

creation to defer approximately \$5.4 million of incremental pre-staging and mobilization costs related to Winter Storm Toby.

Statutory authority: Public Service Law, sections 65(1) and 66(1).

Subject: Deferral of pre-staging and mobilization storm costs.

Purpose: To ensure just and reasonable rates for ratepayers and utility recovery of unexpected, prudently incurred costs.

Substance of proposed rule: The Commission is considering a petition filed by Orange and Rockland Utilities, Inc. (ORU) of the Company, on June 26, 2018, requesting authorization to defer approximately \$5.4 million of incremental pre-staging and mobilization costs related to Winter Storm Toby. The weather forecast predicted that Winter Storm Toby would result in possible snowfall accumulation of up to 15" across the service territory with a potential for 12" of accumulation in isolated areas, and wind gusts at 25-45 mph as a result of a state of emergency was in effect for downstate New York, including Rockland County. Winter Storm Toby was forecasted to be the third major storm to threaten ORU's service territory in three weeks. Based on the weather forecasts, as well as the Company's recent experience with Winter Storm Riley and Quinn, ORU expected Winter Storm Toby to affect its electric operations to the degree meeting the criteria of a "major storm," as defined in 16 NYCRR Part 97, and took preparatory measures as a result, including the acquisition of resources through mutual assistance. Ultimately, the storm did not impact ORU's service territory, as predicted. The Company proposes to defer the incremental operations and maintenance expenses as a regulatory asset in Account 100... Storm Deferral and accrue carrying charges on the deferred balance. 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 (d-96) located on our website <http://www.dps.ny.gov/Document>. For questions, contact: John Puccio, Public Service Commissioner, Empire State Plaza, Albany, New York 12223-1250, (518) 486-2659, email: john.puccio@dps.ny.gov.

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, Empire State Plaza, Albany, New York 12223-1250, (518) 474-6330, email: secretary@dps.ny.gov.

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

Regulatory Impact Statement, Regulators Flexibility Analysis, Rural Area Electricity 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 103(2)(a)(ii) of the State Administrative Procedure Act.

18-0448P1

Section 1208-6.1(a) provides that the purpose of Subpart 1208-6 is to implement Chapter 468 of the Laws of 2017, which authorizes the Secretary to promulgate rules and regulations with respect to the revocation or suspension of the certification of any code enforcement personnel found after a hearing to have "materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report."

Section 1208-6.1(b) defines the term "authority having jurisdiction" (AHJ) as any city, town, village, county, State agency, or other governmental unit or agency charged with or otherwise accountable or responsible for administration and enforcement of the Uniform Code and/or Energy Code.

Section 1208-6.2(a) provides that the Secretary of State may suspend or revoke the certification of a building safety inspector (BSI) or code enforcement official (CEO) if the administrative law judge (ALJ) conducting a hearing finds, after such hearing, that such BSI or CEO has materially failed to uphold his or her code enforcement duties.

Section 1208-6.2(b) provides that a BSI shall be deemed to have materially failed to uphold his or her code enforcement duties if he or she: (1) fails to note one or more serious violations of the Uniform Code on an inspection report relating to a fire safety and/or property maintenance inspection, provided that such violations are of a type that should have been observed by a certified building safety inspector exercising reasonable care in the performance of the inspection; (2) makes any other material error or omission on an inspection report relating to a fire safety and/or property maintenance inspection, provided that such error or omission is of a type that should not have been made by a certified building safety inspector exercising reasonable care in the performance of the inspection; (3) demonstrates, by act or omission, willful misconduct, gross negligence, or gross incompetence in the performance of his or her code enforcement activities; (4) performs any code enforcement activity other than fire safety and/or property maintenance inspections of existing buildings; or (5) performs any code enforcement activity at a time when his or her certification is inactive or suspended.

Section 1208-6.2(c) provides that CEO shall be deemed to have materially failed to uphold his or her code enforcement duties if he or she: (1) fails to note one or more serious violations of the Uniform Code and/or Energy Code on an inspection report relating to any type of inspection, provided that such serious violations are of a type that should have been observed by a certified code enforcement official exercising reasonable care in the performance of the inspection; (2) makes any other material error or omission on an inspection report relating to any type of inspection, provided that such error or omission is of a type that should not have been made by a certified code enforcement official exercising reasonable care in the performance of the inspection; (3) demonstrates, by act or omission, willful misconduct, gross negligence, or gross incompetence in the performance of his or her code enforcement activities; or (4) performs any code enforcement activity at a time when his or her certification is inactive or suspended.

Section 1208-6.2(d) provides that personnel-related matters, such as tardiness, absenteeism, insubordination, rude behavior, and the like, shall not be deemed to be a material failure to uphold code enforcement duties.

Section 1208-6.2(e) provides that (1) the suspension of a person's certification pursuant to Subpart 1208-6 shall result in such person being deemed not to be certified during the period of such suspension; (2) the revocation of a person's certification pursuant to Subpart 1208-6 shall result in such person being deemed not to be certified at any time on or after the date of such revocation; (3) such suspension or revocation shall not be shortened or terminated by reason of such person taking or re-taking any basic training, in-service training, advanced in-service training, or other training; and (4) unless otherwise provided in the order suspending or revoking such certification, such person shall not receive any new or additional certification as either a BSI or a CEO, and such person shall not be permitted to increase or decrease the level of his or her certification pursuant to section 1208-3.1(c) or (d), at any time during the period of such suspension or after such revocation.

Section 1208-6.3(a) provides that a complaint alleging that a BSI or CEO has materially failed to uphold his or her code enforcement duties may be submitted to the Department of State (DOS), and must (1) be in writing; (2) identify the BSI or CEO who is alleged to have materially failed to uphold his or her duties (the "subject person"); (3) identify the AHJ that employs or otherwise uses the services of the subject person; (4) include a statement of the acts or omissions of the subject person that are alleged by the complainant to constitute a material failure to uphold the subject person's code enforcement duties; (5) include the complainant's agreement to cooperate with any investigation conducted by the department and/or by any AHJ; (6) include the complainant's name, address, and contact information; and (7) be signed by the complainant.

Section 1208-6.3(b) provides that DOS will review the complaint to determine if the complaint states, on its face, an allegation that the subject person has materially failed to uphold his or her code enforcement duties.

Department of State

NOTICE OF ADOPTION

Suspension and Revocation of Certifications of Code Enforcement Personnel

I.D. No. DOS-20-18-00002-A

Filing No. 725

Filing Date: 2018-08-07

Effective Date: 2018-08-22

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

Action taken: Amendment of section 1208-3.5(b); addition of subpart 1208-6 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 376-a and 381(1)

Subject: Suspension and revocation of certifications of code enforcement personnel.

Purpose: The purpose of this rule is to add provisions to 19 NYCRR Part 1208 that authorize the Secretary of State to suspend or revoke the certification of a building safety inspector or code enforcement official who is found, after a hearing, to have materially failed to uphold his or her code enforcement duties.

Substance of final rule: The rule adds a new Subpart 1208-6, entitled Suspension or Revocation of Certifications, to 19 NYCRR Part 1208.

Section 1208-6.3(c) provides that if DOS determines that the complaint, on its face, does not state an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS will notify the complainant of that determination, and DOS will take no further action with respect to the complaint. If DOS determines that the complaint, on its face, does state an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS shall investigate the complaint and/or refer the complaint to the appropriate AHJ.

Section 1208-6.3(d) provides that DOS shall be permitted, but not required, to submit a copy of such complaint and any supporting information and documentation provided to DOS by the complainant to each AHJ that employs or otherwise uses the services of the subject person. In addition, if the complaint relates to an inspection performed pursuant to section 807-a of the Education Law, DOS shall be permitted, but not required, to submit a copy of such complaint and any supporting information and documentation provided to DOS by the complainant to the school authorities in charge of the subject school and to the New York State Department of Education. To the extent required by the Personal Privacy Protection Law, DOS shall redact the complainant's name, address, and contact information, and any other "personal information" from copies submitted to an AHJ or to any other person or entity pursuant to this subdivision.

Section 1208-6.3(e) provides that DOS may take action with respect to information indicating that a BSI or CEO has materially failed to uphold his or her enforcement duties even if that information comes to DOS's attention by means other than a formal complaint.

Section 1208-6.4(a)(1) provides that if DOS determines that a complaint states, on its face, an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS shall: (1) investigate such complaint in such manner as the department deems appropriate and/or (2) refer such complaint to the AHJ that employs or otherwise uses the services of the subject person, require such AHJ to investigate the complaint and to submit a written report of such investigation to the department, and provide such AHJ with instructions regarding the conduct of such investigation and the submission of such report.

Section 1208-6.4(a)(2) provides that the complainant, the subject person, and each AHJ that employs or otherwise uses the services of the subject person shall cooperate fully with any such investigation.

Section 1208-6.4(a)(3) provides that (1) upon completion of any such investigation, DOS shall determine whether the matter should be referred to the Office of Administrative Hearings (OAH) for a hearing or discontinued, with or without prejudice, and (2) DOS shall notify the complainant, the subject person, and each AHJ that employs or otherwise uses the services of the subject person of DOS's determination.

Section 1208-6.4(b)(1) provides that if information indicating that a BSI or CEO may have materially failed to uphold his or her code enforcement duties comes to the attention of DOS by any means other than a formal complaint submitted pursuant to section 1208-6.3, DOS may: (1) investigate such matter in such manner as the department deems appropriate and/or (2) refer such matter to the AHJ that employs or otherwise uses the services of such BSI or CEO, require such AHJ to investigate the complaint and to submit a written report of such investigation to the department, and provide such AHJ with instructions regarding the conduct of such investigation and the submission of such report.

Section 1208-6.4(b)(2) provides that the BSI or CEO and each AHJ that employs or otherwise uses the services of such BSI or CEO shall cooperate fully with any such investigation.

Section 1208-6.4(b)(3) provides that (1) upon completion of any such investigation, DOS shall determine whether the matter should be referred to the OAH or discontinued, with or without prejudice, and (2) DOS shall notify the BSI or CEO who was the subject of the investigation and each AHJ that employs or otherwise uses the services of such BSI or CEO of DOS's determination.

Section 1208-6.5 provides that:

(a) DOS may refer the question of whether a BSI or CEO did or did not materially fail to uphold his or her code enforcement duties to the OAH; that upon such referral, an ALJ in the OAH shall conduct a hearing and shall render a decision in writing;

(b) the hearing shall be conducted in accordance with the provisions of Article 3 of the State Administrative Procedure Act and 19 NYCRR Part 400; and

(c) the ALJ's decision shall include findings of fact and conclusions of law or reasons, and if the ALJ finds that the BSI or CEO did materially fail to uphold his or her code enforcement duties, the ALJ shall: (1) suspend the certification of such BSI or CEO for such period of time, and subject to such terms and conditions, as the ALJ may deem to be appropriate, or (2) revoke the certification of such BSI or CEO.

Section 1208-6.6 provides that each person who has performed or hereafter performs any enforcement activity on behalf of any AHJ shall be deemed to have consented to: (a) the jurisdiction of DOS and the DOS's Office of Administrative Hearings for the purpose of proceedings to

suspend or revoke certifications pursuant to this Subpart, and (b) service of notices of hearing, determinations, and other papers in such proceedings by certified mail, return receipt requested, or regular first-class mail directed to such person at the address of such person last known to the department, or in any manner authorized by the CPLR or any other applicable law.

Section 1208-6.7 provides for the purposes of Subpart 1208-6, any authority to perform enforcement activities given to a person under section 1208-2.2(b)(1), section 1208-2.2(b)(2), or section 1208-2.2(b)(4) of Part 1208 shall be deemed to be a certification, and such authority shall be subject to suspension or revocation pursuant to Subpart 1208-6.

Section 1208-6.8 provides that if a person whose certification has been designated as inactive pursuant to section 1208-3.5 of Part 1208 materially fails to uphold his or her code enforcement duties, whether before or after such designation, such person's certification shall be subject to suspension or revocation pursuant to Subpart 1208-6.

Section 1208-6.9 provides that the provisions of Subpart 1208-6 are in addition to, and not in substitution for or limitation of, the provisions of 19 NYCRR section 1208-3.5(b).

The rule also amends 19 NYCRR section 1208-3.5(b) to provide that the revocations contemplated by that provision are in addition to, and not in substitution for or limitation of, the provisions of Subpart 1208-6.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 1208-6.4(a) and (b).

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, email: joseph.ball@dos.ny.gov

Revised Regulatory Impact Statement

The Department of State has determined that the changes made to the last published rule are non-substantive and do not necessitate a revision of the original Regulatory Impact Statement published in the Notice of Emergency Adoption and Proposed Rule Making.

Those changes made to the rule are summarized as follows:

Section 1208-6.4 of Title 19 NYCRR, as originally proposed, provided that if the Department of State (DOS) determined that a complaint stated, on its face, an allegation that a building safety inspector (BSI) or code enforcement official (CEO) materially failed to uphold his or her code enforcement duties, DOS would investigate the complaint or refer the complaint to the authority having jurisdiction (AHJ) who used the services of the BSI or CEO and direct the AHJ to investigate the complaint. Section 1208-6.4, as originally proposed, also provided that if information indicating that a BSI or CEO materially failed to uphold his or her code enforcement duties came to DOS's attention by means other than a formal complaint, DOS could investigate or refer the matter to the AHJ for investigation. However, the rule as originally proposed did not call for DOS to notify the complainant (if any), the affected BSI or CEO, or the affected AHJ, of the steps taken upon completion of the investigation. Section 1208-6.4 was changed to provide that upon completion of an investigation, (1) DOS would determine whether the matter should be referred to the Office of Administrative Hearings for a hearing, or discontinued, with or without prejudice, and (2) DOS would notify the complainant (if any), the BSI or CEO, and the AHJ of that determination.

Revised Regulatory Flexibility Analysis

The Department of State has determined that the changes made to the last published rule are non-substantive and do not necessitate a revision of the original Regulatory Flexibility Analysis for Small Businesses and Local Governments published in the Notice of Emergency Adoption and Proposed Rule Making.

Those changes made to the rule are summarized as follows:

Section 1208-6.4 of Title 19 NYCRR, as originally proposed, provided that if the Department of State (DOS) determined that a complaint stated, on its face, an allegation that a building safety inspector (BSI) or code enforcement official (CEO) materially failed to uphold his or her code enforcement duties, DOS would investigate the complaint or refer the complaint to the authority having jurisdiction (AHJ) who used the services of the BSI or CEO and direct the AHJ to investigate the complaint. Section 1208-6.4, as originally proposed, also provided that if information indicating that a BSI or CEO materially failed to uphold his or her code enforcement duties came to DOS's attention by means other than a formal complaint, DOS could investigate or refer the matter to the AHJ for investigation. However, the rule as originally proposed did not call for DOS to notify the complainant (if any), the affected BSI or CEO, or the affected AHJ, of the steps taken upon completion of the investigation. Section 1208-6.4 was changed to provide that upon completion of an investigation, (1) DOS would determine whether the matter should be referred to the Office of Administrative Hearings for a hearing, or discontinued, with or without prejudice, and (2) DOS would notify the complainant (if any), the BSI or CEO, and the AHJ of that determination.

Revised Rural Area Flexibility Analysis

The Department of State has determined that the changes made to the last published rule are non-substantive and do not necessitate a revision of

the original Rural Area Flexibility Analysis published in the Notice of Emergency Adoption and Proposed Rule Making.

Those changes made to the rule are summarized as follows:

Section 1208-6.4 of Title 19 NYCRR, as originally proposed, provided that if the Department of State (DOS) determined that a complaint stated, on its face, an allegation that a building safety inspector (BSI) or code enforcement official (CEO) materially failed to uphold his or her code enforcement duties, DOS would investigate the complaint or refer the complaint to the authority having jurisdiction (AHJ) who used the services of the BSI or CEO and direct the AHJ to investigate the complaint. Section 1208-6.4, as originally proposed, also provided that if information indicating that a BSI or CEO materially failed to uphold his or her code enforcement duties came to DOS's attention by means other than a formal complaint, DOS could investigate or refer the matter to the AHJ for investigation. However, the rule as originally proposed did not call for DOS to notify the complainant (if any), the affected BSI or CEO, or the affected AHJ, of the steps taken upon completion of the investigation. Section 1208-6.4 was changed to provide that upon completion of an investigation, (1) DOS would determine whether the matter should be referred to the Office of Administrative Hearings for a hearing, or discontinued, with or without prejudice, and (2) DOS would notify the complainant (if any), the BSI or CEO, and the AHJ of that determination.

Revised Job Impact Statement

The Department of State has determined that the changes made to the last published rule are non-substantive and do not necessitate a revision of the original Statement Explaining Why Job Impact Statement Is Not Required published in the Notice of Emergency Adoption and Proposed Rule Making.

Those changes made to the rule are summarized as follows:

Section 1208-6.4 of Title 19 NYCRR, as originally proposed, provided that if the Department of State (DOS) determined that a complaint stated, on its face, an allegation that a building safety inspector (BSI) or code enforcement official (CEO) materially failed to uphold his or her code enforcement duties, DOS would investigate the complaint or refer the complaint to the authority having jurisdiction (AHJ) who used the services of the BSI or CEO and direct the AHJ to investigate the complaint. Section 1208-6.4, as originally proposed, also provided that if information indicating that a BSI or CEO materially failed to uphold his or her code enforcement duties came to DOS's attention by means other than a formal complaint, DOS could investigate or refer the matter to the AHJ for investigation. However, the rule as originally proposed did not call for DOS to notify the complainant (if any), the affected BSI or CEO, or the affected AHJ, of the steps taken upon completion of the investigation. Section 1208-6.4 was changed to provide that upon completion of an investigation, (1) DOS would determine whether the matter should be referred to the Office of Administrative Hearings for a hearing, or discontinued, with or without prejudice, and (2) DOS would notify the complainant (if any), the BSI or CEO, and the AHJ of that determination.

Initial Review of Rule

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

Assessment of Public Comment

The Department of State (DOS) received eight separate comments relating to this rule. The following includes a summary and an analysis of the issues raised and significant alternatives suggested by such comments, a statement of the reasons why any significant alternatives were not incorporated into the rule, and a description of any changes made in the rule as a result of such comments.

Comment 1 questioned how this rule will "work" for a local code enforcement official (CEO) who seeks an interpretation of a code provision, and receives different interpretations from different sources, such as "the local rep" (presumably, a DBSC staff person) and an instructor in a training course.

DOS Response to Comment 1: The rule provides that in the case of a CEO, a material failure to uphold duties must involve a failure to note one or more serious code violations on an inspection report; some other material error or omission on an inspection report; willful misconduct, gross negligence, or gross incompetence; or performing code enforcement activity at a time when his or her certification is inactive or suspended. It is unlikely that a local CEO who makes an honest effort to obtain the proper interpretation of a code provision and applies what he or she honestly and reasonably believes to be the proper interpretation will be subject to suspension or revocation under this rule. DOS also notes that a CEO can apply to the Secretary of State for a formal, and binding, code interpretation under Executive Law section 376(4). No change was made to the rule in response to Comment 1.

Comment 2 appeared to support the concept of suspending or revoking the certification of a CEO who does not do his or her job "adequately," but

questioned whether a CEO should be subject to suspension or revocation for "falling short" on the required annual in-service training for an unforeseen reason.

DOS Response to Comment 2: The already existing training regulations already provide that the certification of a CEO or a building safety inspector (BSI) who fails to complete the required annual in-service training, or any required advance in-service training, will be designated as inactive (19 NYCRR section 1208-3.5). This rule will supplement and clarify these already existing provisions. In addition, DOS views completion of required in-service training as an essential duty that CEOs and BSIs must fulfill to maintain their ability to enforce the code in a due and proper manner. No change was made to the rule in response to Comment 2.

Comment 3 expressed the concern that this rule will "open the floodgate to needless complaints that will tie up [code enforcement personnel] even more."

DOS Response to Comment 3: This rule implements a requirement imposed by the recent amendments to Executive Law section 376-a. DOS believes that the provisions in the rule that call for the DOS to review each complaint it receives and to determine if the complaint is of the type that warrants further action under this rule (subdivisions (b) and (c) of 19 NYCRR section 1208-6.3) will weed out the "needless" complaints mentioned in the comment. No change was made to the rule in response to Comment 3.

Comment 4 noted that the rule provides that a material failure to uphold code enforcement duties includes, inter alia, failure to note a "serious violation" on an inspection report, and asks "what does a serious code violation mean?" (Comment 2, above, also requested an explanation of the meaning of the term "serious" violation.)

Comment 4 also noted that the rule provides that "making any other material error or omission on an inspection report" would also constitute a material failure to uphold code enforcement duties, and appears to express the concern that an honest or inadvertent error could be grounds for suspension or revocation. The person who submitted Comment 4 noted that the codes are changed from time to time, stated that sometimes the State does not inform the authorities who are enforcing the codes of these changes, and expressed the hope that the State "would understand that local municipalities have limited resources and are trying diligently to enforce the law but also keep the cost of living in NYS affordable."

DOS Response to Comment 4: The rule provides that material failures to uphold code enforcement duties include, inter alia, failure to note one or more "serious violations" of the Uniform Code (or, in the case of a CEO, failure to note one or more "serious violations" of the Uniform Code and/or Energy Code) on an inspection report. DOS believes that the term "serious violation" is self-explanatory. DOS also notes that any proceeding to suspend or revoke the certification of a CEO or BSI under this rule will be referred to the Department's Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ). DOS believes that the ALJs who will hear these matters will be able to interpret the term "serious violation" in the context of a proceeding under this rule.

The provisions in the rule that provide that making any other "material error or omission on an inspection report" a material failure to uphold code enforcement duties reflects the express language of the statute under which this rule is proposed. See Executive Law section 376-a(2)(e), which provides, in pertinent part, that the Secretary of State may promulgate rules and regulations with respect to . . . "(r)evocation or suspension of the certification of any code enforcement personnel found after a hearing to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report" (emphasis added). Again, DOS believes that the ALJs who will hear matters referred to them under this rule will be able to interpret the term "material errors or omissions on an inspection report" in the context of a proceeding under this rule.

With respect to New York State informing local governments of code changes as they are adopted, DOS's Division of Building Standards and Codes (DBSC) maintains a "Rule Making Activity" section on its homepage (<https://www.dos.ny.gov/DCEA/>). This section includes information about code changes that are in development, code changes that are currently proposed for adoption, and code changes that have been recently adopted. The DBSC also issues an e-bulletin entitled "Building New York" that includes information of interest to builders and code enforcement officials, including information regarding proposed, or recently adopted, changes to the codes. This e-bulletin is available at no charge to anyone who wishes to subscribe. See https://www.dos.ny.gov/DCEA/code_list.html for more information. In addition, the annual in-service training courses that CEOs and BSIs are required to take are intended to keep code enforcement personnel up to date on the codes. The "advanced in-service training" courses that CEOs and BSIs are required to take after each major update to the codes are particularly important for this purpose.

No change was made to the rule in response to Comment 4.

Comment 5 noted that the rule would "strip inspectors of their certifica-

tions for incompetence” and asked “how about a rule where you have to attend all disciplinary [hearings] of all [CEOs] that you certify?”

DOS Response to Comment 5: With respect to the question “how about a rule where you have to attend all disciplinary [hearings] of all [CEOs] that you certify,” it is not clear if the “you” is the Department of State, and if the “disciplinary hearings” are the proceedings to be commenced under this rule. However, under this rule, complaints that allege a material failure to uphold code enforcement duties will be referred to OAH for a hearing before an ALJ. DOS employees will attend those hearings as presenters and/or as witnesses. Therefore, DOS employees will attend all such disciplinary proceedings. No change was made to the rule in response to Comment 5.

Comment 6 expressed support for this rule, noting that it was “about time a rule like this was adopted.”

DOS Response to Comment 6. No response is required. DOS notes that this rule was proposed to implement the recent amendments to Executive Law section 376-a.

Comment 7 suggested making the following changes to the rule:

(1) add a new subdivision to Section 1208-6.3 (Complaints) that would specify “steps in response to a complaint, including writing back to the complainant of its findings and determinations” and

(2) amend paragraphs (a)(2) and (b)(2) of Section 1208-6.4 (Investigations) to provide that when DOS refers a matter to the authority having jurisdiction (AHJ) to investigate, the AHJ must provide a written report of its investigation to DOS and to the complainant. (The rule currently provides that the AHJ is required to provide its written report only to DOS.)

DOS Response to Comment 7. With respect to that part of Comment 7 that requests notification to the complainant, DOS notes that the rule already provides that (1) DOS will review each complaint to determine if the complaint states, on its face, an allegation that the BSI or CEO named in the complaint (the subject person) has materially failed to uphold his or her code enforcement duties (19 NYCRR section 1208-6.3(b)) and (2) if DOS determines that the complaint does not state an allegation that the subject person has materially failed to uphold his or her code enforcement duties, DOS will notify the complainant of that determination (19 NYCRR section 1208-6.3(c)). However, the rule, as originally proposed, did not expressly provide that DOS would notify the complainant of any action taken if, following DOS’s initial review of the complaint, DOS determines that the complaint does state, on its face, a proper allegation of material failure to uphold code enforcement duties. As noted above, if DOS determines that a complaint, on its face, states a proper allegation, DOS will investigate the complaint or refer the complaint to the AHJ for investigation. In response to Comment 7, DOS has changed the rule to provide that (1) upon completion of the investigation of a complaint, DOS will determine whether the matter should be referred to the OAH for a hearing, or discontinued (with or without prejudice) and (2) DOS will notify the complainant, the subject person, and the AHJ of that determination.

With respect to that part of Comment 7 that requests that the rule require delivery of a copy of the written investigation report to the complainant, DOS notes that a written report of an investigation conducted by DOS, or conducted by an AHJ and provided to DOS, will be a record subject to disclosure under the Freedom of Information Law (FOIL). FOIL is broadly drafted to provide maximum disclosure of records. However, FOIL includes provisions that allow certain records, or certain portions of records, to be withheld under certain circumstances. There are sound policy reasons behind FOIL’s exceptions to disclosure. DOS is concerned that a blanket requirement that DOS and/or an AHJ provide a copy of its inspection report to the complainant may result in disclosure of material which could and should be redacted under FOIL. Therefore, DOS believes that it would be better not to include such a blanket requirement in this rule. A complainant who is interested in obtaining a copy of an investigation report will be free to submit a FOIL request for that report. Such request could be reviewed and responded to in accordance with the procedures established by FOIL. No change was made to the rule in response to this part of Comment 7.

Comment 8 expressed support for this rule.

DOS Response to Comment 8. No response is required.

NOTE: Comments 5 and 8 also included allegations relating to certain officials and/or certain municipalities. DOS has contacted the persons who submitted Comments 5 and 8 with regard to these allegations. Since these allegations do not appear to be directed to the merits of this rule, they will not be addressed in this Assessment.