Assessment of Public Comments:

During the official public comment period, the New York State (NYS) Division of Criminal Justice Services (DCJS) received five (5) written comments relative to the proposed regulatory amendments to Part 358 governing the handling of ignition interlock cases involving certain criminal offenders from the NYS Council of Probation Administrators (COPA), the NYS Probation Officers Association (POA), the Westchester County Probation Department (WPD), the Queens District Attorney's Office, and Smart Start. Subsequently, the NYS Office of Court Administration (OCA) sent comments to DCJS.

COPA, POA and WPD all requested change to reduce the number of regulatory enumerated events that require monitors notification to the applicable Court and District Attorney (DA). Due to their claims of unnecessary paperwork they sought change to establish that upon monitor notification of only four (4) *misconduct* behaviors that monitors instead conduct an investigation and within three days, and when deemed appropriate by them, DA and Court notification occur. In response to their comments, DCJS will eliminate the reporting requirement for start-up and rolling tests (initial tests) where the BAC is equal to or greater than .05% BAC. Since the inception of the IID Program in 2010, DCJS has documented a number of events where a failed start-up test or rolling (initial) test measured at .05% BAC is followed by a passing start-up retest or passing rolling retest. Accordingly, DCJS has determined that placing the emphasis and resources on the timely and accurate reporting of failed/missed confirmatory (start-up or rolling) *re-tests* is the best use of monitoring resources and consistent with the interests of public safety. In addition, DCJS will modify its existing regulatory provision in this area to extend the reporting period by monitors to the DA and Courts required by Rule Section 358.7(d)(1) from three (3) to five (5) days). This will provide monitors greater time to provide required reports to the DA and Courts, particularly in those instances that occur before a weekend and/or holiday. This extended reporting period will also provide operators additional days in which to address/cure missed service visits, eliminating in numerous instances the need for monitors to report such events to the DA and Court.

DCJS believes that the failure to timely install an IID and tampering/circumvention of the IID are all serious non-compliant behaviors that should continue to be reported to the applicable Court and DA. Additionally, certain missed service visits and any failed/missed retests or confirmatory tests are serious non-compliant behaviors necessitating continued reporting as noted above. However, as stated earlier, DCJS agrees to regulatory changes in the area of monitor reporting to judicial and prosecutorial authorities which will only require missed service visits to be reported if the vehicle has not been promptly serviced within the three business days immediately following the missed service appointment. Further, monitor reporting of the failed start-up or rolling test (initial test) where the BAC is .05% or greater is also being eliminated. Moreover, DCJS has not heard any concerns raised by prosecutorial agencies relative to paperwork notification of these specific reportable events, but have agreed to make certain regulatory modifications reflected above based upon comments received and our consultation with specific judges and DA offices. Both the current rule and proposed regulatory amendments place emphasis and resources strategically on monitoring, reporting and enforcement of the operator through confirmatory tests—failed/missed start-up and rolling re-tests. Confirmatory re-tests are prompted by failed/missed start-up or rolling tests **i**ndicating alleged operator intoxication. It is important to consider that such operators have already been arrested, convicted/adjudicated, as applicable, of an underlying Leandra's Law crime, and placed on probation or conditional discharge with monitoring because their behaviors pose a substantial risk to community safety, or in certain instances that defendants have agreed to undergo IID monitoring pre-sentence which may result in more favorable case outcomes. Accordingly, with limited exceptions, all failed/missed *retests* are violations of the conditions under which they have been permitted to continue to operate a motor vehicle by the Courts, and these failed/missed re-tests are therefore, deserving of report notification for whatever action the DA and/or the Court determine(s) appropriate. COPA also raised a few other

scenarios where they felt DA and Court notification was not necessary-for example, where a defendant missed a service visit due to being hospitalized or missed a re-test due to driving on a highway. DCJS does not believe that it is necessary to create exceptions and any monitor has the opportunity to make a recommendation when sending the notification. Further DCJS clarified to COPA that monitors are *not* required to report others who operate the motor vehicle that is equipped with an IID, for whom failed or missed tests are logged. However, any evidence of a crime that is discovered through the operation of the IID (e.g. friend or family member blowing into the IID and recorded on camera) should result in an appropriate response and referral to police for further action whereby such individuals can be subsequently charged with Vehicle and Traffic Law (VTL) §1198 offenses and/or other crimes which may be applicable.

Additionally, the Queens District Attorney's Office, sought change to existing regulatory language that requires that *any test* at, or above, a .05% BAC result in the notification to the appropriate Court and DA. Our proposed change in this area to no longer require the monitor report a failed start-up or rolling test (initial tests), where the BAC is .05% or greater, yet maintain the reporting requirement as to confirmatory test satisfactorily addresses their request. Their Office also sought clarification of the term "service visit" and instances in which court and DA notification must occur. DCJS directly communicated with them to address their questions. Further their Office asked about the difference between a "temporary lockout" and "permanent lockout". DCJS explained to them that neither term exists in either the current or proposed regulation, and clarified the regulatory definition of "lockout mode" and when it occurs that requires court and DA notification.

Smart Start, a qualified manufacturer of IIDs, submitted specific comments on various regulatory sections. Italicized below is a summary of their suggestions followed by DCJS' responses:

- *Rule Section 358.3 (b). Smart Start suggests that all monitors use a standardized "certificate of completion" form for purposes of removal and transfers*. DCJS already has a template which is accessible and available to all monitors.

- *Rule Section 358.3 (bb). Smart Start suggests that additional wording, "with the intention to circumvent or alter the proper operation," be included in the definition of "tamper."* DCJS rejects this additional language as it would be unduly burdensome on monitors to verify intent and would lead to many violators escaping penalties for their wrongful behavior.

- *Rule Section 358.3. Smart Start suggests the addition of other definitions (i.e. fixed site, equipment, service, lockout code, mobile service and camera).* DCJS does not believe that any new definitional terms are necessary at this time, in large part because certain suggested terms are not used in the Rule and the remaining are commonly understood.

- *Rule Section 358.4 (d) (4). Smart Start suggests adding the requirement that operators return the IID upon completion of their term of monitoring or be held financially liable.* As this is a contractual/business relationship between the operator and the vendor, DCJS does not believe it is appropriate to establish a regulatory provision in this area.

- *Rule Section 358.5 (c) (2). Smart Start suggests adding the phrase "the most current" when referring to National Highway Traffic Safety Administration (NHTSA) standards.* DCJS has incorporated by reference in this amendment the most current NHTSA standards and should any revision occur similarly amend our rule to reflect the most up-to-date document.

- *Rule Section 358.5 (c) (3). Smart Start suggests adding language to make sure that the Qualified Manufacturer is provided with proof of a reduced breath sample.* DCJS agrees to add language requiring proof be provided to the applicable Qualified Manufacturer.

- *Rule Section 358.5 (c) (5). Smart Start suggests removing the option of an installation service provider/Qualified Manufacturer use mobile servicing. DCJS rejects their suggestion.* While this may not fit into their business model it does not mean that it should not be an option for the vendors that choose to utilize it.

- *Rule Section 358.5 (c) (6). Smart Start suggests adding language to provide consistency with later portions of the regulation relative to time periods between service visits.* DCJS agrees to make these changes.

- *Rule Section 358.5 (c) (13). Smart Start suggests the addition of "conducted on site at each facility" to the annual quality assurance audits language.* DCJS finds their suggestion unnecessary and instead will maintain business flexibility as to the manner of conducting such audits.

- *Rule Section 358.5 (d) (4). Smart Start suggests striking language that allows for the direct exchange method of servicing IIDs.* DCJS agrees as all service visits shall be conducted in-person and the direct exchange method of servicing is no longer an option. This was previously incorporated in the proposed rule amendments issued for public comment.

- *Rule Section 358.5 (d) (9). Smart Start suggests removing the option of an installation service provider/qualified manufacturer use mobile servicing.* DCJS disagrees with their suggestion and will maintain this option. While this may not fit into Smart Starts business model it does not mean that it should not be an option for the vendors that choose to utilize it.

- *Rule Section 358.7 (c) (2). Smart Start suggests certain technical changes relative to device heads.* DCJS agrees to make additional changes which clarify that the device head should never be removed by the operator. Additionally, as this section governs service visits, DCJS will be adding language to provide parameters on how, and when, unlock codes are to be provided to an operator when necessary for a service visit.

- *Rule Section 358.7 (d) (1). Smart Start suggests only reporting on.05 or above if the test is confirmed.* As earlier noted, DCJS agrees with this suggestion.

In conclusion, while many of the aforementioned comments received were accepted and incorporated into the new proposed regulations or resulted in additional modified regulatory language, others were determined to be either outside the scope of this document, not necessary, or not in the best interests of public safety and/or the interest of justice.