapping services are not necessary and to require that both codes may only be used for face-to-face services. Updates made by the American Medical Association to this CPT code means that it may no longer be used in 15-minute increments and thus the 1 unit per day limit is appropriate. In response to these comments the Board has increased the RVUs associated to this code. The Board received several comments from providers objecting to the limitation of 4 hours for initial testing. In response to these comments, the Board has removed this limitation.

The Board received a comment from an association objecting to the removal of several CPT codes for behavioral health, including: 90832, 90834, 90837, and 90791. These codes have not been removed. Rather Ground Rule 8 simply states that they may not be reported on the same date with 96150-96155. Accordingly, no change has been made to this Ground Rule.

General Comments

The Board received several comments expressing support for the proposal as a whole.

The Board also received several comments from insurance companies and TPAs generally opposing the proposed increased fees.

The Board also received a comment from an insurance company agreeing with the update, including 2018 CPT codes.

The Board received comments from two associations requesting a general fee increase higher than the proposal.

Conclusion

As a result of these comments and the Board internal review, the proposed Medical Fee Schedules have been revised throughout. The Board will receive public comments to the revised rule-making for an additional thirty days.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Establishment of Prescription Drug Formulary

I.D. No. WCB-52-17-00021-RP

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

Proposed Action: Addition of Part 441 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13-p, 117 and 142

Subject: Establishment of Prescription Drug Formulary.

Purpose: Establishment of a drug formulary that includes high-quality and cost-effective pre-authorized medication.

Substance of revised rule (Full text is posted at the following State website: www.wcb.ny.gov): Subchapter M of Chapter V of Title 12 of NYCRR is amended to add a new Part 441 as follows:

441 Formulary

441.1 Definitions. Contains definitions of the following terms: Compound drug, Disability event, Dispense, FDA-approved drug, FDA OTC Monograph, Generic drug, Carrier's Physician, Formulary, Unlisted Drug, Perioperative Formulary drug, Phase A Drug, Phase B drug, Phase C drug, Prior Authorization process, Prior Authorization and URAC.

441.2 New York Workers' Compensation Formulary. Incorporates the four lists of the Formulary by reference into this Part and describes the lists: Phase A lists Formulary drugs that may be prescribed during the first 7 days; Phase B lists Formulary drugs that may be prescribed from day 8 until day 30; Phase C lists Formulary drugs that may be prescribed after the 30th day or when accepted by the insurance carrier. This section also describes how to obtain copies of the Formulary lists.

441.3 Effective Dates and Notice. Sets forth that new prescriptions must be prescribed pursuant to the Formulary within 6 months of the effective date of the Formulary; that refills and renewals must be prescribed pursuant to the Formulary within 12 months of the effective date of the Formulary; that Notice must be given to claimants on non-Formulary agents and their providers within 6 months of the effective date of the Formulary.

441.4 Application of Formulary. This section describes in detail how drugs may be prescribed consistent with Phase A, B, C or the Perioperative Formulary. This section also identifies when Prior Authorization may be required.

441.5 Prior Authorization Process. This section details when Prior Authorization is required. It details the process for requesting Prior Authorization from the Carrier and describes the rules governing the insurance carrier's review of such requests.

441.6 Review by the Board of a Prior Authorization Denial. This section sets forth the process for review by the Board's Medical Director's Office of a carrier denial of a Prior Authorization request.

441.7 Changes to the Formulary. This section describes the process for requesting changes to the drugs listed in the Formulary and the timing thereof.

441.8 Medical Treatment Guidelines and Formulary. This sections states that should there be an inconsistency or conflict between the Formulary and the Medical Treatment Guidelines (MTG), the MTG shall govern.

Revised rule compared with proposed rule: Substantive revisions were made in Part 441.

Text of revised proposed rule and any required statements and analyses may be obtained from Heather MacMaster, Workers' Compensation Board, 328 State Street, Office of General Counsel, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

Additional matter required by statute: The proposed Phase A, Phase B, Phase C and the Perioperative Formulary are published at www.wcb.ny.gov

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text still seek to adopt a comprehensive drug formulary in a way that accomplishes the goals highlighted in the Regulatory Impact Statement. These changes, while some of them are substantial, do not affect the meaning of any statements in the document.

Assessment of Public Comment

The Chair and the Board received 60 written comments from Survey Monkey, emailed comments, and regular mail in response to the proposed adoption of Part 441 of 12 NYCRR and the Formulary incorporated by reference therein. The public comment period remained open through March 9, 2018.

Several commenters commended the Board on the proposed Formulary.

Several commenters opposed the implementation of the Formulary in general. A number of others had more particular comments related to many items including the number of drugs available, the Prior Authorization process, treatment of compound drugs, controverted cases, and the relationship of the Formulary to the Medical Treatment Guidelines. The Board notes that it is statutorily required to implement a comprehensive drug formulary, pursuant to Workers' Compensation Law section 13-p. As a result of the comments received, the Board has substantially revised its prior proposal.

A pharmacy requested that the regulations clarify whether the Formulary sets a floor, such that a PBM may offer a drug list more expansive than the Formulary, or whether the Formulary sets a ceiling, such that a PBM would not be permitted to offer a broader drug list than the Formulary. As a significant legislative purpose of the formulary is to control costs in the workers' compensation system, the Board contemplates that the Formulary sets forth a complete list of drugs available without prior authorization. In the event that stakeholders believe a drug should be added to this list, there is a procedure in place to add needed drugs to the Formulary.

One insurance company requested that a Morphine Equivalency Dosage (MED) limit, such as the CDC's recommended 90 MED limit, be incorporated into the Formulary to ensure that claimants are not prescribed inappropriate amounts of drugs. Guidance regarding narcotic prescriptions and limitations thereon is included in the Board's Non-Acute Pain Medical Treatment Guidelines. Accordingly, no change has been made a result of this comment.

An insurance company recommended that the Formulary specifically exclude all non-FDA approved drugs unless standard treatment/medication protocols have been followed without success and medical necessity can be established. In response to these comments, the definition of Unlisted drug has been revised.

Several commenters suggested that the Formulary should apply only to new cases; it should not apply to workers injured or disabled before July 1, 2018. Having multiple systems for drug prescriptions in place would create an administrative burden. The revised Formulary includes many more options for prescriptions and a defined Prior Authorization process.

Several commenters stated that the current implementation period is too short. The revised regulations specify new effective dates, depending on whether the prescription is new or a refill or renewal prescription. The Board will do outreach to ensure that all stakeholders have time to implement the new Formulary.

Several commenters asked for guidance as to the difference between a new prescription, a refill prescription and a renewal prescription. To the extent that guidance is required beyond industry norms, such guidance will be issued by the Board's Medical Director's Office.

A pharmacy requested that the Board make resources available to carriers and self-insured employers to identify "equivalent preferred drugs." The Board intends to assist in identifying such equivalents.

A worker advocacy group opposed incorporating the Formulary into the regulations by reference. The Board has successfully incorporated other

documents and guidelines by reference, including the Board's Medical Fee Schedules and MTGs. Moreover, the State Administrative Procedure Act (SAPA) permits incorporating certain materials by reference. Therefore, the Board disagrees that incorporating the Formulary by reference will be an issue.

A pharmacy expressed concern about the availability of the Formulary and recommended that updated hard copies be readily available, that stakeholders be permitted to download the Formulary without charge, and that the regulations prohibit the vendor from charging a subscription fee. The regulation provides that the Formulary will be available free of charge online and available to view for free at certain state institutions.

A healthcare consultant expressed concern that unreasonable fees could be charged to access the Formulary and requested that the Board establish a fee structure for Formulary access. The Formulary will be available online free of charge. In the event a hard copy is requested, a five dollar fee to access the Formulary will apply only in the event that someone requests mailing of a hard copy. In the event that the Board seeks to raise this fee in the future, the regulation would be amended and open for public comment. Therefore, no changes have been made to the Formulary as a result of this comment.

A pharmacy requested that the Board limit changes to the Formulary to once annually and several commenters suggested that the Formulary be updated more frequently. The revised regulations provide that the Formulary shall be updated not less than annually. The Board believes this requirement achieves balance to ensure that the Formulary remains current while not having the list of available drugs in a constant state of flux. As such, no changes have been made to the Formulary as a result of this comment.

A pharmacy recommended amending the regulations to establish a 30-day implementation period between the notice of a change in the Formulary and the effective date of the change to allow stakeholders time to program their systems. As changes to the Formulary will require a public comment period, the implementation period for any changes to the Formulary drugs themselves will be addressed when changed.

One worker advocacy group requested that the decision of the Medical Director approving or denying a change in the Formulary be made in writing and include the reasons for the decision, and that the written decisions be published on the Board's website. The revised regulation requires that "Written documentation of the review and assessment of changes to the Formulary shall be maintained by the Board and posted on the Board's website." Accordingly, no change has been made to the regulations due to this comment.