

Proposed Amendments/9 NYCRR Part 358

Revised Proposed Amendments/9NYCRR Part 358

Section 358.1 of 9 NYCRR is amended to read as follows:

Section 358.1 - Objective.

This Part's objective is to promote public/traffic safety, offender accountability, and quality assurance through the establishment of minimum standards for the usage and monitoring of ignition interlock devices imposed by a criminal court [for] involving a felony or misdemeanor charge or conviction under the Vehicle and Traffic Law or Penal Law or arising from a youthful offender adjudication replacing any such conviction.

Section 358.2 of 9 NYCRR is amended to read as follows:

Section 358.2 Applicability.

This Part shall be applicable to every county, monitor, and operator, and shall govern qualified manufacturers and installation/service providers as to use, installation, and reporting with respect to ignition interlock devices imposed upon the aforementioned criminal court population within New York State [and be effective immediately except section 358.6 through 358.10 which shall be effective August 15, 2010].

Section 358.3 of 9 NYCRR is amended to read as follows:

Section 358.3 Definitions.

When used in this Part:

(a) The term "blood alcohol concentration" or "BAC" shall mean the weight amount of alcohol contained in a unit volume of blood, measured as grams ethanol/ 100 ml. blood and expressed as %, grams %, % weight/volume (w/v), and % BAC. Blood alcohol concentration in this Part shall be designated as % BAC.

(b) The term "certificate of completion" shall mean a document issued by the monitor after the conclusion of the ignition interlock period set by the criminal court, including any extensions or modifications as may have subsequently occurred [since the date of sentence] which shows either satisfactory completion of the ignition interlock condition or a change by the court in a pre-sentence order no longer requiring the need for a device, [operator's sentence] or a change in the conditions of probation or conditional discharge no longer requiring the need for a device after completion of the minimum ignition interlock period.

(c) The term "circumvent" shall mean to request, solicit or allow any other person to blow into an ignition interlock device, or to start a motor vehicle equipped with the device, for the purpose of providing the operator whose driving privileges is so restricted with an operable motor vehicle, or to blow into an ignition interlock device or start a motor vehicle equipped with the device for

the purpose of providing an operable motor vehicle to a person whose driving privilege is so restricted or to tamper with an operable ignition interlock device.

(d) The term “county” shall mean every county outside of the city of New York, and the City of New York as a whole.

(e) The term “county executive” shall mean a county administrator, county manager, county director or county president and in cities with a population of one million or more, the mayor.

(f) The term “division” shall mean the division of criminal justice services.

(g) The term “drinking driver program” shall mean an alcohol and drug rehabilitation program established pursuant to section 1196 of the Vehicle and Traffic Law.

(h) The term “Emergency Notification Program” shall mean a protocol that utilizes real time data reporting and provides timely notification to law enforcement agencies regarding at minimum failed or missed rolling re-tests.

(i) [(h)] The term “failed tasks” shall mean failure to install the ignition interlock device or failure to comply with a service visit or any requirement resulting therefrom as prescribed by this Part.

(j) [(i)] The term “failed tests” shall mean a [failed] start-up re-test[,] or [failed] rolling re-test at or above the set point, or a missed rolling re-test.

(k) [(j)] The term “failure report recipients” shall mean all persons or entities required to receive a report from the monitor of an operator’s failed tasks or failed tests pursuant to a county’s plan which may include, but is not limited to the [sentencing] applicable court, district attorney, operator’s alcohol treatment provider, and the drinking driver program, where applicable.

(l) [(k)] The term “ignition interlock device” shall mean any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator’s equivalent blood alcohol level does not exceed the calibrated setting on the device as required by standards of the department of health in Section 59.10 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

(m) [(l)] The term “installation/service provider” shall mean an entity located in New York State approved by a qualified manufacturer that installs, services, and/or removes an ignition interlock device.

(n) [(m)] The term “lockout mode” shall mean circumstances enumerated in this Part which trigger the ignition interlock device to cause the operator’s vehicle to become inoperable if not serviced within five (5) calendar days.

(o) [(n)] The term “monitor” shall mean the local probation department where the operator is under interim probation supervision or probation [supervision] or any person(s) or entity (ies) designated in the county’s ignition interlock program plan for any operator granted conditional

discharge or otherwise required to install an ignition interlock device and undergo monitoring in advance of sentencing pursuant to court order.

(p) [(o)] The term “operator” shall mean a person who is subject to installation of an ignition interlock device arising from [for] a felony or misdemeanor charge or conviction under the Vehicle and Traffic Law or the Penal Law or arising from a youthful adjudication of any such crime.

(q) [(p)] The term “qualified manufacturer” shall mean a manufacturer or distributor of an ignition interlock device certified by the New York State department of health which has satisfied the specific operational requirements herein and has been approved as an eligible vendor by the division in the designated region where the county is located.

(r) The term “real time reporting” shall mean the contemporaneous transmission of data of particular events, as defined in Section 358.5(c) (6), to a specified monitoring entity as the event occurs or as soon as cellular reception permits.

(s) [(q)] The term “region” shall mean counties comprising an area within New York State designated by the division where a qualified manufacturer is authorized and has agreed to service.

(t) [(r)] The term “start-up test” shall mean a breath test taken by the operator to measure the operator’s blood alcohol concentration prior to starting the vehicle’s ignition.

(u) [(s)] The term “start-up re-test” shall mean a breath test taken by the operator to measure the operator’s blood alcohol concentration required within five (5) to fifteen (15) minutes of a failed start-up test.

(v) [(t)] The term “rolling test” shall mean a breath test, administered at random intervals, taken by the operator while the vehicle is running.

(w) [(u)] The term “rolling re-test” shall mean a breath test, taken by the operator while the vehicle is running, within one (1) to three (3) minutes after a failed or missed rolling test.

(1) The term “failed rolling re-test” shall mean a rolling re-test in which the operator’s BAC is at or above the set point.

(2) The term “missed rolling re-test” shall mean failure to take the rolling re-test within the time period allotted to do so.

(x) [(v)]The term “service period” shall mean the length of time between service visits.

(y) [(w)] The term “service visit” shall mean a visit by the operator or another driver of the subject vehicle to or with the installation/service provider for purposes of having the ignition interlock device inspected for repair, defect, and detection of tampering and/or circumvention, [monitored], downloaded, recalibrated, or maintained as authorized by this Part. [It shall also mean where applicable, the act by any operator of sending the portion of the interlock device

that contains the data log and the breath testing module to the qualified manufacturer for the purposes of downloading the data, reporting to the monitor, and recalibrating the device.]

(z) [(x)] The term “set point” shall mean a pre-set or pre-determined BAC setting at which, or above, the device will prevent the ignition of a motor vehicle from operating.

(aa) [(y)] The term “STOP–DWI” shall mean special traffic options program–driving while intoxicated.

(bb) [(z)] The term “tamper” shall mean to alter, disconnect, physically disable, remove, deface, or destroy an ignition interlock device or any of its component seals in any way not authorized by this Part.

Subdivisions (a), (c) and (d) of Section 358.4 of 9 NYCRR is amended to read as follows:

(a) Every county shall establish a county ignition interlock program plan with respect to usage of ignition interlock devices and monitoring the compliance of an operator subject to installation of an ignition interlock device with monitoring as directed by a [sentencing] criminal court. Such plan shall be approved by the county executive [and become effective on or before August 15, 2010, and shall be filed with the division no later than June 15, 2010]. A county may submit an amended plan on its own initiative, which shall be approved by the county executive. Where a plan has been amended by the county, in whole or in part, it shall be promptly filed with the division in advance of its effective date. The division may also require modification or updates of any county plan or amended plan as it deems necessary to be consistent with law or regulatory provisions.

(c) Every plan shall specify monitoring by the probation department where the operator is subject to a period of either interim probation supervision or probation [supervision] and may designate one or more alternative persons or entities, in lieu of the probation department, responsible for monitoring where an ignition interlock device has been:

(i) imposed pursuant to a conditional discharge or

(ii) imposed by court order in advance of sentencing requiring monitoring.

An alternative person or entity may include but is not limited to the sheriff, police commissioner, district attorney, STOP–DWI coordinator, traffic safety board representative, drinking driver program, treatment alternative for safer communities program, or any other similar individual, agency, or organization. Nothing shall preclude a county from sharing monitoring resources, including equipment, with another county to effectuate the provisions of this Part.

(d) Every plan at a minimum shall:

(1) designate the persons or entities, or combination thereof, responsible for monitoring an operator’s compliance with an ignition interlock requirement in cases where an operator does not receive either a period of interim probation supervision or probation [supervision]; establish

that where an operator is under either interim probation supervision or probation [supervision], the probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in its region. The operator may select the model of the ignition interlock device, meeting the specific class and features selected by the probation department from a qualified manufacturer in the operator's region of residence;

(2) establish that where an operator has received a sentence of conditional discharge, the monitor shall select the class of ignition interlock device available from a qualified manufacturer in its region for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence;

(3) establish that where an operator has been court ordered to install an ignition interlock device in advance of sentencing with monitoring, other than interim probation supervision, the monitor shall select the class and features of ignition interlock device available from a qualified manufacturer in its region for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence;

(4) [(3)] in the event more than one qualified manufacturer does business within its region, the county shall establish an equitable procedure for manufacturers to provide ignition interlock devices without costs where an operator has been determined financially unable to afford the costs and has received a waiver from the [sentencing] criminal court. The equitable procedure should be based upon proportion of ignition interlock devices paid to each qualified manufacturer by operators in the county;

(5) [(4)] through any available funding earmarked for such purpose, establish a distribution formula for probation supervision and/or monitoring purposes associated with this Part;

(6) [(5)] establish a procedure whereby the probation department and any other monitor will be notified no later than five (5) business days from the date an ignition interlock condition is imposed by the [sentencing] criminal court, any court approval authorizing reduction in breath sample as authorized by section 358.5, any waiver of the cost of the device granted by the [sentencing] criminal court, and of any intrastate transfer of probation or interstate transfer of any case which either has responsibility to monitor. Such procedure shall also establish a mechanism for advance notification as to date of release where local or state imprisonment is imposed; and

(7) [(6)] establish a procedure governing failure report recipients, including method and timeframe with respect to specific notification and circumstances. At a minimum the procedure shall be consistent with the provisions of section 358.7(d) with respect to [sentencing] applicable criminal court and district attorney notification of specific failed tasks and failed tests reports.

Section 358.5 of 9 NYCRR is amended to read as follows:

Section 358.5 Approval Process and Responsibilities of Qualified Manufacturers.

(a) (1) [On or after August 15, 2010, only] Only a qualified manufacturer may conduct business in New York State with respect to any operator. An interested manufacturer of a certified ignition interlock device seeking to conduct business within New York State shall apply to the division to become a qualified manufacturer in one or more designated regions of New York State.

(2) The four regions of the state by counties for purposes of this Part are as follows:

(i) Region 1: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuylers, Seneca, Steuben, Wayne, Wyoming, and Yates;

(ii) Region 2: Broome, Chenango, Clinton, Cortland, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, and Tompkins;

(iii) Region 3: Albany, Columbia, Delaware, Dutchess, Greene, Montgomery, Orange, Otsego, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren, and Washington; and

(iv) Region 4: Bronx, Kings, Nassau, New York, Queens, Richmond, Suffolk, and Westchester.

(b) (1) The format and content of any application shall be established by the division. The application deadline for any contractual period of any manufacturer seeking approval of the division as a qualified manufacturer to conduct business in New York State shall be set by the division. [by August 15, 2010 shall be on or before May 12, 2010. Thereafter,] Nothing shall preclude the division from establishing an open application process for any interested manufacturers seeking to conduct business on or after such deadline and filing an application to the division for approval [applications may be filed at any time for division approval by manufacturers seeking to conduct business after August 15, 2010]. However, where approved, the contractual end date shall be consistent with other qualified manufacturer agreements. The application shall require at a minimum that the manufacturer submit relevant information, reports, and other documents requested by the division with respect to competitive pricing, service performance, select one or more regions in which it shall agree to conduct business, and certify that it will comply with all applicable provisions specified in this Part with respect to service delivery. In addition, the manufacturer or its representative shall provide a signed statement that the manufacturer or its representative will indemnify and hold harmless the State of New York, the division, the department of health, every county where it does business, and their officers, employees and agents from all claims, demands and actions as a result of property damage and/or injury or death to persons which arise, directly or indirectly, out of any act or omission by the manufacturer, its representative, or installation/service providers relating to the installation, service, inspection, maintenance, repair, use and/or removal of the ignition interlock device.

(2) Every manufacturer who applies shall provide a thorough description of each device intended for use in New York State, provide proof of such certification by the department of health for each device intended for use in New York State, and the fee structure associated with

that specific device. Descriptive information about the device shall include but not be limited to: make and model of device, special features of the device such as camera, reporting capabilities, removable head, global positioning system [satellite], and real-time [or next day] reporting. Fee structure information shall include any and all fees charged to the operator, including but not limited to installation fee, monthly fee, any special service fees, shipping fee, and de-installation fee. The proposed fee structure shall take into consideration and be based upon an anticipated ten percent (10%) waiver of the fees by [sentencing] criminal courts due to operator unaffordability. [On] Annually, on or about February 15th of each year [, 2011 and annually thereafter], the division shall review requests by qualified manufacturers for rate adjustments which shall include information submitted by qualified manufacturers involving unaffordability waivers granted by courts. At its discretion, the division shall approve rate adjustments where appropriate.

(3) Every qualified manufacturer with a certified device who wants any operational modification to the device must submit in advance necessary documentation to the department of health and obtain departmental approval before releasing the modified device. The manufacturer shall notify the division in writing of their intent of any operational modification and also any subsequent approval and provide a written summary of any requested or approved modification. Operational modification means any change to the product design or function that would or could affect the devices anti-circumvention, anti-tampering or analytical features as determined by the department of health.

(4) [(3)] The division shall classify all certified ignition interlock devices into categories based upon features and provide such list to every county. This classification system and subsequent device classification is subject to change by the division as new information becomes available. Upon review of a manufacturer's application, the division shall make a determination whether the manufacturer satisfies all requirements to be designated a qualified manufacturer and provide notification to the applicant and every county within the region that the qualified manufacturer may conduct business. Every qualified manufacturer shall enter into a contractual agreement for a minimum period of three years with the division setting forth the requirements of the qualified manufacturer and all of its installation/service providers consistent with this Part and the application submission approved by the division. However, where a qualified manufacturer enters into a contractual agreement with the division after the regular term of division contracts with other qualified manufacturers, the expiration date shall be consistent with other contracts in this area.

(c) Every qualified manufacturer shall:

(1) adhere to all regulatory provisions of the department of health with respect to certification, testing, labeling, reporting and any additional requirements, and shall also specifically adhere to its responsibilities contained in this Part;

(2) agree that an ignition interlock device shall conform to the national highway traffic safety administration (NHTSA) standards and department of health specifications, be calibrated at a set point of .025 BAC percent, and also require the operator after passing the start-up test allowing the engine to start, to submit to an initial rolling test within a randomly variable interval

ranging from five to fifteen minutes. Subsequent rolling tests shall continue to be required at random intervals not to exceed thirty (30) minutes for the duration of the travel. A start-up re-test shall be required within five (5) to fifteen (15) minutes of a failed start-up test. A rolling re-test shall be required within one (1) to three (3) minutes after a failed or missed rolling test. An ignition interlock device shall enter into a lockout mode upon the following events: one failed start-up retest, one missed start-up re-test, one failed rolling re-test or one missed rolling re-test within a service period, or one missed service visit;

(3) agree to any reduced breath sample volume as permitted in NHTSA standards from 1.5 liters to 1.2 liters, or any subsequent NHTSA reduced volume sample standards, where an individual has submitted sufficient documentation from a physician of a condition which prevents regular operation at normal breath volume levels and such proof authorizing reduction in the breath sample volume has been approved by the applicable criminal court and notification has been provided to the qualified manufacturer by the applicable monitor.

~~(4)~~ [(3)] agree to adhere to a maximum fee/charge schedule with respect to all operator's costs associated with such devices, offer a payment plan for any operator determined to be financially unable to pay the cost of the ignition interlock device where a payment plan is so ordered, and provide a device free of fee/charge to the operator where the cost is waived by the sentencing court, or pursuant to such other agreement as may be entered into for provision of the device. Any contractual agreement between the operator and the qualified manufacturer or its installation/service providers shall permit an early termination without penalty to the operator when a certificate of completion has been issued, where the sentence has been revoked, and whenever the operator has been transferred to a jurisdiction where the manufacturer does not do business. Nothing shall prevent a qualified manufacturer from lowering the fee/charge schedule during the course of an operator's contract and/or the contractual agreement with the division;

~~(5)~~ [(4)] agree to service every county within a region and ensure that there shall be an installation/service provider located in New York State within 50 miles from the operator's residence or location where the vehicle is parked or garaged, whichever is closest and ensure repair or replacement of a defective ignition interlock device shall be made available within the same 50 mile radius by a fixed or mobile installation/service provider, or through a qualified manufacturer sending a replacement, within 48 hours of receipt of a complaint, or within 72 hours where an intervening weekend or holiday. Mobile servicing may be permissible provided that the above facility requirements are met and a specific mobile servicing unit with regular hours is indicated;

~~(6)~~ [(5)] guarantee that an installation/service provider or the manufacturer shall download the usage history of every operator's ignition interlock device within thirty (30) calendar days of initial installation(s) and during subsequent service visits every thirty (30) calendar days where the device does not automatically transmit data directly to the monitor; and within thirty (30) calendar days of initial installation(s) and during subsequent service visits every sixty (60) calendar days where the device automatically transmits data directly to the monitor; [between service visits] or if the operator fails to appear for a service visit(s) as soon thereafter as the

device can be downloaded, and provide the monitor with such information and in such format as determined by the division. Further guarantee that the installation/service provider, unless the manufacturer provides such notification, shall take appropriate, reasonable and necessary steps to confirm any report of failed tasks, failed tests, circumvention, or tampering and thereafter notify the appropriate monitor within three (3) business days of knowledge or receipt of data, indicating:

- (i) installation of a device on an operator's vehicle(s);
- (ii) report of a failed start-up re-test;
- (iii) report of a missed start-up re-test;
- (iv) report of a failed rolling re-test;
- (v) report of a missed rolling re-test;
- (vi) report of the device entering lockout mode;
- (vii) failure of an operator to appear at a scheduled service visit; or
- (viii) report of an alleged circumvention or tampering with the ignition interlock devices as prohibited by paragraphs (a), (c) or (d) of subdivision (9) of section 1198 of the Vehicle and Traffic Law, or an attempt thereof;

[(ix) report of a failed test or re-test where the BAC is .05 percent or higher.]

(7) adhere to real time reporting and Emergency Notification Program requirements, where such is required in any county plan. Where real time reporting is utilized, such reports provided to the monitor as required above must occur contemporaneously as the event occurs or as soon as cellular reception permits. Where an emergency notification program is utilized, immediate report notification as required above must be transmitted to the appropriate monitor and any other law enforcement specified by the county;

(8) [(6)]provide, no more than monthly to the operator upon his or her request, the operator's usage history, including any report of failed tasks, failed tests, circumvention, or tampering. An operator may only make one request during any month for such information. Such request shall be in writing and provide either an email address or self-addressed stamped envelope;

(9) [(7)]agree to safeguard personal information with respect to any operator and any reports and provide access to such records only as authorized herein, by law, or by court order. All records maintained by the manufacturer and any of its installation/service providers with respect to ignition interlock devices in New York State shall be retained in accordance with section 358.9;

(10) [(8)] ensure that the manufacturer and/or the installation/service provider, where applicable, complies with reporting requirements established by the division [and county reporting requirements] in providing information and reports to the division, and on a case –by- case basis

to localities as may be necessary with respect to an operator's use of the ignition interlock device;

(11) [(9)] establish and distribute to the division, its installation/service providers, and any county where it does business [prior to August 15, 2010, or if subsequently approved as a qualified manufacturer prior to doing business in the state,] a current list of all installation/service providers in the county, including business name, address and telephone number and maintain a toll-free 24 hour telephone number to be called from anywhere in the continental United States for an up-to-date listing of installation/service providers in the continental United States and for emergency assistance. Distribute an up-to-date listing of New York State installation/service providers to the division;

(12) [(10)] provide written certification to the division in a format prescribed by the division that all installation/service providers:

(i) have been trained in advance as to installation, maintenance, troubleshooting, set point requirement of .025. BAC percent, and recalibration of such manufacturer's devices;

(ii) have instructions as to installation and usage of such manufacturer's devices;

(iii) have agreed to comply with their manufacturer's service agreements;

(iv) have agreed to comply with the provisions of section 358.5(c) and (d);

(v) have agreed to provide hands-on training to the operator, any member of the same family or household, or any owner of a motor vehicle in which an ignition interlock device is being installed, with a valid driver's license who appears with the operator at installation to receive training as to the operation of an installed device on the vehicle, and to provide written or video instructional material to the operator;

(vi) have been informed of New York State law governing circumvention of ignition interlock devices and penalties associated therewith;

(vii) have agreed to safeguard personal information with respect to any operator and any reports and provide access to such records only as authorized herein, by law, or court order; and

(viii) have been made aware that non-compliance will result in immediate removal and updating the listing of installation/service providers identified in section 358.5(c)[(9)] (11). An installation/service provider may be reinstated by the division, at its discretion, upon satisfactory proof from the qualified manufacturer of corrective action;

(13) [(11)] conduct annual quality assurance audits or reviews of installation/service providers to ensure compliance with applicable laws, regulations and any contractual agreements and provide the division with yearly sworn statements that such audits have been conducted, as well as a copy of the findings of such annual quality assurance audits. Failure to conduct quality assurance audits may result in removal of the qualified manufacturer from doing business in the State of New York. Nothing shall preclude the division and/or its representative from conducting random audits and quality assurance audits or reviews;

(14) [(12)] take all reasonable steps necessary to prevent tampering or circumvention of the ignition interlock device and promptly notify the division, the applicable county's monitor and district attorney of any reasonable belief that an employee of an installation/service provider has attempted to alter or has altered ignition interlock data or has been otherwise involved in tampering or circumventing an ignition interlock device of any operator or any attempt thereof. Failure to notify the monitor and the district attorney may result in removal of the qualified manufacturer from doing business in the State of New York;

(15) [(13)] provide immediate written notice to the division and the applicable county monitor(s) of any removal of any installation/service provider and the reasons for such;

(16) [(14)] provide immediate written notice to the division and the department of health whenever the manufacturer's device, services, and/or operations has been compromised or does not function as intended in New York State or any other state or jurisdiction in which the manufacturer does business, or disapproved, suspended in whole or in part, revoked, or otherwise cancelled by another state or jurisdiction, or has received notice or communication from another state or jurisdiction that any such actions are imminent;

(17) [(15)] submit such reports, as requested and in such format and timeframes as determined by the division, for each model or type of certified device, including, but not limited to:

(i) operator and other vehicular user operation error;

(ii) faulty automotive equipment that directly [impacts] impact successful implementation and use of the device;

(iii) apparent misuse or attempts to circumvent or tamper/bypass a device;

(iv) device malfunctions, including proposed and follow-up action taken by the manufacturer to correct such malfunctions;

(v) deficiencies in device calibration stability; [and]

(vi) deficiencies in device reporting or information transmission as a result of any reason, including but not limited to service outages or downtimes of any nature;

(vii) any proposed operational modification or other proposed operational and/or administrative change, including but not limited to server, firmware, and other technical change or business structural change which may have the potential of affecting service delivery or reporting; and

(viii) [(v)] operator, vehicular user, and installation/service provider complaints;

(18) [(16)] provide documentation and verification of insurance (to be submitted upon each policy issuance or renewal) covering product liability, including coverage in New York State, with a minimum policy limit of \$1 million per occurrence, and \$3 million aggregate total. The manufacturer shall provide a signed statement holding harmless the State of New York, the division, every county, and their employees and agents from all claims, demands, and actions, as a result of damage or injury to persons or property that may arise, directly or indirectly, out of

any act or omission by the manufacturer or their installation/service provider relating to the installation, service, repair, use and/or removal of an ignition interlock device;

(19) provide documentation and verification of and maintain a Standby Letter of Credit (SLOC) as specified in the manufacturer's contract with New York State;

(20) [(17)] submit any other information determined by the division to be relevant to the effectiveness, reliability and value of ignition interlock devices as a sentencing sanction and/or monitoring tool; [and]

(21) [(18)] agree that the consequences of a failure to adhere to any manufacturer requirements specified in this Part and/or in contractual provisions with the State of New York may result in suspension or removal of the qualified manufacturer from doing business in the State of New York, or, in the event of suspension, such terms and conditions required by the division in any manufacturer's reconciliation plan; and

(22) agree to only provide an unlock code to an operator within two (2) hours of a scheduled service visit. The unlock code shall be a unique one time code and only functional for two (2) hours immediately preceding the service visit scheduled as a result of a vehicle being rendered inoperable due to a lockout mode.

(d) Every qualified manufacturer shall ensure that its installation/service providers comply with the following additional requirements:

(1) the ignition interlock device shall be installed in [any] vehicle(s) owned or operated by the operator within seven (7) business days of the operator's request for installation of the device;

(2) provide to all operators, at the time of device installation a hardcopy statement of fees/charges clearly specifying warranty details, schedule of lease payments where applicable, any additional costs anticipated for routine recalibration, service visits, and shipping where the device includes the direct exchange method of servicing, and listing any items available without charge if any, along with a list of installation/service providers in their respective county, a toll-free 24 hour telephone number to be called from anywhere in the continental United States to secure up-to-date information as to all installation/service providers located anywhere in the continental United States and for emergency assistance, and a technical support number available during specified business hours to reach a trained staff person to answer questions and to respond to mechanical concerns associated with the ignition interlock device;

(3) record the odometer reading of the motor vehicle in which the ignition interlock device is installed and during all service visits;

(4) remove an ignition interlock device and return the vehicle to normal operating condition only after having received a certificate of completion or a letter of de-installation from the monitor as authorized pursuant to section 358.7 of this Part. Where at the time of removal the installation/service provider or qualified manufacturer notices any failed tests that have not been backed up by a successful re-test, the monitor shall be notified for approval before the removal is made. [Where the device includes direct exchange method of servicing, the qualified

manufacturer shall report to the monitor before removal is made.] If a device is removed for repair and cannot be reinstalled immediately, a substitute device shall be provided;

(5) installation shall be performed in a professional manner by persons trained and authorized by the manufacturer pursuant to section 358.5(c) [(10)] (12);

(6) installation shall be performed according to the manufacturer's detailed written instructions, with calibration to the required set point of .025 BAC percent and in a manner so as to ensure proper vehicular operation;

(7) at the time of installation permanently affix the warning label notice prescribed by the department of health in a highly visible location on the installed ignition interlock device;

(8) be equipped with the necessary tools and equipment to ensure proper ignition interlock device installation and removal;

(9) perform installations and maintenance, including recalibrations, within a secure area of the installation/service provider's or qualified manufacturer's business establishment or at a location serviced by a mobile unit to prevent unauthorized persons from observing or accessing secured items such as tamper seals and installation, data download, transmission, or recalibration instructions;

(10) maintain records of installation and maintenance work performed on the devices;

(11) screen vehicles for mechanical and electrical conditions that would interfere with the functioning of the device, such as low battery or alternator voltage, defective horn, untuned engine, and frequent stalling;

(12) prior to installation, require that the operator complete mechanical repairs or adjustments where necessary for the proper functioning of the device. In such event, the seven (7) business day installation period in paragraph one shall commence when repairs or adjustments are completed;

(13) prior to installation of the ignition interlock device, obtain and record the following information from every operator:

(i) photo identification;

(ii) the name and policy number of his/her automobile insurance;

(iii) the vehicle identification number (VIN) of all motor vehicles owned or routinely driven by the operator, and a statement disclosing the names of all other individuals who operate the motor vehicle(s) owned or driven by the operator; and

(iv) a notarized affidavit from the registered owner of the vehicle granting permission to install the device if the vehicle is not registered to the operator;

(14) if, during the installation, the operator fails to pass the initial breath test, the installation will be halted and the monitor promptly notified;

Proposed Amendments/9 NYCRR Part 358

(15) after installation during any service visit, recalibrate as necessary or required in this Part and check the device and vehicle to ensure proper operation;

(16) notify the applicable monitor [and county probation department] when an ignition interlock device has been installed on an operator's vehicle(s) within three (3) business days of installation;

(17) complete the following with respect to service visits:

(i) document photo identification from the operator during all required in-person services;

(ii) provide service/monitoring of the ignition interlock device as required herein;

(iii) recalibrate as necessary the ignition interlock device at each service visit;

(iv) check for signs of circumvention or tampering; and

(18) adhere to any other applicable state or federal requirement.

Section 358.6 of 9 NYCRR is amended to read as follows:

Section 358.6 Cancellation, suspension, and revocation of qualified manufacturers, installation/service providers, and certified ignition interlock devices.

(a) Any of the following reasons may result in revocation of a certified ignition interlock device or suspension or removal of a qualified manufacturer or installation/service provider:

(1) when there is a voluntary request by a manufacturer to cancel certification of a device;

(2) when notified by the department of health that a device no longer meets their regulatory standards;

(3) when a device is discontinued by the manufacturer;

(4) when the manufacturer's liability insurance is terminated or cancelled;

(5) when the manufacturer or installation/service provider conceals or attempts to conceal its true ownership;

(6) when materially false or inaccurate information is provided relating to a device's performance standards;

(7) when there are defects in design, materials, or workmanship causing repeated failures of a device;

(8) when the manufacturer or installation/service provider knowingly permits nonqualified service technicians to perform work;

(9) when a manufacturer or installation/service provider assists users with circumventing or tampering with a device;

Proposed Amendments/9 NYCRR Part 358

- (10) when service or the submission of required reports is not provided in a timely manner as required by this Part;
- (11) when the manufacturer or installation/service provider refuses to provide an ignition interlock device free of charge to an operator who has received a judicial waiver;
- (12) when there is a pattern of substandard customer service;
- (13) when a manufacturer or installation/service provider interferes with or obstructs a review or investigation by the division or any designee;
- (14) when there are any other violations of the provisions contained in this Part, including division and department of health regulations, or any ignition interlock contractual agreement;
- (15) upon verbal and/or written notification or communication of disapproval, suspension in whole or in part, revocation, or cancellation of a manufacturer's device, services, and/or operations by another state or jurisdiction;
- (16) when a manufacturer or installation/service provider provides gratuities or any other personal incentives to a state or local official or any monitor for purposes of soliciting business; and
- (17) when a manufacturer or installation/service provider conducts business in New York State outside of the designated region or regions of operation approved by the division.

Section 358.7 of 9 NYCRR is amended to read as follows:

Section 358.7 Monitoring.

- (a) (1) Any monitor shall receive notification pursuant to its county plan of all operators which it has responsibility to monitor within five (5) business days of the [sentencing] applicable criminal court's order imposing the condition of an ignition interlock device and of an operator's release from imprisonment, in accordance with section 358.4(d)[(3)] (6). Such monitor shall obtain proof of installation by the operator and installation/service provider. The installation/service provider shall provide notification of installation of an ignition interlock device to the appropriate monitor and probation department in accordance with section 358.5 (d) (16) and the operator in accordance with subdivision (c) of this section;
- (2) Where a monitor learns that the operator no longer owns or operates a motor vehicle in which an ignition interlock device has been installed, the monitor may issue a letter of de-installation directly to the installation/service provider which authorizes removal of the device;
- (b) (1) Where the operator is under interim probation supervision or probation [supervision] and resides in another county in New York State at the time of sentencing or subsequently desires to reside in another county, upon intrastate transfer of probation, the receiving [county] probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in its region. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the

receiving [county] probation department from a qualified manufacturer in the operator's region of residence. Where intrastate transfer occurs after sentencing and the installation of a different device is required as a result of the transfer, the device shall be installed within ten (10) business days of relocation. All intrastate transfer of those under interim probation supervision or probation shall be in accordance with applicable laws and Part 349, where relevant;

(2) Where an operator has received a sentence of conditional discharge and resides in another county in New York State at the time of sentencing or thereafter, the [receiving county monitor shall select the class of ignition interlock device available from a qualified manufacturer in its region for any such operator.] sentencing county monitor shall contact the monitor in the county of residence to determine the class of ignition interlock device available from a qualified manufacturer in its region which will be required for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence. The [receiving] sentencing county monitor shall perform monitor services and the sentencing court retains jurisdiction of the operator. [Upon knowledge, the monitor of the sentencing county shall provide necessary operator information in advance to the receiving county monitor.] The [receiving] sentencing county monitor shall notify the sentencing court and county district attorney pursuant to paragraph (d) of this section. Where devices with Emergency Notification Program (ENP) capabilities are required by the county of residence, the sentencing county monitor shall notify the IID Manufacturer so that the designated law enforcement agency within the county of residence shall receive all applicable ENP communications/notifications;

(3) Where an operator has been court ordered to install an ignition interlock device in advance of sentencing with monitoring and resides in another county at the time of such order or thereafter, the county monitor in such jurisdiction shall contact the monitor in the county of residence to determine the specific class and features of the ignition interlock device available from a qualified manufacturer in its region which will be required for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence. The monitor in the county of the court ordering installation shall perform monitor services, and the court ordering installation retains jurisdiction of the operator. The county monitor shall notify the court ordering installation and county district attorney pursuant to paragraph (d) of this section. Where devices with Emergency Notification Program (ENP) capabilities are required by the county of residence, the sentencing county monitor shall notify the IID Manufacturer so that the designated law enforcement agency within the county of residence shall receive all applicable ERP communications/notifications;

(4) [(3)] Where an operator [subject to probation supervision or a sentence of conditional discharge,] resides or desires to reside out-of-state and is an offender subject to the interstate compact for adult offender supervision pursuant to section two hundred fifty-nine-mm of the executive law, the governing rules of such compact shall control. Additionally, Part 349, as applicable, shall apply with respect to transfer of supervision of probationers or those under interim probation supervision. Where transfer is permitted, the receiving state retains its authority to accept or deny the transfer in accordance with compact rules. Where an operator is

subject to interim probation supervision or probation [supervision] and is granted reporting instructions and/or acceptance by a receiving state, the sending probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in the receiving state. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the sending [county] probation department from a qualified manufacturer in the receiving state region. The device shall be installed prior to relocation or return where feasible. A qualified manufacturer shall make necessary arrangements to ensure the county monitor in New York State and the receiving state receive timely reports from the manufacturer and/or installation/service provider; and

(5) [(4)] Where an operator resides or desires to reside out-of-state, is not subject to the interstate compact for adult offender supervision and such compact's governing rules, and has been given permission to return or relocate by the [sentencing] criminal court or monitor, the same provisions with respect to selection specified in paragraph [three] four of this subdivision applies and the device shall be installed prior to relocation or return. A qualified manufacturer shall make necessary arrangements to ensure the county monitor receives timely reports from the manufacturer and/or installation/service provider. [Pursuant to the compact, an operator convicted of his or her first DWI misdemeanor is not subject to the compact.]

(c) Every operator shall:

(1) have installed and maintain a functioning ignition interlock device in any vehicle(s) he or she owns or operates within ten (10) business days of the condition being imposed by the court [or if] and any sentence[d] to imprisonment upon release from imprisonment, whichever is applicable and any subsequent vehicle he or she may own or operate to have the device installed in accordance with this Part and, within three (3) business days of installation, submit proof of installation to the court [,county probation department, and any other designated monitor] and applicable monitor. Nothing in this Part shall preclude an operator from having installed a certified ignition interlock device in excess of the class and/or features authorized herein;

(2)(a) submit to service visits within thirty (30) calendar days of [prior] initial installation(s) [or service visits] and subsequent service visits every thirty (30) calendar days [for the collection of data from the ignition interlock device and/or for inspection, maintenance, and recalibration purposes] where the device does not automatically transmit data directly to the monitor; and submit to [an initial] service visits within thirty (30) calendar days of initial installation(s) and subsequent service visits [within] every sixty (60) calendar days [of prior service visits] where the device [either] automatically transmits data directly to the monitor [for inspection, maintenance, or recalibration purposes] or the device head is required to be sent to the qualified manufacturer every thirty (30) calendar days [for such purposes, including data download]. However, an operator shall [only] never remove the device head or any of the component parts of an ignition interlock [upon receipt of a new] device [head].

(b) submit to a scheduled service visit within two (2) hours of an unlock code having been issued by a qualified manufacturer.

(3) provide the installation/service provider and the monitor prior to installation of the ignition interlock device, the following information:

- (i) his/her photo identification/license for examination purposes;
- (ii) the name and policy number of his/her motor vehicle insurance;
- (iii) the vehicle identification number (VIN) of all motor vehicles owned or routinely driven by the operator, and a statement disclosing the names of all other individuals who operate the motor vehicle(s) owned or driven by the operator; and
- (iv) a notarized affidavit from the registered owner of the vehicle granting permission to install the device if the vehicle is not registered to the operator;

(4) present photo identification/license for examination purposes during any in-person service visit; and

(5) provide the monitor with documentation requested by the monitor as to vehicle(s) owned or driven by the operator. Prior to an operator legally driving an employer's vehicle within the scope of his or her employment, the operator must provide satisfactory proof to the monitor that the employer has been notified of the operator's driving privilege is restricted and necessitates installation and maintenance of a functioning ignition interlock device and such employer grants permission for the operator to drive the employer's vehicle without the device only for business purposes. Such exemption for business purposes shall not apply to any vehicle owned by a business entity all or partly owned or controlled by the operator. Any operator shall provide satisfactory proof to the monitor that any other person who rents, leases, or loans a motor vehicle to him or her has been notified that the operator's driving privilege is restricted and necessitates installation of the ignition interlock device on any vehicle he or she owns or operates and that the person grants permission for the operator to install the device on such vehicle(s) and operate the vehicle(s). Further, prior to return of any vehicle which is leased, rented, or loaned, the operator shall comply with service visit requirements of this Part;

(d) (1) Upon learning of the following events:

(i) that the operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates;

(ii) that the operator has not complied with service visits requirements and has not had his/her vehicle promptly serviced within the three business days immediately following the missed service appointment;

(iii) a report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof;

(iv) a report of a failed start-up re-test;

(v) a report of a missed start-up re-test;

- (vi) a report of a failed rolling re-test;
- (vii) a report of a missed rolling re-test; and/or
- (viii) a report of a lockout mode;

the applicable monitor shall take appropriate action consistent with public safety. Where under probation [supervision], the [county] probation department shall adhere to Part 352. With respect to any operator sentenced to conditional discharge, interim probation supervision or operators who are otherwise court ordered to install an ignition interlock device in advance of sentencing, the monitor shall take action in accordance with the provisions of its county ignition interlock program plan.

(2) At a minimum, any monitor shall notify the appropriate court and district attorney, within [three (3)] five (5) business days of the following events:

(i) where an operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates, [where the operator has not complied with a service visit requirement,];

(ii) any report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof[,];

(iii) any report of a [lock-out mode, and/or any report of a failed test or re-test where the BAC is .05 percent or higher] failed start-up re-test;

(iv) any report of a missed start-up re-test;

(v) any report of a failed rolling re-test;

(vi) any report of a missed rolling re-test; and/or

(vii) where the operator has not complied with a service visit requirement, and has not had his/her vehicle promptly serviced within the three business days immediately following the missed service appointment, the monitor shall notify the appropriate court and district attorney no later than the close of business on [such third] the fifth business day.

[(2)] (3) The monitor may recommend modification of the operator's ignition interlock condition [of his or her sentence or release whichever is applicable] as otherwise authorized by law, including extension of his/her ignition interlock period, a requirement that the operator attend alcohol and substance abuse treatment and/or drinking driver program, referral to the department of motor vehicles to determine whether the department may suspend or revoke the operator's license, or recommend revocation of his/her sentence or release, as applicable.

[(3)] (4) Where the operator is under supervision by the [division of parole] department of corrections and community supervision, the monitor shall coordinate monitoring with the [division of parole] department of corrections and community supervision and promptly provide [the parole] such agency with reports of any failed tasks or failed tests.

(e) Any monitor may disseminate relevant case records, including failed tasks or failed reports not otherwise sealed or specifically restricted in terms of access by state or federal law to appropriate law enforcement authorities, district attorney, treatment agencies, licensed or certified treatment providers, the judiciary, for law enforcement and/or case management purposes relating to criminal investigations and/or execution of warrants, supervision and/or monitoring of ignition interlock conditions, and treatment and/or counseling. Personal information in any financial disclosure report shall only be accessible to the monitor, court, and district attorney for purposes related to determination of financial affordability. Case record information is not to be used for noncriminal justice purposes and shall otherwise only be available pursuant to a court order. In all such instances, those to whom access has been granted shall not secondarily disclose such information without the express written permission of the monitor that authorized access.

Section 358.8 of 9 NYCRR is amended to read as follows:

Section 358.8 Costs and maintenance.

(a) Any operator shall pay the cost of installing and maintaining the ignition interlock device unless the operator has been determined to be financially unable to afford the cost of the ignition interlock device by the [sentencing] applicable criminal court whereupon such cost may be imposed pursuant to a payment plan or waived.

(b) Any operator who claims financial inability to pay for the device shall submit in advance of any pre-sentence release or sentencing three (3) copies of his or her financial disclosure report, on a form prescribed by the division, to the [sentencing] criminal court which shall distribute copies to the district attorney and defense counsel. The report shall enumerate factors which may be considered by the [sentencing] court with respect to financial inability of the operator to pay for the device and shall include, but not be limited to income from all sources, assets, and expenses. This report shall be made available to assist the court in determining whether or not the operator is financially able to afford the cost of the ignition interlock device, and if not whether to impose a payment plan. Where it is determined that a payment plan is not feasible, the court shall determine whether the fee/charge for the device shall be waived.

A new Section 358.10 is added to 9 NYCRR Part 358, to read as follows:

Section 358.10 Incorporation by Reference.

The NHTSA Standards governing Model Specifications for Breath Alcohol Ignition Interlock Devices, which have been incorporated by reference in this Part have been filed with the Office of the Secretary of State of the State of New York, the publication so filed being NHTSA-2013-0058, published by the Office of the Federal Register (FR), National Archives and Records Administration in 78 FR 26849, pages 26849-26867, FR Number 2013-10940, posted May 8, 2013 and effective May 8 2014. Technical corrections to the NHTSA Standards, which also have been incorporated by reference in this Part have been filed with the Office of the Secretary of State of the State of New York, the publication so filed being NHTSA-2015-0058, published by the Office of Federal Register (FR), National Archives and Records Administration in 80 FR

16720, pages 16720-16723, posted and effective March 30, 2015. These Standards (including the 2015 technical corrections) may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001, and the Division of Criminal Justice Services, Office of Office of Probation and Correctional Alternatives, Alfred E. Smith Office Building, 80 South Swan Street, Albany, NY 12210.