

# RULE MAKING ACTIVITIES

---

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

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

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

---

---

## Department of Audit and Control

---

---

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

#### **Budgets and Financial and Strategic Operation Plans of the Metropolitan Transportation Authority**

**I.D. No.** AAC-36-03-00004-P

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

**Proposed action:** Addition of Part 202 to Title 2 NYCRR.

**Statutory authority:** NY Constitution, art. X, section 5; State Finance Law, section 8(14)

**Subject:** The format of, supporting documentation for, and monitoring of, the budgets and financial and strategic operation plans of the Metropolitan Transportation Authority (MTA).

**Purpose:** To prescribe specific requirements for the format of the MTA's budget, financial plan and strategic operation plan, the documentation to be prepared and made available with release of the budgets and plans and the periodic monitoring and reporting required during each fiscal year in connection with the budgets and plans.

**Text of proposed rule:** PART 202

*Budget and Financial and Strategic Operation Plan Format, Supporting Documentation and Monitoring - Metropolitan Transportation Authority*

*202.1 Purpose and Applicability of Part. This Part shall apply to the Metropolitan Transportation Authority, created pursuant to title 11 of article 5 of the Public Authorities Law (§ 1260 et seq.). The purpose of this Part is to set forth specific requirements in connection with the format of, the preparation and maintenance of supporting documentation for, and the monitoring of, the annual budgets and financial and strategic operation plans of the Metropolitan Transportation Authority. This part shall apply to all budgets and financial and strategic operation plans prepared by the Metropolitan Transportation Authority for each of its fiscal years commencing with the fiscal year next succeeding the effective date of this regulation, except as otherwise consented to by the Comptroller at the request of the Metropolitan Transportation Authority.*

*202.2 Definitions. For purposes of the Part:*

*a. "MTA" shall mean the Metropolitan Transportation Authority, created by title 11 of article 5 of the Public Authorities Law (§ 1260 et seq.), as amended.*

*b. "MTA Affiliates" shall mean the Triborough Bridge and Tunnel Authority, and the New York City Transit Authority and its subsidiary, the Manhattan and Bronx Surface Transit Operating Authority.*

*c. "MTA Subsidiaries" shall mean the Long Island Rail Road Company, the Metro-North Commuter Railroad Company, the Staten Island Rapid Transit Operating Authority and the Metropolitan Suburban Bus Authority.*

*d. "MTA Headquarters" shall mean the budgetary component within the MTA that provides for certain centralized functions, such as budgeting, cash management, finance and legal services.*

*e. "Budget" shall mean the preliminary, proposed final and final operating budgets of the MTA, MTA Headquarters, MTA Affiliates and MTA Subsidiaries.*

*f. "Plan" shall mean the financial plan for the MTA, MTA Headquarters, MTA Affiliates and MTA Subsidiaries, and any updates.*

*g. "Gap" shall mean the difference between projected revenues and expenses for any given fiscal year before a proposed fare increase or other proposed management actions that increase revenues or reduce costs.*

*h. "Gap-closing program" shall mean any combination of management actions that reduce costs or increase revenues that lower a gap in any given fiscal year.*

*i. "Utilization" shall mean subway, bus, railroad and paratransit ridership, and bridge and tunnel crossings.*

*202.3 Budget and Plan Format. Each Budget and Plan shall: (a) be prepared so that information relating to the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates, is presented in a consistent manner and format; (b) be prepared in accordance with generally accepted accounting principles based on reasonable assumptions and methods of estimation; (c) include estimates of projected revenues and other funding sources (including but not limited to fares, tolls, taxes and governmental subsidies); (d) include estimates of projected reimbursable and non-reimbursable personal service expenses, including but not limited to salary and wage costs, overtime, health insurance and pension costs; (e) include estimates of reimbursable and non-reimbursable non-personal service expenses, including but not limited to power, fuel, public liability, insurance, materials and supplies, contract services and depreciation; (f) include estimates of projected debt service to finance the capital program approved by the Capital Program Review Board created pursuant to Public Authorities Law § 1269-a; (g) include estimates of projected debt service to finance capital needs that extend beyond the approved capital program during the Plan period; (h) identify any planned transactions that would shift resources, from any source, from one year to another, and the*

amount and planned use of any reserves, including but not limited to collective bargaining; (i) include a corresponding cash Budget and Plan, and identify all cash adjustments including but not limited to debt service, taxes and government subsidies; (j) be accompanied by a certification by the Chair of the MTA Board of Directors and the Executive Director of the MTA to the effect that the Budget and Plan is in compliance with all applicable laws, rules and regulations, and discloses all material matters related to, and constitutes an accurate representation of, the MTA's financial condition.

**202.4 Supporting Documentation.** The MTA shall prepare working papers that detail the assumptions and methods of estimation used to calculate all operating and capital budget projections consistent with prudent budgetary practices. The working papers shall be completed prior to the release of its budgets and plans and shall include a statement supporting the reasonableness of each estimate, and the underlying information on which the estimate is based, such as actual results from prior years, inflationary trends and economic data, utilization, demographic and other pertinent data. The MTA also shall prepare and make available for public inspection with the release of its budgets and plans: (a) a reconciliation that identifies all changes in estimates from the projections in the previous Budget or Plan (the reconciliation shall identify changes in revenues and receipts, expenses and disbursements, gap-closing initiatives, collective bargaining costs, staffing levels and other changes as may be necessary); (b) a projection of the number of employees to be employed by the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates covered in the Plan, including (1) whether the sources of funding are reimbursable or non-reimbursable, (2) numbers of full-time and full-time equivalents, and (3) functional classification (e.g., operating, maintenance, administrative); (c) a statement of each revenue-enhancement and cost-reduction initiative that represents a component of any gap-closing program and the annual impact on each revenue and expense category, including the estimated impact on staffing, whether any positions to be eliminated are vacant or filled and whether the reduction will occur through attrition, layoff or other action; (d) a statement of the source and amount of any non-recurring receipt or savings in excess of \$1,000,000 that is planned for use in any given fiscal year; (e) in the case of the Plan, a debt affordability statement showing the budgetary impact of planned borrowings for each year of the Plan, including debt service as a percentage of each of the following: operating revenue and subsidies, fare and toll revenue, and non-reimbursable expenses; (f) in the case of the Plan, a statement of the annual projected capital costs by project category (e.g., "station rehabilitation") and sources of funding for each year of the Plan, and for each approved capital project, a statement projecting the annual commitment, total project cost, sources of funding, expected date of completion and annual cost for operation and maintenance when the project is placed into service.

**202.5 Monitoring the Budget and Plan.** The MTA shall prepare and make available for public inspection one or more reports on the following: (a) within forty-five days of the release of the Budget or Plan (1) monthly projections for the current fiscal year of all revenues and expenses, in a format consistent with the Budget and Plan, (2) monthly projections for the current fiscal year of all receipts and disbursements, in a format consistent with the Budget and Plan, (3) monthly projections for the current fiscal year of staffing for the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates, in a format consistent with 202.4 (b), and (4) monthly projections for the current fiscal year of utilization for each of the Subsidiaries and Affiliates; (b) within thirty days after the close of each month, in a format consistent with the Budget and Plan (1) a comparison of actual revenues and expenses to planned levels for the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates, explaining and quantifying variances that are due to timing or have a budgetary impact, (2) a comparison of actual receipts and disbursements to planned levels for the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates, explaining and quantifying variances that are due to timing or have a budgetary impact, (3) a comparison of actual staffing to planned levels for the MTA, MTA Headquarters, and each of the Subsidiaries and Affiliates, explaining and quantifying variances that are due to timing or have a budgetary impact, and (4) a comparison of actual utilization to planned levels for each of the Subsidiaries and Affiliates, with an explanation of any variance and budgetary impact; (c) each month, until implemented or rescinded, the status of each gap-closing initiative with a projected value equal to or greater than \$1,000,000 in any given fiscal year including milestones, impact on staffing, current implementation status, actual savings or revenues to date and projected annual savings or revenues in comparison to Budget and Plan projections; (d) each month, transfers to or from the

corporate and stabilization accounts, interagency loans and other reserves or accounts; (e) each month, the status of approved capital projects by project category, including but not limited to commitments, expenditures, and completions, and an explanation of variances from the Plan, cost overruns and delays.

**202.6 Strategic Operation Plan.** The requirements of the foregoing provisions of this Part (§§ 202.1 - 202.5) shall apply to the information required to be submitted by the MTA pursuant to paragraphs (c), (d), (e), (f) and (g) of subdivision (1) of Public Authorities Law § 1269-d.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mitch Morris, Department of Audit and Control, 110 State St., 14th Fl., Albany, NY 12236, (518) 473-4138, e-mail: mmorris@osc.state.ny.us

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

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

#### **Regulatory Impact Statement**

1. **Statutory Authority:** State Finance Law § 8(14) authorizes the Comptroller to make, amend and repeal rules and regulations as he may deem necessary in the performance of the duties imposed upon him by law. Article X, § 5 of the State Constitution provides that the accounts of certain public corporations created by special act of the Legislature (such as the Metropolitan Transportation Authority [the "MTA"]) shall be subject to the supervision of the State Comptroller. This constitutional grant has been interpreted by the Court of Appeals to be entirely discretionary to the Comptroller, who is to be guided by his personal responsibility and commitment to his oath of office.

2. **Legislative Objectives:** The proposed regulation will represent an exercise of the Comptroller's discretionary authority to supervise the accounts of the MTA by prescribing requirements for the clear and open presentation of its budgets and financial and strategic operation plans, including the preparation and public availability of supporting documents underlying budget and plan assumptions and methods of estimation, and requiring an on-going review and oversight of financial condition by the monitoring of and reporting on the status of the budget and plans during the fiscal year.

3. **Needs and Benefits:** A report issued by the State Comptroller in April 2003 concerning the MTA's finances noted the need for improved presentation, documentation and monitoring of MTA budget and financial plan information to ensure an open and clear process for the benefit of taxpayers, the riding public and other stakeholders. The proposed regulation implements recommendations made in the report. The improved format, documentation, monitoring and reporting requirements in this proposed regulation will benefit the taxpayers, riding public and other MTA stakeholders by ensuring that appropriate financial information is provided to facilitate an open budget and plan process.

4. **Costs:** None. Information that would be required by the proposed regulation is already prepared internally by the MTA. Moreover, the MTA is currently implementing changes to its budgetary processes that would facilitate compliance with these regulations.

5. **Local Government Mandates:** None.

6. **Paperwork:** The proposed regulation would require reporting on budget and plan progress during each fiscal year by the MTA. It would also require the submission of supporting documentation with the MTA's budget and financial plan. Both paperwork requirements are needed to ensure full, open and clear disclosure of the MTA's budget and plan information for the benefit of taxpayers, the riding public and other MTA stakeholders.

7. **Duplication:** None.

8. **Alternatives:** None.

9. **Federal Standards:** None.

10. **Compliance Schedule:** These regulations expressly provide that they shall apply to budgets, financial plans and strategic operation plans of the MTA commencing with its fiscal year next succeeding the effective date of the regulation, except as otherwise consented to by the Comptroller at the request of the MTA. Since the MTA finances are reported on a calendar year basis, the requirements imposed by the regulations would begin to take effect on January 1, 2004.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because the proposal will not impose any reporting, record keeping or compliance requirements on small businesses or local governments, or require local governments or small businesses to undertake any other affirmation acts. Rather, the proposal solely relates to the budgets, financial plans and

strategic operation plan of the Metropolitan Transportation Authority, a public benefit corporation.

#### **Rural Area Flexibility Analysis**

This action will not impose any adverse economic impact, reporting, record keeping or other compliance requirements, or necessitate any professional services in rural areas. This action applies only to the budgets, financial plans and strategic operation plans of the Metropolitan Transportation Authority, a public benefit corporation headquartered in the City of New York.

---



---

## Banking Department

---



---

### EMERGENCY RULE MAKING

#### **High Cost Home Loans**

**I.D. No.** BNK-36-03-00002-E

**Filing No.** 919

**Filing date:** Aug. 20, 2003

**Effective date:** Aug. 20, 2003

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

**Action taken:** Repeal of emergency rule I.D. No. BNK-33-03-00002-E adopted on Aug. 3, 2003; and amendment of Part 41 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 6-i and 6-l

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

**Specific reasons underlying the finding of necessity:** Chapter 626 of the Laws of 2002 is effective April 1, 2003. Provisions of chapter 626, by the enactment of section 6-l of the Banking Law, will affect the making of certain home mortgage loans, known as high cost home loans, on and after the effective date. Part 41 of Title 3 NYCRR has governed the making of such loans prior to the effective date and is not in conformity with certain provisions of chapter 626. Also, in certain limited instances, the proposed amendments to Part 41 will clarify certain provisions enacted by chapter 626. Mortgage lenders and brokers and consumers should be aware of the revised regulatory requirements prior to the effective date of chapter 626 in order that mortgage loans made on and after April 1, 2003 conform legally to the statutory and regulatory requirements.

**Subject:** The making of certain residential mortgage loans, referred to as high cost home loans.

**Purpose:** To conform the provisions of Part 41 to various provisions of Banking Law, section 6-l.

**Substance of emergency rule:** Section 41.1(a) is amended to revise the definition of a lender subject to Part 41.

Section 41.1(b) is amended to revise the definition of an affiliate.

Section 41.1(c) is amended to make technical revisions.

Section 41.1(d) is amended to revise the definition of a bona fide loan discount point.

Section 41.1(e) is amended to revise the definition of a high cost home loan in regard to the points and fees threshold for determining such loans and limiting the exclusion of certain discount points in the computation of points and fees.

Section 41.1(f) is amended to revise the definition of loan amount.

Section 41.1(h) is amended to revise the definition of points and fees.

Section 41.1(j) is amended to make certain technical revisions.

Section 41.2(a) is amended to clarify the exceptions to the prohibition upon accelerating the indebtedness of high cost home loans.

Section 41.2(b) is amended to increase the term of a balloon mortgage to fifteen years.

Section 41.2(g), relating to modification and deferral fees, is repealed and then added as a new paragraph 2 to section 41.3(d), relating to refinancing of high cost home loans.

Section 41.3(a) is amended by adding a new disclosure requirement.

Section 41.3(b) is amended to revise requirements relating to the residual income guidelines and the presumption of affordability and to add certain conditions in order to determine that repayment ability has been "corroborated by independent verification."

Section 41.3(c) is amended to revise the percentage of points and fees that may be financed in making a high cost home loan, and to revise the charges that may be excluded from such financed points and fees.

Section 41.3(d) is re-titled and amended to revise the limitations upon points and fees that may be charged by particular lenders when refinancing high cost home loans and to add a previously repealed paragraph (see revisions to section 41.2(g)) relating to modification of an existing high cost home loan.

Section 41.3(f) is amended to delete a reference to median family income.

Section 41.3(g) is added to prohibit the refinancing of special mortgages, except under certain conditions.

Section 41.5(a) is amended to clarify deceptive acts relating to splitting or dividing loan transactions.

Section 41.5(b)(2) is amended to clarify retention of fees by lenders and brokers in relation to unfair, deceptive or unconscionable practices.

Section 41.5(b)(4) is amended to revise the definition of loan flipping, as an unfair or deceptive practice, and to add conditions to determine whether a loan has a net tangible benefit to the borrower.

Section 41.5(b)(6) is amended to clarify the standards to determine that recommending or encouraging default of a home loan or other debt is an unfair or deceptive practice.

Section 41.7 is amended to revise the legend that appears on a high cost home loan mortgage.

Section 41.8 is amended to delete VA and FHA mortgage loans from the definition of exempt products.

Section 41.9 is amended to repeal the current provisions relating to correction of errors and to add new provisions.

Section 41.11, relating to prohibiting the financing of single premium insurance, is re-titled and amended to include other insurance premiums or payments for any cancellation or suspension contract or agreement.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 17, 2003.

**Text of emergency rule and any required statements and analyses may be obtained from:** Christine M. Tomczak, Secretary to the Banking Board, Banking Department, One State St., 6th Fl., New York, NY 10004-1417, (212) 709-1642, e-mail: christine.tomczak@banking.state.ny.us, or at the department's website: www.banking.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Banking Law section 14(1) authorizes the Banking Board to adopt regulations not inconsistent with the law. Section 6-i of the Banking Law specifically states that no banking organization, partnership, corporation exempt organization, or other entity (hereafter "lenders") can make a mortgage loan in New York State unless those entities conform to Banking Law requirements pertaining to mortgage bankers (Article 12-D of the Banking Law) and rules and regulations promulgated by the Banking Board. Section 6-l of the Banking Law imposes new requirements upon the making of certain mortgage loans. Part 41 of the rules and regulations of the Banking Board was adopted pursuant to section 6-i of the Banking Law, and prior to approval of chapter 626 of the laws of 2002, which enacted section 6-l. Provisions of section 6-l, which are inconsistent with certain provisions of Part 41, supercede such regulatory provisions, and the Banking Board, in promulgating the amendments to Part 41, makes Part 41 consistent with section 6-l.

##### 2. Legislative objectives:

Part 41 is intended to provide consumer protections by establishing important consumer disclosure requirements and prohibiting contractual terms and practices that are unfair in the making of residential mortgage loans that are offered on a high-cost basis. Section 6-l is intended to have the same objectives. Since Part 41 provides the broad regulatory scheme under which high cost mortgage loans are made, it is necessary that its provisions be in conformity with section 6-l and also, in limited instances, clarify certain provisions of such section in order that lenders and brokers appropriately make high cost loans in conformity with the intended legislative objectives.

##### 3. Needs and benefits:

Part 41 was intended to regulate the making of residential mortgage loans within a certain segment of the mortgage loan market, referred to as the sub-prime, or non-conventional, mortgage loan market. The regulatory scheme defined by Part 41, by requiring certain disclosures and practices to be followed in the making of such loans, sought to prevent occurrences of predatory lending. Predatory lending occurs when the borrower or

debtor does not have sufficient income or other financial resources to pay the monthly principal and interest payments or when equity in a residential property is stripped by repeated re-financings, primarily by the charging of excessive points and fees, when the borrower realizes no economic benefit.

Since the Legislature established a number of different standards regarding disclosures and practices in the making of such residential mortgage loans by enactment of section 6-1 of the Banking Law, it is necessary that the comparative standards in Part 41 be made consistent with section 6-1.

Further, it is also necessary that certain provisions of section 6-1 be clarified by the amendments to Part 41 in order that lenders and brokers may be in compliance with the requirements section 6-1 when making such loans, given that such provisions are not otherwise defined by section 6-1 nor has the Legislature provided any other guidance which would clarify the intended meaning of those provisions. The clarifying provisions of the amendments to Part 41 address determining "corroboration by independent verification" of a borrower's repayment ability and "net tangible benefit" to a borrower, both of which are critical standards in assessing whether instances of predatory lending have occurred.

4. Costs:

The amendments to Part 41 should impose no additional cost upon mortgage lenders or brokers not otherwise imposed by the enactment of the comparative provisions of section 6-1 of the Banking law to which the amendments conform Part 41. The amendments impose no additional cost upon the Banking Department or any other state agency, or any unit of local government.

5. Local government mandates:

The amendments to Part 41 do not impose any requirements or burdens upon any units of local government.

6. Paperwork:

The amendments to Part 41 do not impose any new paperwork requirements.

7. Duplication:

None.

8. Alternatives:

The Banking Department considered whether to forego amending Part 41 or to repeal Part 41 in light of the enactment of section 6-1 of the Banking Law, given that section 6-1 may be viewed legally as occupying the field of regulation of high cost home loans in the state of New York. It was determined that Part 41 provides a more extensive regulatory scheme than section 6-1 for the making of such mortgage loans, and therefore it is appropriate to make the non-conforming provisions of Part 41 consistent with the comparative statutory provisions of section 6-1. In addition, the provisions of section 6-1 that are clarified by the amendments will eliminate uncertainty among mortgage lenders and brokers in the making of such loans by articulating appropriate conditions, which such lenders and brokers must meet in order to be in compliance with certain non-defined statutory standards established by section 6-1.

9. Federal standards:

In the initial promulgation of Part 41, the Banking Department stated the regulations established thresholds that were lower than the thresholds set by the Home Ownership Equity Protection Act (HOEPA). Subsequently, federal regulators modified the annual percentage rate threshold for first mortgages under HOEPA by making it identical to the corresponding threshold in Part 41. Section 6-1 of the Banking Law establishes modified points and fees thresholds in certain instances that are more lenient for brokers and lenders than the comparable threshold in HOEPA. The definition of points and fees, in part, established by section 6-1 refers and therefore corresponds to the comparative definition in HOEPA. The amendments would adopt the thresholds and definitions established by section 6-1.

10. Compliance schedule:

None. Any modification of existing disclosures or practices by lenders or brokers in regard to any cost home loans made on or after April 1, 2003 are the result of standards established by section 6-1 of the Banking Law. Chapter 626, which enacted section 6-1, was approved on October 3, 2002, and brokers and lenders have had sufficient time to familiarize themselves with these standards and subsequently modify their disclosures and practices, if necessary, in order to comply with the standards of 6-1 and the proposed amendments to Part 41.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic or technological impact upon small business beyond any such effects that may be

caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse economic or technological impact upon local governments. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic impact upon private entities in rural areas beyond any such effects that may be caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse economic impact upon public entities in rural areas. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements private on public entities in rural areas.

**Job Impact Statement**

A Job Impact Statement is not attached because the proposed amendments to Part 41 will not have any appreciable and/or substantial adverse impact on jobs and employment opportunities beyond any such effects that may be caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41.

---



---

## State Board of Elections

---



---

### NOTICE OF EXPIRATION

The following notice has expired and can not be reconsidered unless the State Board of Elections publishes a new notice of proposed rule making in the *NYS Register*.

**Campaign Finance Limits**

I.D. No.	Proposed	Expiration Date
SBE-08-03-00003-P	February 26, 2003	August 25, 2003

---



---

## Department of Health

---



---

### EMERGENCY RULE MAKING

**Expedite HIV Testing of Women and Newborns**

**I.D. No.** HLT-36-03-00003-E

**Filing No.** 920

**Filing date:** Aug. 25, 2003

**Effective date:** Nov. 1, 2003

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

**Action taken:** Amendment of section 69-1.3(b) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 576, 2500-a and 2500-f

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

**Specific reasons underlying the finding of necessity:** Immediate adoption of this amendment is necessary to protect the public health and welfare and to prevent harm to infants born in New York State. The New York State Department of Health is actively engaged in the prevention of mother-to-child HIV transmission. Recent advances in medical knowledge concerning the prevention of perinatal HIV transmission have demonstrated that antiretroviral therapy, given to prevent HIV transmission, is most efficacious when given prenatally, during labor, or within the first 12 hours of an infant's birth. Although approximately 94 percent of women are tested for HIV during prenatal care, the HIV status of six percent is

unknown at presentation for delivery. Women at high risk for HIV who have received no prenatal care are over-represented within this group. In 1999, the Department implemented expedited HIV testing in the labor and delivery setting so that providers can initiate partial antiretroviral regimens either to the mother in labor or to the infant immediately after birth. The turnaround time for reporting the result was 48 hours from the drawing of blood from the mother (with her consent) or from the newborn (no consent required).

Heretofore, the program has been limited by the lack of a point-of-care rapid HIV test. In cases of HIV-exposure in a newborn where prenatal and/or intrapartum antiretroviral therapy (ART) were not given, studies have shown that therapy must be started for the newborn within 12 hours of birth to be effective in reducing the risk of transmission. The current expedited HIV testing protocols in most New York State birth facilities do not meet this 12-hour timeline for initiating prophylactic newborn ART. In 2001 to 2002, over 1400 HIV-infected women gave birth in New York State. Of these, one hundred mother/infant pairs were first identified as HIV-infected/exposed through expedited HIV testing in the labor, delivery or in the immediate newborn period. In the vast majority of cases (98 of 100), the median time from the mother's admission to the collection of the specimen for expedited HIV testing was 2.5 hours. However, even when testing was performed on-site, results were not returned for at least 20 hours, and treatment was not initiated in the newborn until 22.5 hours after birth. Clearly, achieving timelier reporting of expedited HIV test results is hampered by the lack of a point-of-care rapid test.

In November 2002, the U.S. Food and Drug Administration approved the first of a new generation of point-of-care rapid HIV tests. The test is waived under the Clinical Laboratories Improvement Act (CLIA) and may be performed under the supervision of a licensed physician, nurse practitioner or physician assistant, provided the facility performing the test has obtained a CLIA number and is registered with the Clinical Laboratories Evaluation Program (CLEP).

The availability of point-of-care HIV testing offers providers the opportunity to intervene during this most critical time frame for perinatal HIV transmission: labor and delivery. The purpose of this emergency and proposed rule making, which amends 10 NYCRR, Subpart 69-1.3(1)(2), is to ensure that the HIV exposure status is available as soon as possible for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring a maximum turnaround time of twelve hours from the time the mother consents to testing or from the time of the infant's birth to the receipt of the result of the expedited HIV test, medical providers and patients will have information that is critical for the administration of antiretroviral medication during labor and delivery and to the newborn immediately after birth.

As a result of the Expedited HIV Testing regulations (effective August 1999) and the consequent increase of prenatal and expedited HIV testing, along with the prompt initiation of treatment to HIV-infected mothers, the rates of perinatal HIV transmission in New York State have decreased: from 10.9% in 1997 to 3.9% in 2001. New, rapid, point-of-care HIV testing technology can provide test results within 20 to 40 minutes. In most cases, this technology will allow obstetricians to have preliminary HIV test results before the mother delivers, when the initiation of antiretroviral therapy can be of significant benefit. In light of the advances in testing technology, the Department is proposing a regulatory change to 10 NYCRR 69-1.3(1)(2) that would apply in cases where a woman presents for delivery with no documentation of her HIV status. In these cases, the amended regulation would require the birth facility to arrange an immediate HIV screening test of the mother with her consent or of her newborn without consent with results available as soon as possible, but in no event longer than 12 hours after the mother provides consent for testing or, if she does not consent, 12 hours after the time of the infant's birth. Reducing the turnaround time for expedited HIV testing allows health care providers to provide antiretroviral therapy in time to reduce the risk of mother-to-child transmission of HIV.

The emergency rule will take effect on November 1, 2003.

**Subject:** Expedited HIV testing of women and newborns.

**Purpose:** To enhance protection of newborns.

**Text of emergency rule:** Paragraph (2) of Subdivision (1) of Section 69-1.3 of NYCRR is amended to read as follows:

(2) if no HIV test result obtained during the current pregnancy is available for the mother not known to be HIV-infected, arrange an immediate screening test of the mother with her consent or of her newborn for HIV antibody with results available as soon as practicable, but in no event longer than [48 hours] 12 hours after the mother provides consent for

testing or, if she does not consent, 12 hours after the time of the infant's birth.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 22, 2003.

**Text of emergency rule and any required statements and analyses may be obtained from:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

#### **Regulatory Impact Statement**

##### Statutory Authority:

Public Health Law (PHL) section 2500-f requires the commissioner to promulgate regulations to implement a comprehensive program for the testing of newborns for HIV and/or the presence of HIV antibodies. The proposed revision to the regulation amends the current comprehensive program in response to recent advances in medical knowledge concerning the prevention of perinatal HIV transmission and the availability of rapid HIV testing technology, with at least one device suitable for "point-of-care" use.

##### Legislative Objectives:

In the memorandum accompanying the comprehensive newborn testing bill (Chapter 220 of the Laws of 1996), the legislature indicated its purpose was "to ensure that newborns who are born exposed to HIV receive prompt and immediate care and treatment and counseling that can enhance, prolong and possibly save their lives". Transmission of HIV from mother to newborn can be prevented in many cases by the administration of antiretroviral medications, which are recommended to be given to the mother starting during the second trimester of pregnancy, continued during labor, and given to the newborn after birth. The proposed amendment to 10 NYCRR, Subpart 69-1.3(2) will ensure that the HIV exposure status is available for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring a maximum turnaround time of twelve hours from the time of the mother's consent to testing or of the time of the infant's birth to the receipt of the result of the expedited HIV test, medical providers and patients will have information that is critical for the timely and efficacious administration of antiretroviral medication.

##### Needs and Benefits:

Improvements in medical knowledge and major advances in medical technology have occurred since the current program for the Expedited HIV Testing of Women and Newborns was implemented in August 1999. To date, the success of New York State's efforts to reduce perinatal HIV transmission to the lowest possible level has resulted in a decrease in the rate of perinatal HIV transmission for all HIV-exposed infants born in New York from 10.9% in 1997 to 3.9% in 2001. However, transmission is still occurring in instances where the HIV exposure status of an infant was identified too late to provide effective intervention. In such infants therapy must begin within 12 hours of birth to be effective in reducing the risk of transmission. In an addendum to the NYSDOH PCR study, published in the *New England Journal of Medicine* on 4/1/99, it was demonstrated that when ARV was given to the newborn within 12 hours of birth there was a 5.9% rate of HIV transmission. There was no significant benefit if ARV was begun after 12 hours birth as the transmission rate increased to 25%. The ability to have results from expedited HIV testing as soon as possible in cases where there was no history of prenatal HIV testing, coupled with the administration of prophylactic antiretroviral therapy, ideally during labor but no later than 12 hours of birth, is of vital importance in further reducing perinatal HIV transmission. To reduce perinatal HIV transmission to the greatest extent possible, facilities are urged not to view the 12-hour turnaround time as the goal of testing, but as the outside limit for offering effective therapeutic interventions to prevent transmission of HIV from the mother to her newborn.

##### Costs:

##### Costs to State and Local Governments:

The cost to State Government is minimal and can be covered by existing programs and staff. There is no cost to local government except to the extent they own and operate maternity hospitals. Any cost to the State and local governments will be reduced by the savings to the Medicaid program by reducing the costs of care as fewer incidences of HIV transmission to newborns occur. Local governments that operate medical facilities will incur costs as described in the section on Costs to Regulated Parties noted below.

##### Costs to Regulated Parties:

The approved rapid test is CLIA- waived due to low complexity and may be done at the point-of-care either under the supervision of a licensed laboratory or under a limited license under the supervision of a clinician in the labor and delivery setting.

The vast majority (138) of the 159 birthing facilities currently hold a clinical laboratory permit in HIV testing or are eligible for fast-track approval for a permit in HIV testing. These facilities already have or could readily develop the capability of generating HIV test results on-site within twelve hours without additional costs. This is especially true for facilities with around-the-clock centralized laboratory services. Reagent, equipment, personnel and overhead costs for testing a single specimen using an instrument-based method (*i.e.*, ELISA) are approximately \$15 for routine testing, but up to ten times that amount for 'on demand' (STAT) testing. Birth facilities would incur costs directly related to this proposal whenever expedited testing needed to be performed in the laboratory outside normal testing, and qualified staff needs to be called in specifically to run one test. Facilities using such an on-call staffing approach to expedited newborn HIV testing would incur up to 1.5 times the usual hourly wage for a medical technologist, which is estimated to be \$40 per hour (including benefits) or \$50 per hour (including benefits) if the technologist is a supervisor.

Facilities without current capacity to consistently generate results in 12 hours or less are encouraged to consider bringing HIV testing in-house and/or locating HIV testing in the labor and delivery setting whenever possible. Costs of introducing in-house HIV testing into either a centralized laboratory or the labor and delivery suite includes costs of reagents, devices and human resources necessary to validate the test method and write protocols, at an estimated maximum one-time cost of \$1000. Point-of-care testing on the labor and delivery floor may be performed under supervision of the facility's central laboratory director at no additional cost, or conducted without such linkage, *i.e.*, as a limited service laboratory. The latter option would require a fee of \$100 to register the alternative testing site with the Department. Other minimal costs include costs of initial training and ongoing competency assessment of non-laboratory testing personnel, *i.e.*, labor and delivery nursing staff, although technologists may also travel to patient floors to lend their expertise in the performance of tests and interpretation of results. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training in device use, troubleshooting, record keeping and quality assurance activities, and adding the cost of 25 test devices. The device designated for point-of-care testing has a list price of \$10.00 - \$15.00 for each test kit.

Overall, the Department estimates that the costs of performing tests at the point-of-care are likely to be less than, or equal to, the costs of expedited HIV tests currently performed in a centralized laboratory. This estimate is based on the fact that rapid HIV tests do not require the purchase or maintenance of expensive laboratory equipment and that the cost of testing devices (OraQuick®, SUDS®) and the salaries of personnel conducting the tests are comparable. The cost of expedited HIV testing done in a reference laboratory (cost at one commercial laboratory is \$75.00/expedited test) may not change, but birth facilities using these laboratories will have to ensure that they will be able to report results within the 12-hour turnaround time. The cost to the birth facility in time spent to provide pre-test HIV counseling is not expected to differ from the current cost of expedited HIV testing, which includes reimbursement rates of \$52 for testing and \$44 for counseling (\$96.00/expedited test).

In light of the advances in testing technology, and the benefits of early initiation of antiretroviral therapy to prevent mother-to-child transmission of HIV, many birth facilities will opt to use a rapid HIV test device that generates results in a half-hour or less. Facilities have two options when performing rapid HIV testing on-site. Under the first option, they may perform the test under the main laboratory's permit, either in the laboratory itself or at the point-of-care under the supervision of the laboratory. Under the second option, facilities may register the labor and delivery suite as a Limited Service Laboratory and perform the test at point-of-care. Laboratories with a comprehensive HIV testing permit may choose to conduct "stat" testing 24 hours a day, 7 days a week using standard enzyme immunosorbent assay (EIA) testing technology within the 12 hour time limit. However, testing using rapid testing devices is encouraged to obtain HIV tests results as soon as possible. While procedures such as immediate transport of specimens by courier to a near-by laboratory, may, in theory, be effective for meeting a 12-hour turn-around-time, the Department's experience with such complex arrangements shows them to usually be an unacceptable alternative for on-site expedited testing.

Option 1 for rapid HIV testing: on-site testing with oversight by a centralized laboratory. Current PHL requires facilities performing HIV antibody screening to hold a permit in HIV testing. Of the 159 regulated hospitals and birthing centers affected by this amendment, 138 hold laboratory permits that include HIV and/or diagnostic immunology testing, the latter of which would be allowed, in response to the adoption of this amendment, to add HIV testing through a fast-track mechanism. For any of these 138 facilities that choose to add a new test to an existing HIV or fast-tracked diagnostic immunology permit, costs for protocol development, staff training, test validation and implementation of quality assurance measures are expected to be approximately \$1000. There are no additional costs associated with modifying an existing permit to add a category or test. The remaining 21 birth facilities would incur an additional cost if they seek to provide HIV testing on-site, either under a comprehensive permit at an initial cost of \$1000 plus annual fees based on gross annual receipts, or, using option 2 below, under a limited service laboratory registration at an annual registration fee of \$100.

Option 2. On-site testing at the point-of-care, *i.e.*, in the labor and delivery suite or midwifery clinic, regardless of whether or not the facility currently operates a comprehensive laboratory on-site. Facilities choosing this option would incur a cost of \$100 annually for registration as a limited service laboratory. Point-of-care testing sites would also incur small costs for initial training and ongoing competency assessment of non-laboratorial testing personnel, *i.e.*, labor and delivery nurses. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training (on average approximately \$50.00/hour by 8 hours equating to \$400.00) in device use, troubleshooting, record keeping and quality assurance activities, and adding the cost of 25 test devices (\$15 per test by 25 = \$375). Therefore, the total training costs would be approximately \$775. Cost attributable to periodic competency assessments of one to two hours could be calculated using the same formula. A materials cost of approximately \$10.00 - \$15.00 a test would be attributable to one single-use device and control materials.

Under either option, costs would be offset by revenue generated from third party billing, including Medicaid. Costs of expedited HIV testing in labor, delivery and newborn nursery settings will continue to diminish as efforts to increase prenatal HIV counseling and testing succeed. Any other provider costs associated with rapid HIV testing in the labor and delivery settings are medically appropriate and must continue to be considered part of labor and delivery costs.

Costs to the Department of Health:

The Department will use existing staff to review and approve HIV testing applications, and to conduct on-site surveys of applicant facilities.

Local Government Mandates:

This amendment to the current regulation will not impose any new program services, duties or responsibilities upon any county, city, town, village, school district, fire district or any other special district, except for those local governments operating hospitals with maternity services.

Paperwork:

Paperwork related to point-of-care rapid HIV tests does not significantly differ from that currently required by expedited testing regulations. This paperwork includes the clinician's written order for testing, notation of the completion of pre- and post-test counseling, documentation of the acquisition of the test specimen and recording the test result in the medical record. Some paperwork will be required of hospitals that apply for a limited permit to perform CLIA-waived testing, for laboratories that seek an addition to an existing permit, and for those hospital laboratories that choose to seek a new HIV testing permit.

Duplication:

None.

Alternatives:

There are no alternatives to the 12-hour time limit proposed by this amendment because a longer time period would result in some HIV-exposed infants not being detected in time to administer therapy to prevent HIV transmission. Because advances in scientific knowledge and medical technology allow for rapid HIV testing, the Department determined that the proposed revision to the regulation is the best approach to protect the public health.

Federal Standards:

There are currently no Federal regulations related to prenatal or newborn testing. The Federal government has provided only recommendations and guidelines for these activities. The proposed regulatory change is consistent with current federal recommendations.

Compliance Schedule:

The Department has already advised regulated parties that this amendment will be going into place. The Department understands that many facilities are already undertaking activities to implement rapid HIV testing. The Department expects that facilities will be in compliance by the emergency regulation's November 1, 2003 effective date.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses:**

The proposed rule will impact an estimated three birth hospitals and four birthing centers that meet the definition of a small business (independently owned and employs 100 or fewer individuals). No real impact on small businesses is expected, since regulations requiring expedited HIV testing are already in place. No new costs to local governments are anticipated, except for those operating hospitals with maternity services.

**Compliance Requirements:**

The reporting, recordkeeping and other affirmative acts that impact small businesses or local governments would not change with this proposed amendment. Current regulations require hospitals and birthing centers to ensure that all mothers who present for delivery have a negative HIV test result from the current pregnancy or a positive HIV test result during or prior to the pregnancy. If no test result is documented, the mother is offered consented expedited HIV testing. If she declines, an expedited HIV test is performed on her infant, without consent. Current regulations require a turnaround time for preliminary HIV test results of no more than 48 hours from the time the specimen is collected. The proposed rule change would decrease the turnaround time to within 12 hours after the mother's consent for testing, or if she does not consent, within 12 hours of the infant's birth.

**Professional Services:**

Impacted small businesses and local governments would need the same staff of health care providers (doctors, nurses, nurse practitioners, physicians assistants), counseling and support staff as they currently employ. No additional staff would be needed.

**Compliance Costs:**

The percentage of women receiving prenatal counseling and testing is steadily increasing, and the need for expedited HIV testing in the intrapartum period is decreasing. As of December 2002, hospital data indicate that approximately 94% of all women giving birth have documentation of their HIV status before delivery. This rate was 62% in July 1999, one month before expedited testing in delivery settings was implemented. Using these data, the need for expedited HIV testing has clearly decreased through the years, from an estimated 120,000 mothers/infants in 1999 to less than 15,000 in 2002. At \$52 per test, the total statewide testing cost in 1999, estimated to be \$6.24 million per year, has decreased to \$780,000 per year. This number is expected to continue to decline as more women accept prenatal HIV testing. The cost for expedited HIV testing using rapid, point-of-care testing kits is not expected to exceed the cost of expedited testing as currently performed and would be considerably less if facilities choose to take advantage of point-of-care rapid testing.

**Economic and Technological Feasibility:**

The proposed amendment to the regulatory program is economically and technologically feasible since it is not anticipated that additional staff would be required and rapid, point-of-care testing technology is readily available.

**Minimizing Adverse Impact:**

Provider costs associated with rapid, point-of-care expedited HIV testing are medically appropriate and must be considered part of labor and delivery costs. Current reimbursement rates for expedited HIV testing subsidize the costs incurred by the delivery facility (\$44 for counseling and \$52 for testing), and will continue. Since preventing HIV transmission saves the high treatment costs for HIV-infected persons, expedited HIV testing in the labor and delivery setting is actually cost effective. Hospitals and birthing centers also realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

**Small Businesses and Local Government Participation:**

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a video conference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**

Forty-four counties meet the definition of a rural area (population less than 200,000) and an additional 11 counties have towns that are classified

as rural (towns with population densities of 200 persons or less per square mile). The proposed amendment to the current regulation applies to hospitals and birthing facilities in 55 counties. These facilities already follow the Expedited HIV Testing regulation; significant program expansion is not expected.

**Reporting, Recordkeeping and Other Compliance Requirements:**

The reporting, recordkeeping and other affirmative acts that will impact hospitals in rural areas have already been undertaken to comply with the Expedited HIV Testing regulation. Current regulations require maternity hospitals and freestanding birthing centers to ensure that all women who present for delivery with no documentation of HIV status are counseled about expedited HIV testing, and, arrange that an immediate HIV screening test of the mother with her consent or of her newborn without consent is performed. Technological advances mean that rapid HIV screening tests can now be performed at the point-of-care. Birth facilities can choose to use the new technology for rapid HIV testing, or to continue with the expedited HIV testing program already in place at their facilities. If the new technology is not chosen, the decreased turnaround time for the return of preliminary test results will have to be negotiated with either the hospital-based or the commercial laboratories that perform expedited HIV testing.

**Professional Services:**

Hospitals in rural areas would not need additional professional staff to provide this service for women without known HIV test results.

**Costs:**

According to current annualized data, fewer than 50 maternity patients or newborns in any hospital or birthing center operated in rural areas require expedited HIV testing. This number will continue to diminish as efforts to promote prenatal HIV testing succeed. If an average of \$52 (the total per test average cost of ELISA or SUDS testing, exclusive of counseling) for each expedited HIV test is used to estimate the total cost of expedited testing (test device, equipment and personnel), the total annual cost for rapid expedited HIV testing in each rural birth facility will be approximately \$2,600, or less, depending on the number of maternity patients or newborns needing rapid testing.

**Minimizing Adverse Impact:**

Additional provider costs associated with testing are medically appropriate and must be considered part of labor and delivery costs. However, preventing HIV transmission is cost effective because of the high cost of treatment for HIV-infected persons. Hospitals and birthing centers will realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

**Rural Area Participation:**

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a video conference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

**Job Impact Statement**

A Job Impact Statement is not attached because this amended rule will not have a substantial adverse impact on jobs and employment opportunities as apparent from its nature and purpose.

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

**Newborn Screening**

**I.D. No.** HLT-36-03-00008-P

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

**Proposed action:** Amendment of section 69-1.2(b) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2500-a

**Subject:** Newborn screening.

**Purpose:** To add three conditions to the current eight that comprise the New York State newborn screening panel.

**Text of proposed rule:** Section 69-1.2 Diseases and conditions tested.

(a) Unless a specific exemption is granted by the State Commissioner of Health, the testing required by sections 2500-a and 2500-f of the Public Health Law shall be done by the testing laboratory according to recognized clinical laboratory procedures.

(b) Diseases and conditions to be tested shall include: phenylketonuria, branched-chain ketonuria, homocystinuria, galactosemia, homozygous

sickle cell disease, hypothyroidism, biotinidase deficiency [and], human immunodeficiency virus (HIV) exposure and infection, *cystic fibrosis*, *congenital adrenal hyperplasia*, and *medium-chain acyl-CoA dehydrogenase deficiency (MCADD)*.

**Text of proposed rule and any required statements and analyses may be obtained from:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

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

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

#### Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) Section 2500-a requires institutions caring for infants 28 days or under of age, as well as persons required to register the birth of a child, to cause newborns to be tested for phenylketonuria, branched-chain ketonuria, homocystinuria, galactosemia, homozygous sickle cell disease, hypothyroidism, and other diseases and conditions to be designated by the Commissioner of Health. Specifically, PHL Section 2500-a (a) provides statutory authority for the Commissioner of Health to designate in regulation other diseases or conditions that would require newborn testing in accordance to the Department's mandate to prevent infant and child mortality, morbidity, and diseases and defects of childhood. Pursuant to this authority, biotinidase deficiency and human immunodeficiency virus (HIV) have been added to the newborn testing panel by regulatory amendment since the enactment of Section 2500-a.

Legislative Objectives:

In enacting PHL Section 2500-a, the Legislature intended to promote public health through mandatory screening of New York State newborns to detect those with serious but treatable neonatal conditions and to ensure their referral for medical intervention. This proposal, which would add three disorders to the list of seven genetic/congenital disorders and one infectious disease currently in regulation, is in keeping with the Legislature's public health aims of early identification and timely medical intervention for all the State's youngest citizens. The Legislature recently affirmed its objective for a healthy young citizenry by enacting a State budget with dedicated funding for expansion of the State's Newborn Screening Program's testing panel, applying new technologies for the most accurate and timely identification of affected infants. The Department anticipates this express commitment to maintaining a premier program to continue in the form of annual appropriations to ensure funding for staffing and non-personal services.

Needs and Benefits:

Following legislative enactment of PHL Section 2500-a, the New York State Newborn Screening Program began as a statewide mandatory initiative to detect infants with serious but treatable neonatal conditions, and refer those infants for immediate medical intervention and follow-up. Regulations promulgated by the Commissioner of Health in 10 NYCRR Subpart 69-1 set forth requirements for specimen collection, testing, result reporting and case follow-up. Data compiled from New York State's Newborn Screening Program and other states' programs have shown that timely intervention and treatment can drastically improve affected infants' survival chances and quality of life. Advancing technology, emerging novel medical treatments and rising public expectations for this critical public health program demand that the panel of screening conditions be expanded at this time through amendment of Subpart 69-1.2.

This amendment would add three disorders—cystic fibrosis (CF), congenital adrenal hyperplasia (CAH) and medium-chain acyl-CoA dehydrogenase deficiency (MCADD)—to the scope of newborn screening services already provided by the Department. The three new disorders meet established criteria applied worldwide for newborn screening program test panels. These criteria are: the conditions must be medically significant; their incidence and prevalence must represent a matter of public health concern, or they must affect a substantial number of newborns, so that the resulting cost to society for health care and lost productivity is significant; reliable assays for diagnosis of the conditions, suitable for large-scale population screening, must be available; and early detection of the disorders during the neonatal period must allow for medical intervention effective in amelioration, or prevention of medical complications and other consequences.

An American Academy of Pediatrics task force reviewing newborn screening has suggested that state newborn screening programs consider testing for CF—one of the most common serious inherited disorders. Chronic illness and even death can result from alterations in the viscosity

(thickness) of body secretions, especially in the lungs, pancreas and gastrointestinal tract, caused by CF. Such alterations lead to impaired absorption of nutrients in the gastrointestinal tract, and eventual malnutrition and failure to thrive; as well as impaired lung function resulting in increased chronic bacterial bronchitis and abundant inflammation in the airways, respiratory failure, and even death. Early detection and intervention ensures improved infant nutritional status and linear growth, as well as more stable lung function. In New York State's birth population, CF has a combined incidence of one in 3,700 births, resulting in an expected annual incidence of 86 CF cases.

CAH is the third most common condition that can be detected by newborn screening and the most immediately lethal. This inherited endocrine disorder may cause sexual misassignment of female infants as male at birth, with eventual accelerated skeletal maturation and short stature in both sexes. Treatment with supplements slows precocious maturation, and surgery can correct genital malformations. CAH affects one in 5,000 newborns in the State, yielding an expected annual incidence of 50 cases. Testing for CAH is now a part of many states' screening profiles, including the neighboring states of Massachusetts, Rhode Island, Pennsylvania and New Jersey. In 1999, the Department received 25 unsolicited letters from physicians, endocrinology experts and families of affected infants, urging addition of CAH testing for New York's newborns.

MCADD is one of several abnormalities in the body's ability to metabolize fats, resulting in toxic build-up of fatty acids. Although the disorder's presentation is variable, it may cause hypoglycemia, lethargy, vomiting, seizures and coma. One-third of infants die during the first clinical episode, and MCADD is thought to be the cause of one to two percent of sudden infant deaths. Survivors of severe clinical episodes may experience muscle weakness, failure to thrive and cerebral palsy, as well as learning difficulties. However, the disorder is effectively treated when detected early, primarily through avoidance of fasting. MCADD has an estimated incidence of one in 18,000 births in the State, an expected annual incidence of 14 cases of the condition.

Costs:

Costs to Private Regulated Parties:

Regulated parties include the approximately 170 hospitals, and diagnostic and treatment centers providing birthing services in the State, their chief executive officers, and birth attendants who assist with at-home births (*i.e.*, licensed midwives). These entities will incur no new costs related to collection and submission of blood specimens to the State's Newborn Screening Program, since the dried blood spot specimens now collected and mailed to the program for other currently available testing would also be used for the additional tests proposed by this amendment. However, birthing facilities and, to a lesser extent, at-home birth attendants would likely incur minimal additional costs related to fulfilling their responsibilities for ensuring referral of infants who screen positive for CF, CAH or MCADD, specifically, human resources costs of approximately 1.0 person/hour (for nursing and counseling staff with clerical support) for communicating the need of and/or arranging referral for medical evaluation of the additional identified infants. Overall, for 95 percent of the State's birthing facilities (*i.e.*, 156 of 163), the number of infants requiring referral would increase from seven or fewer to no more than ten per week; therefore, no additional staff would be required at these institutions.

Facilities and practitioners receiving referrals, including: hospitals; specialized care centers; clinical specialists (*i.e.*, medical geneticists); and primary and ancillary care providers (*i.e.*, pediatricians, nutritionists and physical therapists), would incur costs for medical evaluation, including confirmatory testing in some cases, ongoing care, and treatment supplies such as antibiotics and dietary supplements. Specifically, such parties would incur human resources costs of approximately \$300 for an initial comprehensive medical evaluation of an infant with an abnormal screening test result. However, given the low specificity of screening tests to ensure no false negative results, the Department anticipates that as many as 98 percent of referred infants will ultimately be found not to be afflicted with the target condition, using clinical assessment and relatively simply confirmatory tests.

Hospitals, specialized care centers and independent providers will incur additional costs for providing post-evaluation and ongoing medical management services to the approximately two percent of identified infants whose disorders are confirmed. Human resources costs for post-confirmation services of two to five person/hours, involving medical geneticists, genetic counselors and nutritionists, have been estimated at \$450 per affected infant, including \$300 for a comprehensive office visit and \$150 for a genetic or nutritional counseling session.

The Department expects that costs of medical services and supplies will be reimbursed by all payor mechanisms now covering the care of children identified with conditions currently in the newborn screening panel, as well as that of children diagnosed with CF, CAH or MCADD, by targeted testing at the primary care level. Payors include indemnity health plans, managed care organizations, New York State's medical assistance program (Medicaid), Child Health Plus and the Children with Special Health Care Needs program. The Department also expects that medical care providers will claim reimbursement from one or more of these payors at a rate equal to the usual and customary charge, thereby recouping costs. Patients' families may also incur costs to the extent that a provider's charge for a service or supply item is not reimbursed in full by a third-party payor, and the provider is one of the few that balance-bill the patient. Some families may incur travel costs, since specialized care services are more readily available in large metropolitan areas.

Overall health care costs for definitive diagnosis and comprehensive medical management of affected individuals will vary significantly, primarily by the condition, and the services and supplies required for sustaining some level of continued health. Many of the costs associated with medical management of a child affected with CF, and to lesser extent CAH and MCADD, are not attributable solely to the proposed regulation, as most would have been incurred at some point following diagnosis by targeted testing at the primary care level. Although the proposed rule's speeding early diagnosis may result in increased overall lifetime costs for patients who would have died in the absence of screening, *e.g.*, those with MCADD, substantial cost-savings are likely to be accrued from avoided complications to set off against treatment costs. Early diagnosis and early treatment may prevent or lessen irreversible organ damage and thereby reduce costs related to caring for affected individuals incurred by New York's health care and education systems. Furthermore, early detection affords affected individuals with the opportunity for improved quality of life, a benefit that cannot be quantified.

The Department estimates that approximately 500 infants will screen as presumptively positive for CF annually. These presumptive-positive infants will require sweat tests and comprehensive level office visits at CF centers to determine final diagnosis. The cost of these services is estimated at \$225,000 annually, using the prevailing rate of \$300 and \$150 for a comprehensive office visit and sweat test, respectively. Most presumptive-positive infants will be found to have at least one genetic mutation associated with CF. Many will be carriers of mutations for CF (*i.e.*, able to pass the gene on to their children). In addition to targeted testing and genetic counseling of families with affected infants, carriers' families should be offered further diagnostic testing and genetic counseling to determine risk for conceiving future children with CF. The annual cost of genetic counseling is estimated at \$75,000, using the prevailing rate of \$150 per session. For the approximate 86 confirmed CF cases expected annually, treatment is directed at improving nutrition, antibiotic therapy and chest physiotherapy, and is costly. However, emerging evidence of benefits from early treatment points to potential costs savings over a lifetime. Potential long-term savings include those associated with reductions in the number of outpatient treatments for respiratory illnesses and hospitalizations, as well as maintenance of an affected child's nutritional status from an early age in contrast to having to "catch up."

The Department estimates 5,000 infants to screen positive for CAH annually. CAH-positive infants would require additional testing at an endocrine center at a cost of approximately \$150 each, plus one or more comprehensive office visits, for a total cost of \$2 million. Approximately 50 infants would be diagnosed with the condition. If not treated, CAH can cause heart failure and death within a few days from birth. Although CAH cannot be cured, it can be effectively treated with hormone replacement therapy. The costs of medical management, hormone-replacing medication and special dietary needs for affected infants pale by comparison to the hundreds of thousands of dollars needed to care for a severely disabled child and the lost potential of an individual's contribution to society.

As many as 140 infants may screen positive for MCADD and require referral to endocrine centers for final diagnosis. These infants would require additional (confirmatory) testing and one or more comprehensive office visit(s), at a total cost of approximately \$75,880. In 2000, the Program in Population Health at the University of Wisconsin collected data showing that costs for medical management of an affected child afforded early MCADD diagnosis are minimal. For example, families and/or payors would incur approximate annual costs of \$4,000 and \$300 for diet supplementation and laboratory testing, respectively. On the other hand, costs for treatment of infants not afforded early detection through newborn screening are significantly higher. A cost analysis conducted in

1999 by the National Newborn Screening and Genetics Resource Center in Austin, Texas, determined that costs for medical treatment of complications from a severe episode in an undiagnosed infant could be as high as \$500,000, and total medical costs, including management of complications such as autism, seizures and cerebral palsy, could rise to more than \$1 million for a lifespan of six years or under. Such costs may be translated into cost savings whenever early diagnosis is achieved through screening for MCADD.

#### Costs for Implementation and Administration of the Rule:

##### Costs to State Government:

New York State currently bears the cost of the annual appropriation for the State's Newborn Screening Program. Although funding for the program requires State expenditures, proactively treating congenital abnormalities may save money by avoiding more financially burdensome medical costs and institutional services.

State-operated facilities providing birthing services, infant follow-up and medical care would incur costs and savings as described for regulated parties. The Medicaid Program would also experience costs equal to the 25-percent State share for treatment and medical care of affected Medicaid-eligible children. However, Medicaid would also benefit from cost savings, since early diagnosis avoids medical complications, thereby reducing the average length of hospital stays and need for expensive high-technology health care services.

##### Costs to the Department:

Costs incurred by the Department's Wadsworth Center for performing newborn screening tests, providing short and long term follow-up, and supporting continuing research in neonatal and genetic diseases are covered by State budget appropriations. In addition to recent dedicated funding for program expansion, the Department expects that appropriations for staffing and non-personal services will continue. Department programs other than the Newborn Screening Program may incur minimal costs for distribution of informational material on testing for the three new conditions and for occasional use of existing public health nursing staff to track affected infants.

##### Costs to Local Government:

Local government-operated facilities providing birthing services, infant follow-up and medical care would incur the costs and savings described for private regulated parties. County governments would also incur costs equal to the 25-percent county share for treatment and medical care of affected Medicaid-eligible children, and realize cost savings as described above for State-operated facilities.

##### Paperwork:

No increase in paperwork would be attributable to activities related to specimen collection, and reporting and filing of test results, as the number and type of forms now used for these purposes will not change. Based on Department projections of increased numbers of specimens requiring follow-up under this proposed rule, facilities that submit such specimens will sustain a minimal increase in paperwork, specifically, that necessary to conduct and document follow-up and/or referral of one to three additional screening-positive cases per week. Pediatricians and other primary health care providers, as well as specialized care centers, involved in evaluation and management of affected infants, will experience minimal additional paperwork, including documentation of follow-up testing to the Department. Birthing facilities will need to complete and mail to the Department a single-page form to designate a staff physician to receive referrals of infants with presumptive-positive results for the new disorders.

##### Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates a facility, such as a hospital, caring for infants 28 days or under of age and, therefore, is subject to these regulations to the same extent as a private regulated party.

##### Duplication:

These rules do not duplicate any other law, rule or regulation.

##### Alternative Approaches:

Potential delays in detection of serious but treatable neonatal conditions until onset of clinical symptoms would result in increased infant morbidity and mortality, as well as higher health care costs, and are therefore unacceptable. Moreover, failure to act upon the availability of new technologies for diagnosis of CF, CAH or MCADD in newborns contramands the Department's mandate to promote and protect the public health. Given the decided public health benefits of preventing adverse clinical outcomes in affected infants, the Department has determined that

there are no alternatives to requiring newborn screening for these three conditions.

**Federal Standards:**

There are no existing federal standards for medical screening of newborns.

**Compliance Schedule:**

On October 16, 2000, the Commissioner of Health sent a letter to all New York State-licensed physicians informing them of the Department's intent to add tests for CF, CAH and MCADD to the State's newborn screening panel. The Newborn Screening Program distributed the Commissioner's letter to hospital CEOs and their designees responsible for newborn screening; directors of pediatric units; directors of specialized care centers; local health departments; and pediatricians and midwives identified by the program as involved with newborn screening. The Department received few comments from these mailings, the vast majority of which only posed specific questions about the initiative, to which written responses were provided. No adverse comments were submitted by the medical community. In June 2002, and as recently as September 23, 2002, the program sent a reminder letter to hospital CEOs and directors of specialized care centers about implementation of the new testing.

The Department also convened a Newborn Screening Task Force, comprised of directors of specialty care centers, payors, national experts in newborn screening quality assurance, health professionals working in other states' expanded screening programs and parents, to discuss this initiative, specifically, the scope of needed follow-up services and their availability at specialized care centers and other health care settings, and to review informational materials on CF, CAH and MCADD designed for distribution to medical professionals and lay persons. The Task Force met at least six times since November 2000, and, during July 2002, the Newborn Screening Program laboratory director met with representatives of various specialty centers to assess and shape the infrastructure necessary for care of affected infants. The Task Force identified 17 CF clinics, 17 endocrine (for CAH) disorder clinics and six inherited metabolic (for MCADD) care centers available to evaluate presumptively identified infants and render medical care to affected infants. The only concern raised entailed access to genetic counseling for families of infants determined to be unaffected by CF but who are carriers of the predisposing gene for the condition. The concerned party was assured that access to genetic counseling for all State residents is available through contract facilities under the New York State Genetic Services Program, which includes CF specialty care centers Statewide.

Based on Department outreach efforts, strong support for the amendment is expected from patient advocacy organizations representing affected individuals, as well as the medical community at large. The Department is not aware of any opposition to expanded newborn testing, and there appears to be no prospect of organized opposition. It is believed that the health care system has been effectively primed for integrated care of identified infants. Consequently, regulated parties should be able to comply with these regulations as of their effective date, effective upon publication of the Notice of Adoption in the *New York State Register*.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses and Local Governments:**

This proposed amendment to add cystic fibrosis (CF), congenital adrenal hyperplasia (CAH) and medium-chain acyl-CoA dehydrogenase deficiency (MCADD) to the list of conditions for which every newborn in New York State must be tested will affect hospitals; alternative birthing centers; and physician and midwifery practices operating as small businesses or operated by local government, provided such facilities care for infants 28 days or under of age, or are required to register the birth of a child. The Department estimates that ten hospitals and one birthing center in the State meet the definition of a small business. Local government, including the New York City Health and Hospitals Corporation, operates 21 hospitals. No specialized care center is operated by a local government or as a small business. New York State licenses 67,790 physicians and certifies 350 licensed midwives, some of whom, specifically those in private practice, operate as small businesses. It is not possible, however, to estimate the number of these medical professionals operating an affected small business, primarily because the number of physicians directly involved in delivering infants cannot be ascertained.

**Compliance Requirements:**

The Department expects that affected facilities, and medical practices operated as small businesses or by local governments will experience minimal additional regulatory burdens in complying with the amendment's requirements, as functions related to mandatory newborn screening are already embedded in established policies and practices of affected

institutions and individuals. Activities related to collection and submission of blood specimens to the State's Newborn Screening Program will not change, since newborn dried blood spot specimens now collected and mailed to the program for other currently performed testing would also be used for the additional tests proposed by this amendment. However, birthing facilities and at-home birth attendants (*i.e.*, nurse-midwives) would be required to follow-up infants screening positive for CF, CAH or MCADD, and assume responsibility for referral for medical evaluation and additional testing as appropriate for each infant's medical status. The anticipated increased burden is expected to have minimal effect on the ability of small businesses or local government-operated facilities to comply, as no such facility would experience an increase of more than two per week in the number of infants requiring referral. Therefore, the Department expects that regulated parties will be able to comply with these regulations as of their effective date, effective upon publication of the Notice of Adoption in the *New York State Register*.

**Professional Services:**

No need for additional professional services is anticipated. Although increased numbers of repeat specimens and referrals are foreseen, affected facilities' existing professional staff should be able to assume the minimal increase in workload. Infants with a positive screening test for CAH will be referred to the facility physician already designated to receive positive screening results for hypothyroidism, and those with positive screening for MCADD will be referred to the physician receiving positive screening results for phenylketonuria (PKU). Birthing facilities will need to identify a staff physician with the specialty training necessary for appropriate CF diagnosis and treatment.

**Compliance Costs:**

Birthing facilities operated as small businesses and by local governments, and practitioners who are small business owners (*i.e.*, private practicing licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State Newborn Screening Program, since the dried blood spot specimens now collected and mailed to the program for other currently available testing would also be used for the additional tests proposed by this amendment. However, such facilities, and, to a lesser extent, at-home birth attendants, would likely incur minimal costs related to follow-up of infants screening positive for CF, CAH or MCADD, primarily because the new testing proposed under this regulation is expected to result in no more than one additional referral per week. Communicating the need of and/or arranging referral for medical evaluation of one additional identified infant would take 1.0 person/hour, and is expected to be able to be accomplished with existing staff.

Providers, such as clinical specialists (*i.e.*, medical geneticists), and primary and ancillary care providers (*i.e.*, pediatricians, nutritionists and physical therapists), some of whom operate small businesses, would incur costs for first response and ongoing care of affected infants, as well as treatment supplies such as antibiotics and dietary supplements. Specifically, such providers would incur human resources costs of approximately \$300 for an initial comprehensive medical evaluation of one infant with an abnormal screening test result. However, given the low specificity of screening tests to ensure no false negative test results, the Department anticipates that as many as 98 percent of infants will be found to not have the target condition, using clinical assessment and relatively simply confirmatory tests.

Hospitals and independent providers will incur additional costs for providing post-evaluation and ongoing medical management services to the approximately two percent of identified infants whose disorders are confirmed. Human resources costs for post-confirmation services of two to five person/hours, involving medical geneticists, genetic counselors and nutritionists, have been estimated at \$450 per affected infant, including \$300 for a comprehensive visit and \$150 for a genetic or nutritional counseling session. The Department believes that most infants presumptive-positive for CF will be found to have at least one gene mutation associated with CF; carriers of CF mutations would be able to pass the gene on to their children. Therefore, in addition to confirmatory testing and genetic counseling of families with affected infants, carriers' families should be offered genetic counseling at a cost of \$150 per session, to determine their risk of conceiving future children with CF.

The Department expects that costs of medical services and supplies will be reimbursed by all payor mechanisms now covering the care of children identified with conditions in the present newborn screening panel, as well as the care of children diagnosed with CF, CAH or MCADD by targeted testing at the primary care level. Payors include indemnity health plans, managed care organizations, and New York State's medical assis-

tance program (Medicaid Program), Child Health Plus and the Children with Special Health Care Needs programs. The Department also expects that medical care providers will claim reimbursement from one or more of these payors at a rate equal to the usual and customary charge, thereby recouping costs.

Overall health care costs for definitive diagnosis and comprehensive medical management of affected individuals will vary significantly, primarily depending on the condition and the services and supplies required for sustaining some level of continued health. Many of the costs associated with medical management of a child affected with CF, and to lesser extent CAH and MCADD, are not attributable solely to the proposed regulation, as most such expenses would have been incurred at some point following diagnosis, by targeted testing at the primary care level. Although the proposed rules' speeding of early diagnosis may result in increased overall lifetime care and treatment costs for patients who would have died in the absence of screening, *e.g.*, MCADD patients, substantial cost-savings are likely to be accrued from prevented medical complications to set off against treatment costs. Early diagnosis and early treatment may prevent or lessen irreversible organ damage and thereby reduce costs related to caring for affected individuals incurred by New York's health care and education system infrastructure. Furthermore, early detection affords affected individuals the opportunity for improved quality of life, a benefit that cannot be quantified.

#### Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses and local governments affected by this amendment.

#### Minimizing Adverse Impact:

The Department did not consider alternate, less stringent compliance requirements, or regulatory exceptions for facilities operated as small businesses or by local government, because of the importance of the proposed testing to statewide public health and welfare. These amendments will not have an adverse impact on the ability of small businesses or local governments to comply with Department requirements for mandatory newborn screening, as full compliance would require minimal enhancements to present collection, reporting, follow-up and record keeping practices.

#### Small Business and Local Government Participation:

On October 16, 2000, the Commissioner of Health sent a letter to all New York State-licensed physicians informing them of the Department's intent to add testing for CF, CAH and MCADD to the State's newborn screening panel. The Newborn Screening Program distributed the Commissioner's notification to local health departments, and small businesses and local government-operated facilities engaged in newborn screening, specifically: hospital chief executive officers and their designees; directors of pediatric units; and pediatricians and midwives identified by the program as involved in newborn screening. The Department received few comments in response to these mailings, the vast majority of which only posed specific questions about the initiative, to which written responses were provided. No adverse comments were submitted by the medical community.

Based on Department outreach efforts, strong support for the amendment is expected from patient advocacy organizations representing affected individuals, as well as the medical community at large. The Department is not aware of any opposition to expanded newborn testing, or of any prospect of organized opposition from small businesses or local government. It is believed that the health care system has been effectively primed for integrated care of identified infants. Consequently, regulated parties that are small business owners or facilities operated by local government should be able to comply with these regulations as of their effective date, effective upon publication of the Notice of Adoption in the *New York State Register*.

#### Rural Area Flexibility Analysis

##### Effect of Rule:

Rural areas are defined as counties with a population under 200,000, and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 persons or fewer per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas.

This proposed amendment to add cystic fibrosis (CF), congenital adrenal hyperplasia (CAH) and medium-chain acyl-CoA dehydrogenase deficiency (MCADD) to the list of conditions for which every newborn in the State must be tested will affect hospitals, alternative birthing centers, and physician and midwifery practices located in rural areas, provided such

facilities care for infants 28 days or under of age, or are required to register the birth of a child. The Department estimates that 54 hospitals and birthing centers operate in rural areas, and another 30 birthing facilities operate in counties with low-population density townships. No specialized care center operates in a rural area. New York State licenses 67,790 physicians and 350 midwives, some of whom are engaged in private practice in areas designated as rural; however, the number of professionals practicing in rural areas cannot be estimated because licensing agencies do not maintain records of licensees' employment addresses.

#### Compliance Requirements:

The Department expects that facilities and medical practices affected by this amendment and operating in rural areas will experience minimal additional regulatory burdens in complying with the amendment's requirements, as activities related to mandatory newborn screening are already part of established policies and practices of affected institutions and individuals. Activities related to collection and submission of blood specimens to the State's Newborn Screening Program will not be altered by this amendment, since the dried blood spot specimens now collected and mailed to the program for other currently available testing would also be used for the additional tests proposed by this amendment. However, birthing facilities and at-home birth attendants (*i.e.*, licensed midwives) would be required to follow-up infants screening positive for CF, CAH or MCADD, and assume responsibility for referral for medical evaluation and additional testing as appropriate for each infant's medical status. This requirement is expected to affect minimally the ability of rural facilities to comply, as no such facility would experience an increase in infants requiring referral of more than two per week. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with these regulations as of their effective date, effective upon publication of the Notice of Adoption in the *New York State Register*.

#### Professional Services:

No need for additional professional services is anticipated. Although increased numbers of repeat specimens and referrals are foreseen, affected facilities' existing professional staff is expected to be able to assume the resulting minimal increase in workload. Infants screening positive for CAH will be referred to the facility physician designated to receive positive screening results for hypothyroidism, and those screening positive for MCADD, to the physician designated to receive positive screening results for phenylketonuria (PKU). Birthing facilities will need to designate a staff physician with the specialty training necessary for diagnosis and treatment of CF.

#### Compliance Costs:

Birthing facilities operating in rural areas and practitioners in private practice in rural areas (*i.e.*, licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State's Newborn Screening Program, since the dried blood spot specimens now collected and mailed to the program for other currently available testing would also be used for the additional tests proposed by this amendment. However, such facilities and, to a lesser extent, at-home birth attendants would likely incur minimal costs related to follow-up of infants screening positive for CF, CAH or MCADD, since the added testing proposed under this regulation is expected to result in no more than one more referral per week. Communicating the need of and/or arranging referral for medical evaluation of one additional identified infant would take 1.0 person/hour, and is expected to be able to be accomplished with existing staff.

Rural providers, including clinical specialists (*i.e.*, medical geneticists) and primary and ancillary care providers (*i.e.*, pediatricians, nutritionists and physical therapists), would incur costs for first response and ongoing care of identified infants, as well as treatment supplies such as antibiotics and dietary supplements. Specifically, such medical professionals would incur human resources costs of approximately \$300 for an initial comprehensive medical evaluation of each infant with an abnormal screening result. However, given the low specificity of screening tests to ensure no false negative results, the Department anticipates that as many as 98 percent of infants will be ultimately found to not be afflicted with the target condition, using clinical assessment practices and relatively simply confirmatory tests.

Hospitals and independent providers will incur additional costs for providing post-evaluation and ongoing medical management services to the approximately two percent of identified infants whose disorders are confirmed. Human resources costs of two to five person/hours for post-confirmation services, involving medical geneticists, genetic counselors and nutritionists, have been estimated at \$450 per affected infant, including \$300 for a comprehensive visit, and \$150 for a genetic or nutritional

counseling session. The Department believes that most infants identified with CF will be found to have at least one mutation associated with CF; carriers of CF mutations will be able to pass the gene on to their children. Therefore, in addition to confirmatory testing and genetic counseling of families with affected infants, carriers' families should be offered genetic counseling at a cost of \$150 per session, to determine the risk of conceiving children with CF in the future.

The Department expects that costs of medical services and supplies will be reimbursed by all payor mechanisms now covering the care of children identified with conditions already in the newborn screening panel, as well as children diagnosed with CF, CAH or MCADD, by means of targeted testing at the primary care level. Payors include indemnity health plans, managed care organizations, and New York State's medical assistance program (Medicaid), Child Health Plus and Children with Special Health Care Needs programs. The Department also expects that medical care providers will claim reimbursement from one or more of these payors at a rate equal to the usual and customary charge, thereby recouping costs.

Overall health care costs for definitive diagnosis and comprehensive medical management of affected individuals will vary significantly, primarily by the condition and the services and supplies required for sustaining some level of continued health. Many of the costs associated with medical management of a child affected with CF, and to lesser extent CAH and MCADD, are not attributable solely to the proposed regulation, as most would have been incurred at some point following diagnosis by targeted testing at the primary care level. Although the proposed rule's advancement of early diagnosis may result in increased overall lifetime costs for patients who would have died in the absence of screening, e.g., those with MCADD, substantial cost-savings are likely to be accrued from prevented medical complications, to be set off against treatment costs. Early diagnosis and early treatment may prevent or lessen irreversible organ damage, and thereby reduce costs related to caring for affected individuals incurred by New York's health care and education system infrastructure. Moreover, early detection affords affected individuals with the opportunity for improved quality of life, a benefit that cannot be quantified.

#### Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas.

#### Minimizing Adverse Impact:

The Department did not consider less stringent compliance requirements or regulatory exceptions for facilities located in rural areas because of the importance of the added infant testing to statewide public health and welfare. These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for mandatory newborn screening, as full compliance would entail minimal enhancements to present collection, reporting, follow-up and record-keeping practices.

#### Participation by Parties in Rural Areas:

On October 16, 2000, the Commissioner of Health sent a letter to all New York State-licensed physicians informing them of the Department's intent to add testing for CF, CAH and MCADD to the State's newborn screening panel. The Newborn Screening Program distributed the Commissioner's letter to local health departments, and all rural facilities engaged in newborn screening, specifically, hospital chief executive officers and their designees; directors of pediatric units; and pediatricians and licensed midwives identified by the program as involved in newborn screening. The Department received few comments from these mailings, the vast majority of which only posed specific questions about the initiative, to which written responses were provided. No adverse comments were submitted by the medical community.

Based on Department outreach efforts, strong support for the amendment is expected from patient advocacy organizations representing affected individuals, as well as the medical community at large. The Department is not aware of any opposition to expanded newborn testing, or of any prospect of organized opposition from providers located or operating in rural areas. It is believed that the health care system has been effectively primed for integrated care of identified infants. Consequently, regulated parties should be able to comply with these regulations as of their effective date, effective upon publication of the Notice of Adoption in the New York State Register.

#### Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment proposes the addition of three disorders—cystic fibrosis (CF), congenital adrenal hyperplasia (CAH) and medium-chain acyl-CoA dehydrogenase

deficiency (MCADD)—to the scope of newborn screening services already provided by the Department. It is expected that, of the small number of regulated parties that will experience moderate rather than minimal impact on their workload, few, if any, will need to hire new personnel. Therefore, this proposed amendment carries no adverse implications for job opportunities.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Public Water Systems-MTBE

I.D. No. HLT-36-03-00009-P

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

**Proposed action:** Amendment of Subpart 5-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1) and 225(1)

**Subject:** Public water systems-MTBE.

**Purpose:** To adopt a revised maximum containment level (MCL) of 0.010 mg/L for methyl-tertiary-butyl-ether (MTBE) and prescribe analytical procedures and monitoring requirements for affected public water systems.

**Substance of proposed rule:** Section 5-1.52, Table 3 is amended to add the following contaminant and to establish a more restrictive maximum contaminant level (MCL) of 0.10 MCL (mg/L for Methyl-tertiary-butyl-ether (MTBE).

Section 5-1.52, Table 9B is amended to add methyl-tertiary-butyl-ether (MTBE) as a contaminant for which monitoring would coincide with pre-existing principal organic contaminant monitoring requirements for community and nontransient noncommunity water systems.

Section 5-1.52, Table 13 is amended to extend the provisions for state, consumer or public notification to MTBE as required by this action.

Appendix 5-C, II. ORGANIC CHEMICALS, is amended to include a Section C. - Methyl-tertiary-butyl-ether (MTBE) Analytical Requirements. This section includes approved analytical methods, namely, EPA Method 502.2 (as most recently amended by the State) and EPA Method 524.2.

Section 5-1.22(b) is amended to reference the 1997 edition of the "Recommended Standards for Water Works" as this document is updated every five years, and currently, the 1987 edition is referenced. Section 5-1.22(b) is amended to also reference the 1995 edition of the Department's "Rural Water Supply" booklet, as the 1966 edition is currently referenced. The most current versions of these documents are already in widespread use.

Appendices 5-A and 5-B are amended to reflect the 1997 edition of the "Recommended Standards for Water Works" and the 1995 edition of "Rural Water Supply".

**Text of proposed rule and any required statements and analyses may be obtained from:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

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

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

#### Summary of Regulatory Impact Statement

##### Statutory Authority

The statutory authority for the proposed revisions can be found in Public Health Law, Sections 201 and 225. Section 201 of the Public Health Law establishes the powers of the Department of Health to supervise and regulate the sanitary aspects of public water systems. Section 225 of the Public Health Law provides that the State Sanitary Code may deal with any matters affecting the security of life or health or the preservation and improvement of public health in the State and establishes the powers of the Public Health Council to establish, amend or repeal regulations of the State Sanitary Code.

##### Legislative Objective

The changes to the State Sanitary Code are being proposed pursuant to the legislative objective set forth in the Public Health Law Section 225 which authorizes the Public Health Council to amend the State Sanitary Code to insure the protection of public health. Since there is currently no specific maximum contaminant level (MCL) for Methyl-tertiary-butyl-ether (MTBE) which pertains to public water systems, the New York State Department of Health's (Department's) unspecified organic contaminant

(UOC) standard of 0.05 mg/L applies. The following changes establish a more restrictive MCL for MTBE in drinking water and adopt monitoring requirements for this chemical.

Section 5-1.52, table 3 has been amended to establish an MCL of 0.010 mg/L for MTBE because many surveys, including those conducted by the Department and the US Geological Survey, have shown detections of MTBE in groundwater. MTBE has been detected in some public water systems.

Section 5-1.52, table 9B has been modified to include (MTBE) as a contaminant for which monitoring would coincide with pre-existing principal organic contaminant monitoring requirements for community and nontransient noncommunity water systems.

By including MTBE under the routine monitoring requirements for public water systems, exposure to this chemical can be assessed and appropriate action taken to reduce unnecessary risk to the consumer.

Section 5-1.52, table 13 extends the provisions for state, consumer or public notification to MTBE.

Section 5-1.22(b) has been modified to ensure that the 1997 version of the "Recommended Standards for Water Works" and the 1995 version of the Department's "Rural Water Supply" booklet (Appendices 5-A and 5-B) are referenced. The most current versions of these documents are already in widespread use.

Appendix 5-C has been modified to include a new Section II, subsection c dealing with MTBE analytical requirements.

#### Needs and Benefits

The need for this amendment has been brought to light by the many surveys, including those conducted by the Department and the US Geological Survey, which have detected MTBE in ground water. There is sufficient toxicological data to raise concern over the potential human health risks of MTBE in drinking water. Numerous reports have focused national attention and public policy discussions on the MTBE issue, which has led to legislative and public pressure for MTBE regulations.

The toxicological data on the known and potential health effects of MTBE in humans and animals support concerns about the potential health risks from MTBE in drinking water. There are no data on the human noncancer or cancer effects of short-term or long-term exposure to MTBE in drinking water. Most of the information on the potential risks of exposures comes from laboratory studies of animals exposed by inhalation or by the injection of MTBE in oil directly into the stomach (gavage dosing). Although these studies identify the central nervous system, kidneys, liver, gastrointestinal tract, and blood as sensitive to the noncancer effects of MTBE, additional studies are needed to fully characterize the noncancer health effects of MTBE. In addition, MTBE is an animal carcinogen. In long-term studies, MTBE induced lymphomas in female rats, testicular and kidney tumors in male rats, and liver tumors in male and female mice. The way MTBE causes these cancers is unknown; thus, these animal data support concerns about the carcinogenic potential of MTBE in humans.

The use of the additive has unequivocally led to ground water contamination, primarily because gasoline spills/leaks are unavoidable and MTBE tends to move quickly and over great distances in ground water. Concerns about ground water contamination lead to a United States Environmental Protection Agency (USEPA) "Blue Ribbon Panel" to call for a phase-out of MTBE in gasoline with the caveat that the reductions in air pollution achieved with the use of MTBE are not lost. As a result, EPA has proposed action to phase out MTBE.

An extensive sampling program of public and private water supplies in Northeastern United States (See reference (1)) detected low levels of MTBE in about 15% of the samples. Another sampling program of private water supplies in New York State (See reference (2)) detected MTBE concentrations at or above the detection limit (1 mcg/L) in 28% of the samples. Additionally, the New York State Department of Environmental Conservation (NYSDEC), through its Spill Response Program, has documented that 867 private wells and 47 public water supply wells have observed MTBE impacts (based on 1998 data). As part of the NYSDOH's ongoing water quality surveillance program, MTBE analysis has been done on over 1400 samples, representing 1248 public water supply systems, over the past 5 years. One sample result exceeded the state drinking water maximum contaminant level of 50 mcg/L.

Although the MCL applies to public water systems, it will be used as a basis for spill cleanup where private wells are contaminated. It is estimated that between 0.6 and 3.0 percent of private wells will be impacted by MTBE at levels exceeding 10 mcg/L (See reference (1)). It is estimated that approximately 4,000 — 23,000 private wells will be affected by the proposed standard of 10 mcg/L. Once the proposed standard is adopted, it is anticipated that only 20 percent of the estimated number of wells

exceeding the proposed standard will be discovered, remediated and exposures reduced. This results in a range of 800 4,400 private wells with reduced MTBE exposures.

#### Costs

The amended regulations have no cost impacts that affect all regulated parties. Monitoring for MTBE will be included with the routine compliance monitoring for volatile organic compounds (VOCs). Therefore, there will be no additional cost for MTBE routine monitoring as analysis for this compound can be included using existing methods for the analysis of VOCs.

As discussed in the Needs and Benefits section, this rule does not apply to private wells. However, the proposed standard will be used as guidance by the New York State Department of Environmental Conservation (NYSDEC) for remediation of private wells contaminated by gasoline products, thereby providing protection for private wells. The largest cost impact will come from providing treatment for the estimated 800 4,400 private wells. It is estimated that treatment for a private well will cost \$10,000, including installation and 5 years of operation and maintenance of a granular activated carbon treatment system. This average estimate per household corresponds to an estimated total cost impact of \$8,000,000 to \$44,000,000 for New York State to treat private wells for MTBE contamination at the proposed MCL. Some of these funds necessary to cover treatment of private wells, may come from the NYSDEC Spill Fund when the responsible party can not be assessed.

#### Cost to State Government

The cost to State government will affect those state agencies that operate water systems as defined in Part 5 of the State Sanitary Code. There are approximately 25 state owned or operated facilities. Currently, there are no known state owned and operated public water systems affected by MTBE contamination.

The annualized State government cost for MTBE monitoring will be negligible since monitoring for MTBE will be included with the routine compliance monitoring for (VOCs). An exceedance of the MCL would require additional monitoring costs as described in the "Monitoring Costs" section.

The largest cost incurred by State government will be for treatment of private wells for MTBE contamination at the proposed MCL. This cost corresponds to an estimated impact of \$8,000,000 to \$44,000,000. Some of these funds necessary to cover treatment of private wells, may come from the NYSDEC Spill Fund when the responsible party can not be assessed.

#### Cost to Local Government

The amended regulations apply to all local governments (town, village, county, authorities or area wide improvement districts) which own and/or operate a water system having its own source of water and are considered community water systems. There are approximately 1,000 water systems that are owned or operated by local government. If required treatment costs are proportional to these systems, the total capital cost and the annual operation and maintenance cost is projected to range from \$3,000,000 to \$8,000,000.

#### Cost to Private Regulated Parties

The cost incurred by a privately owned water system that meets the definition of a public water system is not different than a system operated by local government. Included in this group of an estimated 2,350 water systems are: 1) privately owned community water systems consisting of private water systems serving residential suburban areas (realty subdivisions), mobile home parks and apartment buildings, residential health care facilities, private schools/colleges, and residential private institutions; and 2) privately owned and operated nontransient noncommunity water systems consisting mainly of industrial, commercial and private buildings, nursery schools, day care centers and nonresidential health care facilities. Also, nearly all of the 6,481 transient noncommunity water systems, such as restaurants, motels and campsites are privately owned. Thus, there are approximately 8,831 of these privately held water systems.

There will be no annualized cost to most of these systems for MTBE monitoring since monitoring for MTBE will be included with the routine compliance monitoring for (VOCs). Treatment costs associated with known spills may be covered by the Spill Fund, or through the pursuit of responsible parties.

#### Cost to State and Local Health Departments

The cost to the State Health Department initially will be approximately 2 man-years during the preparation and implementation phase of these regulations. However, once the amendment is implemented, it is estimated to be less than 0.5 person-years per year for these activities in addition to oversight and training. Since monitoring for MTBE will be included with

the routine compliance monitoring for VOCs, the time necessary for implementation should be no more than 0.1 person-years per year.

**Local Government Mandates**

The requirements contained in this State proposed rule apply to any water system impacted by MTBE contamination and which has its own source(s) of water and is owned and/or operated by a county, city, town, village or school district. Fire districts are not included in the regulatory definition of a water system to which this proposed rule applies.

**Paperwork**

There will be no significant increase in paperwork for local and State health departments resulting from this rule. MTBE monitoring will be included under the routine compliance monitoring requirements for public water systems. As such, MTBE monitoring results will be tracked and reported simultaneously with existing routine compliance monitoring results.

**Duplication**

There will be no duplication of existing State or Federal regulations. The USEPA will not likely have an MCL for MTBE until 2008 and the MCL may be higher than 10 mcg/L.

**Alternatives**

One alternative is to keep the existing MCL of 50 parts per billion. Another alternative is waiting for the federal MCL in 2008, or a secondary federal MCL (typically a less stringent MCL established for aesthetic reasons, such as taste and odor) which is anticipated to be established sometime in 2001. The Department chose to propose its own MCL now, to reduce exposure to a potentially harmful level of MTBE.

**Federal Standards**

This rule will not exceed any minimum standards of the federal government as there is no federal MCL for MTBE to date.

**Compliance Schedule**

Compliance with this amendment would be required upon promulgation. The proposed rule will affect only a small number of public water systems and the treatment technology needed for compliance is readily available and unsophisticated.

**References**

(1) New Hampshire Department of Environmental Services. "Assessment of the Proposed Revision to the Drinking Water and Groundwater Standards for Methyl Tertiary Butyl Ether (MTBE)". January 20, 2000.

New Hampshire's Department of Environmental Services in consultation with the New Hampshire Department of Health and Human Services, Bureau of Health Risk Assessment, reviewed the current primary and secondary drinking water standards and ambient groundwater quality standards for the gasoline additive MTBE. During the review process, private well data was evaluated to determine the potential cost of treatment to remove MTBE from individual private wells in the state of Maine. This data was extrapolated for similar cost estimates in New York State for this rule proposal. For more information on this study, or to obtain a copy of this document, contact Kim Evans at the NYS Department of Health, Flanigan Square, 547 River Street, Troy, NY, or call at 518/402-7713.

(2) Lince, D. and Kaplan, J. "Health Consultation for Methyl-tert-Butyl-Ether in Private Wells near Gasoline Stations in New York" (prepared under a cooperative agreement between New York State Department of Health and the Agency for Toxic Substance and Disease Registry); July 26, 1999 public comment draft.

This study investigated whether widespread MTBE contamination is occurring in private wells near gasoline stations in NYS, compared to those further away from gasoline stations. In addition, this study investigated whether the levels of contamination differ significantly between regions of reformulated gasoline use and regions of conventional gasoline use. The results of this study were used to estimate potential private well contamination from MTBE for the purpose of this proposal. For more information on this study, or to obtain a copy of this document, contact Kim Evans at the NYS Department of Health, Flanigan Square, 547 River Street, Troy, NY, or call at 518/402-7713.

**Regulatory Flexibility Analysis**

**Effect on Small Business and Local Governments**

Nearly all of the public water systems affected by this amendment are owned or operated by either a small business or local government. There are approximately 2,477 small (serving less than 3,300 people) privately owned community and nontransient noncommunity water systems in New York State which are affected by this amendment. Nearly all of these systems are believed to meet the definition of a small business. The small community systems consist mostly of suburban water systems serving realty subdivisions and long established water companies serving all or part of a local municipality such as a village. There are 356 systems in this

category the remaining 2,121 water systems primarily consist of mobile home parks, apartment complexes and condominiums.

There are approximately 1,000 water systems owned and/or operated by local government. These include those serving municipalities (town, village, city, authority or area wide improvement district), schools or government buildings.

**Compliance Requirements**

The amendment establishes a maximum contaminant level (MCL) for methyl-tertiary-butyl-ether (MTBE) of 0.010 mg/L. Monitoring will be required of all community and nontransient noncommunity water systems. MTBE monitoring will be included with the routine compliance monitoring for volatile organic compounds (VOCs). As with current compliance requirements, the absence of detectable amounts of the contaminant will generally result in a decrease in sample frequency and increase if detected. These monitoring results must be summarized and reported to the state.

Failure to comply with the MCL results in a requirement for public notification which must include mandatory health effects language.

Note: The MCL of 0.010 milligrams per liter (mg/L) for MTBE is equivalent to 10 micrograms per liter (mcg/L). For ease in reference, the MCL of 10 mcg/L will be used throughout the remainder of this document.

**Professional Services**

Public water systems impacted by this amendment will require the professional services of a certified or approved laboratory to perform the analyses for MTBE. The laboratory used must be one approved by the Department under its Environmental Laboratory Approval Program (ELAP). It is estimated that sufficient laboratory capability and capacity is available.

A licensed professional engineer is required to design treatment facilities to meet the MCL or design facilities for accessing an alternate source.

**Compliance Costs**

The amended regulations may have cost impacts that affect community and nontransient noncommunity public water systems that serve 25 or more persons or have 15 or more service connections, since state discretion still applies to compliance monitoring. The amended regulations require monitoring for an additional contaminant, namely MTBE. Monitoring for MTBE will be included with the routine compliance monitoring for volatile organic compounds (VOCs). Therefore, there will be no additional cost for MTBE routine monitoring as analysis for this compound can be included using existing methods for the analysis of VOCs. Monitoring for VOCs applies to points of entry of water from all combined or separate sources of water and before water treatment, if present.

Based upon available data and past limited water quality surveys of water systems nationally and those performed by the Department, the detection of MTBE is expected to occur in approximately five percent of public water systems. This corresponds to approximately 174 small businesses and local governments having MTBE detections. Sampling of public water systems conducted to date, shows that only 17 will violate the proposed MCL of 10 mcg/L for MTBE. Consequently, these systems will have to install treatment facilities.

If a MCL is exceeded and water treatment is the only option available, the cost projected by 1996 USEPA data will vary with system size as summarized in the table below.

Contaminant	Public Water System Maximum Water Usage (Gallons Per Day)	Estimated Capital Cost (Dollars Per Gallon) <sup>2</sup>	Total Capital Cost (Dollars) <sup>2</sup>	Estimated Annual Operation and Maintenance Cost (Dollars) <sup>3</sup>	Estimated Number of Systems <sup>4</sup>
MTBE	<10,000	1.50 +	10,000 – 15,000	1,500 – 3,000+	5 <sup>(5)</sup>
MTBE	10,000 – 30,000	1.50 – 1.00	15,000 – 30,000	3,000 – 4,000+	14 <sup>(6)</sup>
MTBE	30,000 – 50,000	1.00 – 0.90	30,000 – 45,000	4,000 – 5,000+	8 <sup>(6)</sup>
MTBE	50,000 – 100,000	0.90 – 0.70	45,000 – 70,000	5,000 – 6,000+	4 <sup>(6)</sup>
MTBE	100,000 – 500,000	0.70 – 0.44	70,000 – 220,000	6,000 – 9,125	— <sup>(7)</sup>
MTBE	500,000 – 1,000,000	0.44 – 0.40	220,000 – 400,000	9,125 – 18,250	— <sup>(7)</sup>

<sup>1</sup> Cost is based on the maximum daily flow of 200 gallons per person per day or from available water consumption data.  
<sup>2</sup> Site variations may affect costs. Urban areas and site conditions may increase capital costs dramatically.  
<sup>3</sup> Annual Operation and Maintenance Cost is based on \$0.05 per 1,000 gallons of water treated for larger systems, treating at least 100,000 gpd. For systems treating less than 100,000 gpd, costs were extrapolated using private well remediation costs (NYSDEC).  
<sup>4</sup> The number of systems is based on local health unit and available New York State MTBE electronic data.  
<sup>5</sup> In addition to the number of systems known to be treated for MTBE, the estimated number of systems that will require MTBE treatment in the future is based on a one percent projection of all transient noncommunity systems, that is consistent with studies that have been published nationwide.  
<sup>6</sup> Approximately half of all community and nontransient noncommunity systems have been sampled for MTBE to date, therefore the estimated number of systems requiring treatment has been doubled to account for known contaminated wells, and discovery of potential future contamination events.  
<sup>7</sup> The projection for larger systems is still unknown, but may be as high as 6 systems based on 3 known, large systems affected by MTBE contamination, and discovery of potential future contamination events.

The exact cost for monitoring and treatment of MTBE for the approximately 174 potentially affected public water systems owned or operated by either a small business or local government cannot be determined since larger systems are likely to have more entry points and higher water usage while small systems usually have a single entry point and lower water

usage. Furthermore, monitoring is likely to vary depending on the water system and MTBE concentrations and the necessity for installing treatment facilities or an alternate source can not be predicted. It is estimated that a public water system that exceeds the MCL for MTBE, will have to conduct quarterly or more frequent monitoring for MTBE per affected entry point. The cost for analysis of MTBE is approximately \$140 per analysis. Therefore, the minimum additional cost for MTBE analysis is \$560 per year. Treatment cost is dependent upon system size and number of affected entry points and can be determined by the costs outlined in the table above.

**Economic and Technological Feasibility**

Economically, compliance with this amendment will not increase monitoring costs because monitoring will be included with the routine compliance monitoring for VOCs. Additional costs would be associated with an exceedance of the MCL that would require installation of treatment facilities, as discussed in the preceding section. Capital costs are estimated to be no more than \$15,000 and the operating costs not more than \$3,000 per year. These costs are proportionate to typical operating costs.

With regard to technology, analytical methods exist for accurate MTBE monitoring results and these are included as part of this amendment. The monitoring results will provide the basis for water system compliance with the amendment. Furthermore, there are technologically feasible alternatives available for MTBE treatment. The Department has the staff and the expertise to provide any necessary technical guidance.

**Minimizing Adverse Impact**

The adverse impact of this amendment is minimized since monitoring for MTBE will be included with the routine compliance monitoring for VOCs. Therefore, there will be no additional monitoring costs. The inclusion of MTBE will not modify the current monitoring criteria for a public water system. The MCL is a performance standard.

**Small Business and Local Government Participation**

While the Department has not actively conducted a Public Outreach Program, the proposed rule is indeed a response to increased public awareness and concern about the widespread use and increased number of detections of MTBE in drinking water supplies nationally. This increased level of concern is evidenced by the several events that have recently taken place locally and nationally in an effort to gain a better understanding of the public health concerns surrounding the use of MTBE.

In November 1998, the EPA created a blue-ribbon panel of leading experts from the public health and science communities, automotive fuels industry, water utilities (many of which are small businesses), and local and state government to focus on the issues posed by the use of MTBE and other oxygenates in gasoline. The Blue Ribbon Panel findings included recommendations to enhance, accelerate, and expand existing programs to improve protection of drinking water supplies from contamination. The recommendations focused on prevention, treatment and remediation, as well as reducing the use of MTBE.

In 1998 the NYS Legislative Commission on Water Resource Needs of NYS and Long Island began holding hearings on water quality and quantity issues throughout NYS. As a result of those hearings, Suffolk and Nassau County Health Departments began requiring all water suppliers to sample for MTBE as part of their normal sampling program for organic chemicals.

The State of New York provided a press release stating that the Department of Health would be initiating rule making to develop a stricter standard for MTBE. The general public was given an opportunity to respond to the press release.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas**

This regulation would apply to rural areas of the state, potentially impacting approximately 7,800 small public water systems located throughout rural areas as defined by New York State.

Some of these systems may be located near or within metropolitan areas. For these systems, there is often a greater opportunity to connect to a municipal water supply system. This type of regionalization is a less costly compliance alternative available to systems which are adjacent to metropolitan areas. For the majority of systems, which are truly rural, this option does not exist. However, there is less methyl-tertiary-butyl-ether (MTBE) impact in rural areas, which comprise most of upstate New York. Gasoline stations in the upstate or northern region are supplied with conventional gasoline. Conventional gasoline may also contain MTBE, but at relatively low concentrations ranging from 1% to 5% by volume and then usually only in premium grade gasolines, which constitute a relatively small percentage of gasoline sold. In contrast, gasoline stations in the southern region (where rural areas are less predominant) are supplied with reformulated gasoline (RFG), which contains fuel oxygenates, (such as MTBE) in

all grades. When MTBE is used as the fuel oxygenate, as it is in 84% of all RFG sold, MTBE concentrations range from 11-15% by volume (Lince *et. al.* 1999). In addition, due to the nature of rural areas, water supplies are less likely to be near a leaky gasoline tank. Therefore, public and private water supplies in rural areas are less likely to be impacted by MTBE contamination.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services**

Demonstrating compliance with the new maximum contaminant level (MCL) for MTBE being imposed by this regulation will add to existing record keeping requirements for impacted systems. These requirements include reporting of results, recordkeeping, reporting violations of the established MCL and other compliance requirements which cover compounds currently regulated in drinking water.

Small public water supply systems will require the professional services of a certified or approved laboratory to perform the water analyses for MTBE. The laboratory used must be one approved by the New York State Department of Health (Department) under its Environmental Laboratory Approval Program (ELAP). It is estimated that sufficient laboratory capability and capacity is available. Public notice is required when a system violates these regulations.

A licensed professional engineer is required to design treatment facilities to meet the MCL or design facilities for accessing an alternate source.

**Costs**

The amended regulations have cost impacts that affect all regulated parties. The amended regulations require monitoring for an additional contaminant, namely MTBE. Monitoring for MTBE will be included with the routine compliance monitoring for volatile organic compounds (VOCs). Therefore, there will be no additional cost for MTBE routine monitoring as analysis for this compound can be included using existing methods for the analysis of VOCs. Monitoring for VOCs applies to points of entry of water from all combined or separate sources of water and before water treatment, if present.

Based upon available data and past limited water quality surveys of water systems nationally and those performed by the Department, the detection of MTBE is expected to occur in approximately 5 percent of small public water systems. This corresponds to approximately 390 small water systems located in rural areas having MTBE detections. Sampling of all public water systems conducted to date, shows that only 17 (3 of which are in areas considered rural) will violate the proposed MCL of 10 mcg/L for MTBE. Consequently, these systems will have to install treatment facilities.

If a MCL is exceeded and water treatment is the only option available, the cost projected by 1996 United States Environmental Protection Agency (USEPA) data will vary with system size as summarized in the table below.

Contaminant	Public Water System Maximum Water Usage (Gallons Per Day)	Estimated Capital Cost (Dollars Per Gallon) <sup>2</sup>	Total Capital Cost (Dollars) <sup>2</sup>	Estimated Annual Operation and Maintenance Cost (Dollars) <sup>3</sup>	Estimated Number of Systems <sup>4</sup>
MTBE	<10,000	1.50 +	10,000 - 15,000	1,500 - 3,000+	57 <sup>(5)</sup>
MTBE	10,000 - 30,000	1.50 - 1.00	15,000 - 30,000	3,000 - 4,000+	14 <sup>(6)</sup>
MTBE	30,000 - 50,000	1.00 - 0.90	30,000 - 45,000	4,000 - 5,000+	8 <sup>(6)</sup>
MTBE	50,000 - 100,000	0.90 - 0.70	45,000 - 70,000	5,000 - 6,000+	4 <sup>(6)</sup>
MTBE	100,000 - 500,000	0.70 - 0.44	70,000 - 220,000	6,000 - 9,125	— <sup>(7)</sup>
MTBE	500,000 - 1,000,000	0.44 - 0.40	220,000 - 400,000	9,125 - 18,250	— <sup>(7)</sup>

<sup>1</sup> Cost is based on the maximum daily flow of 200 gallons per person per day or from available water consumption data.  
<sup>2</sup> Site variations may affect costs. Urban areas and site conditions may increase capital costs dramatically.  
<sup>3</sup> Annual Operation and Maintenance Cost is based on \$0.05 per 1,000 gallons of water treated for larger systems, treating at least 100,000 gpd. For systems treating less than 100,000 gpd, costs were extrapolated using private well remediation costs (NYSDEC).  
<sup>4</sup> The number of systems is based on local health unit input and available New York State MTBE electronic data.  
<sup>5</sup> In addition to the number of systems known to be treated for MTBE, the estimated number of systems that will require MTBE treatment in the future is based on a one percent projection of all transient noncommunity systems, that is consistent with studies that have been published nationwide.  
<sup>6</sup> Approximately half of all community and nontransient noncommunity systems have been sampled for MTBE to date, therefore the estimated number of systems requiring treatment has been doubled to account for known contaminated wells, and discovery of potential future contamination events.  
<sup>7</sup> The projection for larger systems is still unknown, but may be as high as 6 systems based on 3 known, large systems affected by MTBE contamination, and discovery of potential future contamination events.

The exact cost for monitoring and treatment of MTBE for public water systems cannot be determined. It is estimated that if 390 small water systems located in rural areas have MTBE detections, then additional annual monitoring could be as high as \$217,000, assuming one contaminated water source per system. However, monitoring is likely to vary depending on the water system and MTBE concentrations and the necessity for installing treatment facilities or an alternate source cannot be predicted. It is estimated that a public water system that exceeds the MCL for MTBE, will have to conduct quarterly or more frequent monitoring for MTBE per affected entry point. The cost for analysis of MTBE is approximately \$140 per analysis. Therefore, the minimum additional cost for

MTBE analysis is \$560 per year. Treatment cost is dependent upon system size and number affected entry points and can be determined by the costs outlined in the table above.

#### Minimizing Adverse Impact

The adverse impact of this amendment is minimized since monitoring for MTBE will be included with the routine compliance monitoring for VOCs. Therefore, there will be no additional monitoring costs. The inclusion of MTBE will not modify the current monitoring criteria for a public water system. The MCL is a performance standard.

#### Rural Area Participation

Given the amount of local and national attention to MTBE issues, Public Outreach has occurred indirectly and independent of this proposed amendment and has affected all areas of the State, including rural areas. In addition, on November 9, 1999, Governor Pataki issued a press release announcing that the Department of Health would be initiating rule making to develop a stricter standard for MTBE. The general public, including the rural community, was given an opportunity to respond to the press release.

#### Job Impact Statement

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

**Text of emergency rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

#### Regulatory Impact Statement

1. Statutory authority: Sections 7.09(b), 7.09(c) and Section 31.04(a) of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, the authority to administer the forensic psychiatric program, and the power to adopt regulations for quality control, respectively. Article 730 of the Criminal Procedure Law establishes the role of the Commissioner of Mental Health in the process of determining the fitness to stand trial.

2. Legislative objectives: Article 7 and Article 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 730 of the Criminal Procedure Law reflects the role of the Commissioner of Mental Health in the process of determining the fitness to stand trial.

3. Needs and benefits: This amendment will streamline proper decision making regarding changes in custody status of patients who have been committed to the custody of an Office of Mental Health (OMH) forensic facility by a criminal court after having been found to have a mental illness which renders them incapable of understanding the court proceedings against them or participating in their own defense. OMH has a responsibility to take steps, in the interest of public safety, to see that these individuals are kept at the appropriate level of custody and are promptly returned to the court when their mental status changes.

Currently Part 540 provides that the clinical director may apply to the court for the return of a patient in the custody of his or her facility where that patient's mental status has changed in terms of their capability of understanding the court proceedings and participating in their own defense. The current regulation involves a review by the hospital forensic committee in accordance with requirements of Section 510.09. The hospital forensic committee reviews, due to difficulty of scheduling and additional paperwork, often consume a period of several weeks. This adds unnecessarily to the patient's length of stay and delays the defendant's ability to face a fair and speedy trial. It also results in overcrowding as patients who might otherwise return to court await the committee's action. This situation has become critical and immediate action is necessary to address it.

This rule will streamline the process of making determinations regarding the fitness to stand trial and the return to court of the patients involved. It will establish that the clinical director is responsible for determining whether a patient remains an incapacitated person or is fit to stand trial. It outlines that the clinical director may designate certain facility psychiatrists to examine the patient and prepare a report and recommendation to the clinical director. While the clinical director will review and consider these recommendations, he or she need not follow them.

In summary, this amendment streamlines the process of determining fitness to stand trial. It supports sound decisionmaking and it maintains the final decisionmaking authority of the clinical director. This new process will meet all the requirements and expectations of the court orders involved.

4. Costs: It is estimated that this amendment could result in a savings of at least 2,000 hours of staff time per year at Mid-Hudson Forensic Psychiatric Center. It is also estimated that by streamlining this process there will be a reduction at that facility in patient length of stay, averaging between 14 to 21 days and resulting in a savings to the State of at least \$100,000 in associated costs.

There will also be significant savings to local governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH currently provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be between \$1,475,000 to \$2,212,000.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts. This regulation applies only to state-operated forensic facilities.

6. Paperwork: This rule should decrease and simplify the paperwork requirements.

---



---

## Office of Mental Health

---



---

### EMERGENCY RULE MAKING

#### Patients Committed to the Custody of the Commissioner

**I.D. No.** OMH-36-03-00001-E

**Filing No.** 918

**Filing date:** Aug. 20, 2003

**Effective date:** Aug. 20, 2003

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

**Action taken:** Amendment of Part 540 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), (c) and 31.04(a); and Criminal Procedure Law, art. 730

**Finding of necessity for emergency rule:** Preservation of public safety.

**Specific reasons underlying the finding of necessity:** This rule is necessary to streamline the currently lengthy and involved process of making determinations regarding fitness to stand trial and return to court of patients against whom criminal charges are pending.

**Subject:** Patients committed to the custody of the commissioner pursuant to Criminal Procedure Law, art. 730.

**Purpose:** To establish a faster and more appropriate process for determination of fitness to stand trial and return to court of a patient against whom criminal charges are pending.

**Substance of emergency rule:** Part 540 currently provides that the clinical director of a State operated forensics facility may apply to the court for the return of a patient in the custody of his or her facility where that patient's mental status has changed in terms of their capability of understanding the court proceedings and participating in their own defense. The current regulation involves a review by the hospital forensic committee in accordance with requirements of Section 510.09. This rule will streamline the process of making determinations regarding the fitness to stand trial and the return to court of the patients involved. It will establish that the clinical director is responsible for determining whether a patient remains an incapacitated person or is fit to stand trial. It outlines that the clinical director may designate certain facility psychiatrists to examine the patient and prepare a report and recommendation to the clinical director. While the clinical director will review and consider these recommendations, he or she need not follow them.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 17, 2003.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected. This change is critical and is needed immediately to address census and staffing issues, improve treatment for patients, and provide for a safer environment for patients and staff.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These regulatory amendments will be effective upon their adoption.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose any adverse economic impact on small businesses, or local governments. There will be significant savings to local governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH currently provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be \$1,475,000 to \$2,212,000.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule will have a positive economic impact on rural counties.

There will be significant savings to rural county governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be between \$1,475,000 to \$2,212,000.

Rural counties have been especially concerned about these costs since they can have a proportionately larger budget impact and are difficult to plan for or to address in the local budget process.

**Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves procedural changes to custody determinations regarding patients at state operated forensic facilities and will not have any adverse impact on jobs and employment activities. It will have a positive impact on staffing at Mid-Hudson Forensic Psychiatric Center by reducing the amount of staff time necessary to conduct reviews and prepare documentation regarding custody determinations under Criminal Procedure Law Article 730.

---



---

## Department of Motor Vehicles

---



---

### NOTICE OF ADOPTION

**Livingston County Motor Vehicle Use Tax**

**I.D. No.** MTV-26-03-00015-A

**Filing No.** 926

**Filing date:** Aug. 26, 2003

**Effective date:** Sept. 10, 2003

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

**Action taken:** Addition of section 29.12(t) to Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Livingston County motor vehicle use tax.

**Purpose:** To impose the tax.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MTV-26-03-00015-P, Issue of July 2, 2003.

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

**Text of rule and any required statements and analyses may be obtained from:** Ida L. Traschen, Associate Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

---



---

## Office of Parks, Recreation and Historic Preservation

---



---

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

**Snowmobile Trail Development and Maintenance**

**I.D. No.** PKR-36-03-00005-P

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

**Proposed action:** This a consensus rule making to amend section 453.1(ff) of Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, sections 3.09(8) and 25.01(9)

**Subject:** Snowmobile trail development and maintenance.

**Purpose:** To expand the definition of local sponsor to allow for greater opportunities for funded snowmobile trails within New York State.

**Text of proposed rule:** Subdivision (ff) of section 453.1 of Title 9 NYCRR is AMENDED to read as follows.

(ff) Local sponsor shall mean a county engaging and assisting in the development and maintenance of a system of snowmobile trails and a program with relation thereto within its boundaries to encourage safety, tourism and utilization or in the event the county does not undertake such a program or system of trails, any city, town, village or recognized governmental body within such a county which undertakes the same.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeffrey A. Meyers, Counsel's Office, Office of Parks, Recreation and Historic Preservation, Agency Bldg. 1, 19th Fl., Empire State Plaza, Albany, NY 12238, (518) 486-2921, e-mail: jeffrey.meyers@oprhp.state.ny.us

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

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

**Consensus Rule Making Determination**

The Office of Parks, Recreation and Historic Preservation (OPRHP) has determined that these amendments to Title 9 NYCRR meet the qualifications for a consensus rule making, as no person is likely to object to their adoption. The rule change modifies the definition of local sponsor to include any governmental body engaging and assisting in the development and maintenance of a local system of snowmobile trails.

The amendment of Section 453.1(ff) would allow any governmental body engaging and assisting in the development and maintenance of a local system of snowmobile trails to participate in and obtain available funding associated with the New York State Snowmobile Trail Program. This will increase tourist and business opportunities in the State and improve the opportunities available to users of the New York State Snowmobile Trail Program.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because the Office of Parks, Recreation and Historic Preservation has determined that the change to the regulation will not have a substantial adverse impact on jobs and employment opportunities. Currently, the definition of local sponsor limits participation in the snowmobile trail program and available funding to counties participating in the program, or, in the alternative, cities, towns or villages in a county that chooses not to participate. By changing the definition to include any governmental body engaging and

assisting in the development and maintenance of a local system of snowmobile trails, the type of government is not restricted and the opportunities to participate are made more widely available to all governmental bodies. Because snowmobiling in New York State is a significant source of tourist dollars and business opportunities, expanding this definition will increase these revenues. Thus, the change to the regulation would only have a positive effect upon on jobs and employment opportunities in the State of New York.

---



---

## Public Service Commission

---



---

### NOTICE OF ADOPTION

#### Submetering of Electricity by Mr. David Transom

**I.D. No.** PSC-27-01-00009-A

**Filing date:** Aug. 25, 2003

**Effective date:** Aug. 25, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 00-E-1160, granting in part the petition for rehearing of David G. Transom concerning the submetering of electricity at 349 E. 49th St., New York, NY.

**Statutory authority:** Public Service Law, sections 65(1) and 66(1)-(5), (12) and (14)

**Subject:** Petition for rehearing regarding a submetering plan.

**Purpose:** To grant in part the petition for rehearing of Mr. David G. Transom.

**Substance of final rule:** The Commission granted, in part, a petition for rehearing of the Order issued May 4, 2001 filed by David G. Transom requesting that additional consumer protection measures be imposed before submetering is installed at 349 East 49th Street, New York City, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (00-E-1160SA3)

### NOTICE OF ADOPTION

#### Delivery Rate Changes by Niagara Mohawk Power Corporation

**I.D. No.** PSC-20-03-00017-A

**Filing date:** Aug. 20, 2003

**Effective date:** Aug. 20, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 01-M-0075 allowing Niagara Mohawk Power Corporation (Niagara Mohawk) to amend its tariff schedule, P.S.C. No. 218—Gas.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Revisions of delivery rates.

**Purpose:** To comply with the commission's Opinion Nos. 01-6 and 00-9.

**Substance of final rule:** The Commission approved modifications to Niagara Mohawk Power Corporation's tariff schedule, P.S.C. No. 218—Gas, to revise gas delivery rates, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (01-M-0075SA14)

### NOTICE OF ADOPTION

#### Residential Direct Load Control Program by Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-24-03-00005-A

**Filing date:** Aug. 21, 2003

**Effective date:** Aug. 21, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 00-E-2054 approving Consolidated Edison Company of New York, Inc.'s (Con Edison) request to expand its Direct Load Control Program.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Direct Load Control Program.

**Purpose:** To expand the program.

**Substance of final rule:** The Commission authorized the expansion of Consolidated Edison Company of New York, Inc.'s Direct Load Control Program, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (00-E-2054SA27)

### NOTICE OF ADOPTION

#### Buy Back Rates by Central Hudson Gas & Electric Corporation

**I.D. No.** PSC-24-03-00006-A

**Filing date:** Aug. 25, 2003

**Effective date:** Aug. 25, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 03-E-0794, approving revisions to Central Hudson Gas & Electric Corporation's (Central Hudson) tariff schedule, P.S.C. No. 15—Electricity.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Tariff amendments.

**Purpose:** To allow Central Hudson to revise rates for the purchase of electric energy and capacity from customers with on-site generation facilities.

**Substance of final rule:** The Commission approved the modifications to Central Hudson Gas & Electric Corporation's (Central Hudson) S.C. No. 10—purchase of energy and/or capacity by Central Hudson from qualifying on-site generation facilities and directed the company to file Second Revised Leaf No. 232 on not less than one day's notice, to become effective September 1, 2003, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to

be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-0794SA1)

**NOTICE OF ADOPTION**

**Economic Development Plan by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-24-03-00007-A

**Filing date:** Aug. 20, 2003

**Effective date:** Aug. 20, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 01-M-0075 approving the amendments to Niagara Mohawk Power Corporation's (Niagara Mohawk) tariff schedule, P.S.C. No. 207—Electricity.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Revisions to Niagara Mohawk's economic development plan.

**Purpose:** To incorporate two new economic development programs in the joint proposal rate plan.

**Substance of final rule:** The Commission authorized the update of Niagara Mohawk Power Corporation's Economic Development Plan to include two new economic development plan programs entitled Small Business Growth Transition and Targeted Financial Assistance.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(01-M-0075SA17)

**NOTICE OF ADOPTION**

**Amendment of Certificate of Incorporation by Warwick Valley Telephone Company**

**I.D. No.** PSC-26-03-00018-A

**Filing date:** Aug. 21, 2003

**Effective date:** Aug. 21, 2003

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

**Action taken:** The commission, on Aug. 20, 2003, adopted an order in Case 03-C-0762 allowing Warwick Valley Telephone Company to amend its certificate of incorporation.

**Statutory authority:** Public Service Law, section 108

**Subject:** Certificate of amendment to the certificate of incorporation.

**Purpose:** To approve Warwick Valley Telephone Company's restated and amended certificate of incorporation.

**Substance of final rule:** The Commission approved Warwick Valley Telephone Company's request to amend its Certificate of Incorporation, pursuant to Sections 101 and 108 of the Public Service Law, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-C-0762SA1)

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

**Performance Assurance Plan by Verizon New York**

**I.D. No.** PSC-36-03-00010-P

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

**Proposed action:** The Public Service Commission is considering modifications to Verizon New York's performance assurance plan (PAP) pursuant to the annual review provided for in the PAP.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Performance Assurance Plan.

**Purpose:** To consider changes.

**Substance of proposed rule:** The Commission is considering modifications to the Verizon NY Performance Assurance Plan in accord with the Annual Review provided for in the Plan. The Commission will consider, inter alia, the initial and reply comments filed with the Commission in response to the June 4, 2003 Notice Inviting Comments on proposed modifications and/or additions to the Plan.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(99-C-0949SA10)

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

**Customer Service Quality Mechanism by New York State Electric & Gas Corporation**

**I.D. No.** PSC-36-03-00011-P

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

**Proposed action:** The Public Service Commission is considering modifications to New York State Electric & Gas Corporation's (NYSEG) customer service quality mechanism for its electric business. The modifications may include changes to the complaint rate target levels used to measure service quality and the penalties associated with the company's failure to achieve the specified levels. It is anticipated that parties will present their recommendations on this matter to the commission via a joint proposal or individual comments. The commission will review, and may accept or reject, in whole or in part, or modify, the parties' recommendations on the issue.

**Statutory authority:** Public Service Law, sections 5(1)(b), 43, 65(1) and 66

**Subject:** Issues associated with NYSEG customer service quality, including the manner in which customer complaint statistics are used and the penalties imposed for failure to achieve certain specified levels of service.

**Purpose:** To consider revisions.

**Substance of proposed rule:** The Public Service Commission is considering issues associated with New York State Electric & Gas Corporation's (NYSEG) Customer Service Quality Mechanism as it relates to its electric business, and, in particular, Commission Complaint Rate target levels. In addition, the Commission will consider changes to the penalties associated with NYSEG's failure to meet the specified complaint rate levels. The Commission will review, and may accept or reject, in whole or in part, or modify, the parties' recommendations on the issue. If the parties cannot agree, the matter will be referred to the Commission for resolution.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(01-E-0359SA12)

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

**Lightened Regulation by Equus Power 1, L.P.**

**I.D. No.** PSC-36-03-00012-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, or modify requests of Equus Power 1, L.P. (Equus) for an order providing for lightened regulation and approving financing.

**Statutory authority:** Public Service Law, sections 4(1), 66(1), 69, 70 and 110

**Subject:** Equus' requests for lightened regulation of it as an electric corporation and for financing approval of up to \$49 million.

**Purpose:** To consider Equus' requests in connection with its proposed electric generating facility.

**Substance of proposed rule:** By petition filed August 19, 2003, Equus Power 1, L.P. (Equus) seeks an order granting a Certificate of Public Convenience and Necessity to allow it to construct and operate an electric generating facility located in the Village of Freeport, New York, providing for lightened regulation of it as an electric corporation, and granting financing approval of up to \$49 million. The request for a Certificate of Public Convenience and Necessity seeks a license, so it is not the subject of this notice. Equus requests that financing approval be given on an emergency basis, pursuant to § 202(6) of the State Administrative Procedure Act.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(03-E-1179SA1)

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

**Restructuring of Corporate Debt by Dynegy Danskammer, LLC and Dynegy Roseton, LLC**

**I.D. No.** PSC-36-03-00013-P

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

**Proposed action:** The Public Service Commission is considering the petition of Dynegy Danskammer, LLC and Dynegy Roseton, LLC for approval of the restructuring of corporate debt and the collateral pledge of certain securities and assets.

**Statutory authority:** Public Service Law, sections 69 and 70

**Subject:** Restructuring of corporate debt and the collateral pledge of certain securities and assets.

**Purpose:** To approve the restructuring of corporate debt and the collateral pledge of certain securities and assets.

**Substance of proposed rule:** The Public Service Commission is considering the petition of Dynegy Danskammer, LLC and Dynegy Roseton, LLC for approval of the restructuring of corporate debt and the collateral pledge of certain securities and assets. The Commission may grant, deny or modify, in whole or in part, the relief requested.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(03-E-1181SA1)

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

**Customer Service Quality Mechanism by New York State Electric & Gas Corporation**

**I.D. No.** PSC-36-03-00014-P

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

**Proposed action:** The Public Service Commission is considering modifications to New York State Electric & Gas Corporation's (NYSEG) customer service quality mechanism for its gas business. The modifications may include changes to the complaint rate target levels used to measure service quality and the penalties associated with the company's failure to achieve the specified levels. It is anticipated that parties will present their recommendations on this matter to the commission via a joint proposal or individual comments. The commission will review, and may accept or reject, in whole or in part, or modify, the parties' recommendations on the issue.

**Statutory authority:** Public Service Law, sections 5(1)(b), 43, 65(1) and 66

**Subject:** Issues associated with NYSEG customer service quality, including the manner in which customer complaint statistics are used and the penalties imposed for failure to achieve certain specified levels of service.

**Purpose:** To consider revisions to NYSEG's customer service quality mechanism and related matters.

**Substance of proposed rule:** The Public Service Commission is considering issues associated with New York State Electric & Gas Corporation's (NYSEG) Customer Service Quality Mechanism as it relates to its gas business, and, in particular, Commission Complaint Rate target levels. In addition, the Commission will consider changes to the penalties associated with NYSEG's failure to meet the specified complaint rate levels. The Commission will review, and may accept or reject, in whole or in part, or modify, the parties' recommendations on the issue. If the parties cannot agree, the matter will be referred to the Commission for resolution.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(01-G-1668SA4)

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

**Transfer of Property by New York State Electric and Gas Corporation**

**I.D. No.** PSC-36-03-00015-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a proposal filed by New York State Electric and Gas Corporation to sell its Court Street building and property located in the City of Binghamton, Broome County to 267 Court Street, LLC.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of property.

**Purpose:** To allow New York State Electric and Gas Corporation to transfer its Court Street building and property to 267 Court Street, LLC.

**Substance of proposed rule:** On August 14, 2003, New York State Electric and Gas Corporation (NYSEG) filed a petition to sell its Court Street Building and Property located in the City of Binghamton, Broome County to 267 Court Street, LLC.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-M-1150SA1)

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

**Issuance of Debt by Bristol Water Works Corporation**

**I.D. No.** PSC-36-03-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition filed by Bristol Water Works Corporation for authority to issue debt of approximately \$156,500 in order to upgrade its water system.

**Statutory authority:** Public Service Law, section 89-f

**Subject:** Issuance of debt.

**Purpose:** To approve the issuance of debt to replace and upgrade water treatment pumps and piping and restore a water storage tank.

**Substance of proposed rule:** On August 19, 2003, Bristol Water Works Corporation filed a petition requesting Public Service Commission approval to issue debt of approximately \$156,500 to replace and upgrade its water treatment pumps and piping, and to restore its water storage tank. The company provides treated water service to 288 residential users, a restaurant, a hotel, and a sewer plant. In addition, the company provides untreated water to a golf course. The company provides water service to an area known as the Bristol Harbour Village, Town of South Bristol, Ontario County. The Commission may approve or reject, in whole or in part, or modify, the company's request.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-W-1175SA1)

**Department of Taxation and  
Finance**

**EMERGENCY  
RULE MAKING**

**New York State and City of Yonkers Withholding Tables**

**I.D. No.** TAF-32-03-00005-E

**Filing No.** 928

**Filing date:** Aug. 26, 2003

**Effective date:** Aug. 26, 2003

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

**Action taken:** Amendment of sections 171.4(b)(1) and 251.1(b); repeal of Appendixes 10 and 10-A; and addition of new Appendixes 10 and 10-A to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1329(a); 1332(a); and section 7 of the Model Local Law found in section 1340(c); Codes and Ordinances of the City of Yonkers, sections 15-105; 15-108(a); 15-121; and 15-130

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

**Specific reasons underlying the finding of necessity:** This rule was adopted as an emergency measure on June 12, 2003, because the Commissioner of Taxation and Finance was required by L. 2003, ch. 62 to adjust the New York State and City of Yonkers withholding tables and other methods by July 1, 2003. An emergency measure was the only way for the commissioner to adopt regulatory amendments to make the adjustments and comply with both the above requirements and the requirements of the State Administrative Procedure Act. The June 12, 2003 emergency measure is scheduled to expire on Sept. 9, 2003. The proposal to make the rule permanent was published in the *State Register* on Aug. 13, 2003, but the permanent rule will not be effective until the notice of adoption is published in the *State Register*. The earliest date the notice of adoption may be published is Oct. 15, 2003. This emergency re-adoption is necessary to extend the life of these provisions past Oct. 15, 2003, and ensure the continuation of withholding rates that more accurately reflect the current income tax rates.

**Subject:** New York State and City of Yonkers withholding tables and other methods.

**Purpose:** To reflect the revision of some tax rates and the tax table benefit recapture for wages and compensation paid on or after July 1, 2003.

**Substance of emergency rule:** Section 671(a)(1), section 1329(a), and section 7 of the Model Local Law contained in section 1340(c) of the Tax Law mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of New York State personal income tax, City of Yonkers income tax surcharge, and City of Yonkers earning tax on nonresidents reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule repeals Appendixes 10 and 10-A of Title 20 NYCRR and enacts new Appendixes 10 and 10-A of such Title to provide new New York State and City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The new tables and other methods reflect the revision of the New York State and City of Yonkers tax tables and the tax table benefit recapture which were enacted by Chapter 62 of the Laws of 2003. This rule also reflects the increases of the New York State and City of Yonkers supplemental withholding tax rates to be applied to supplemental wage payments. **This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a

permanent rule, having previously published a notice of proposed rule making, I.D. No. TAF-32-03-00005-P, Issue of August 13, 2003. The emergency rule will expire October 24, 2003.

**Text of emergency rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

#### **Regulatory Impact Statement**

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax; section 1329(a) of the Tax Law and section 15-105 of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be withheld in the same manner and form as that required by sections 671 through 678 of the Tax Law, except where noted; section 1332(a) of the Tax Law and section 15-108(a) of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Section 7 of the Model Local Law found in section 1340(c) of the Tax Law and sections 15-121 and 15-130 of the Codes and Ordinances of the City of Yonkers provide with respect to the withholding of the City of Yonkers nonresident earnings tax, that the provisions of Part V of Article 22, as described above, shall have the same force and effect as if they were incorporated into the Codes and Ordinances of the City of Yonkers, except where noted.

2. Legislative objectives: New Appendixes 10 and 10-A of Title 20 NYCRR contain the revised New York State and City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The amendments reflect the revision of the tax tables and the tax table benefit recapture in Chapter 62 of the Laws of 2003, and the requirement in the new law that the withholding rates for the remainder of tax year 2003 reflect the full amount of tax liability for tax year 2003 as accurately as practicable. The revised tax tables include two new brackets for taxpayers at the highest levels of taxable income and an increase in the tax rates for taxpayers whose taxable income reaches these levels. The rule also reflects the increase, to 9.05 percent, for the New York State supplemental withholding rate, and the increase, to .4525 percent, for the City of Yonkers supplemental withholding rate, both to be applied to supplemental wage payments. Although the City of Yonkers Earnings Tax on Nonresidents withholding tables and other methods are included as part of the new Appendix 10-A, no revision was required for these tables and other methods included therein by the Laws of 2003.

3. Needs and benefits: This rule sets forth New York State and City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after July 1, 2003, reflecting the revision of the tax tables and the tax table benefit recapture contained in Chapter 62 of the Laws of 2003. This rule benefits taxpayers by providing New York State and City of Yonkers withholding rates that more accurately reflect the current income tax rates. If this rule was not promulgated, the use of the existing withholding tables would cause some under withholding for some taxpayers.

In order to have these provisions in place by July 1, 2003, the rule was previously adopted as an emergency measure on June 12, 2003. The emergency measure is scheduled to expire on September 9, 2003. The proposal to make the rule permanent was published in the *State Register* on August 13, 2003, but the permanent rule will not be effective until the date that the Notice of Adoption is published in the *State Register*. The earliest date the Notice of Adoption may be published is October 15, 2003. This emergency readoption is necessary to extend the life of these provisions past October 15, 2003, and ensure the continuation of withholding rates that more accurately reflect the current income tax rates.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Codes and Ordinances of the City of Yonkers already mandate withholding in amounts that are substantially equivalent to the amounts of New York State and City of Yonkers personal income tax on residents, and City of Yonkers nonresident earnings tax reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendixes 10 and 10-A of Title 20 NYCRR to the rates of the New York State income tax, the City of Yonkers income tax surcharge on residents and the City of Yonkers non-

resident earnings tax, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to revise the New York State withholding tables and other methods, and the City of Yonkers income tax surcharge on residents and earnings taxes on nonresidents withholding tables and other methods, arises due to the statutory change in the rates of New York State personal income tax, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Management Services Bureau, Operations Support Bureau and Bureau of Fiscal Management.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers have been sent copies of the new tables and other methods as part of the employer's guide which is routinely revised.

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

8. Alternatives: Since section 671(a) of the Tax Law mandates New York State withholding tables be promulgated, and Sections 1309 and 1329(a) of the Tax Law, Section 7 of the Model Local Law contained in section 1340(c) of the Tax Law, and section 92-88 of the Codes and Ordinances of the City of Yonkers mandate that City of Yonkers withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods. The only alternative to promulgating this rule would be to allow the withholding tables adopted as an emergency measure to lapse. That alternative, however, would require that employers withhold at rates that no longer reflect the personal income tax rates of New York State and the City of Yonkers which will be in effect for the 2003 tax year.

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

10. Compliance schedule: Affected employers have received the required information in sufficient time to implement the revised New York State and City of Yonkers withholding tables and other methods for wages and other compensation paid on or after July 1, 2003.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, which are currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised New York State and City of Yonkers withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms or other paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any of such services.

4. Compliance costs: Small businesses and local governments are already subject to the New York State and City of Yonkers withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Sections 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be

promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

#### **Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, who is currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The number of employers that are also public or private interests in rural areas cannot be determined with any degree of certainty. According to information supplied by the former New York State Office of Rural Affairs, there are 44 counties throughout New York State that are rural areas (having a population of less than 200,000) and 71 towns in the remaining 18 counties of New York State that are rural areas (with population densities of 150 people or less per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms or other paperwork.

Further, many employers currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the New York State and City of Yonkers withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

#### **Job Impact Statement**

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse

impact on jobs and employment opportunities. These amendments provide new New York State and City of Yonkers withholding tables and other methods, applicable for compensation paid on or after July 1, 2003, which reflect the revision of the tax tables and the tax table benefit recapture in Chapter 62 of the Laws of 2003. The rule also reflects the increases of the New York State and City of Yonkers supplemental withholding tax rates applied to supplemental wage payments.

## **EMERGENCY RULE MAKING**

### **City of New York Withholding Tables**

**I.D. No.** TAF-32-03-00007-E

**Filing No.** 929

**Filing date:** Aug. 26, 2003

**Effective date:** Aug. 26, 2003

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

**Action taken:** Amendment of section 291.1(b); repeal of Appendix 10-C and addition of new Appendix 10-C to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1309; and 1213(a); Administrative Code of City of New York, sections 11-1771(a); 11-1797(a); 11-1909 and 11-1943

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

**Specific reasons underlying the finding of necessity:** This rule was adopted as an emergency measure on July 1, 2003, because the Commissioner of Taxation and Finance was required by L. 2003, ch. 63 to adjust the New York City withholding tables and other methods by July 1, 2003. The commissioner was required to act by July 1, 2003, but after the enactment of a New York City local law authorizing the imposition of new tax rates. An emergency action was the only way for the commissioner to adopt regulatory amendments to make the adjustments and comply with both the above requirements and the requirements of the State Administrative Procedure Act. The July 1, 2003 emergency measure is scheduled to expire on Sept. 28, 2003. The proposal to make the rule permanent was published in the *State Register* on Aug. 13, 2003, but the permanent rule will not be effective until the date that the notice of adoption is published in the *State Register*. The earliest date the notice of adoption may be published is Oct. 15, 2003. This emergency readoption is necessary to extend the life of these provisions past Oct. 15, 2003, and ensure the continuation of withholding rates that more accurately reflect the current income tax rates.

**Subject:** City of New York withholding tables and other methods.

**Purpose:** To reflect the revision of certain tax rates and the new tax table benefit recapture for wages and compensation paid on or after July 1, 2003.

**Substance of emergency rule:** Section 1309 of the Tax Law and section 11-1771(a) of the Administrative Code of the City of New York mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of City of New York personal income tax on residents reasonably estimated to be due for the taxable year.

This rule repeals Appendix 10-C of Title 20 NYCRR and enacts a new Appendix 10-C of such Title to provide new City of New York withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The new tables and other methods reflect the revision of the City of New York tax tables and the new tax table benefit recapture which were enacted by Chapter 63 of the Laws of 2003. This rule also reflects the increase in the City of New York supplemental withholding tax rate to be applied to supplemental wage payments.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. TAF-32-03-00007-P, Issue of August 13, 2003. The emergency rule will expire October 24, 2003.

**Text of emergency rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

#### **Regulatory Impact Statement**

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be

prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax; section 1309 (not subdivided) provides that City of New York personal income tax withholding shall be withheld from city residents in the same manner and form as that required by New York State; section 1312(a) provides that any personal income tax imposed on New York City residents by the City of New York shall be administered and collected by the Tax Commissioner in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Administrative Code of the City of New York, section 11-1771(a) provides that the method of determining the amount of City tax withholding will be prescribed by tax regulations promulgated by the Commissioner; section 11-1797(a) provides for the Commissioner to make such rules and regulations that are necessary to enforce the provisions of the Administrative Code of the City of New York; section 11-1909 (not subdivided) and section 11-1943 (not subdivided) provide that after January 1, 1976 the laws found in Parts V and VI of Article 22 of the Tax Law, which contain sections 671 through 699 of the Tax Law and which pertain to the withholding of tax and the procedural and administrative aspects of the state tax law, shall have the same force and effect as if they were incorporated into the Administrative Code of the City of New York, except where noted.

2. Legislative objectives: New Appendix 10-C of Title 20 NYCRR contains the revised City of New York withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The amendments reflect the revision of the tax tables and the newly added tax table benefit recapture in Chapter 63 of the Laws of 2003, and the requirement in the new law that the withholding rates for the remainder of tax year 2003 reflect the full amount of tax liability for tax year 2003 as accurately as practicable. The revised tax tables include two new brackets for taxpayers at the highest levels of taxable income and an increase in the tax rates for taxpayers whose taxable income reaches these levels. The rule also reflects the increase, to 5.60 percent, of the City of New York supplemental withholding tax rate to be applied to supplemental wage payments.

3. Needs and benefits: This rule sets forth City of New York withholding tables and other methods, applicable to wages and other compensation paid on or after July 1, 2003, reflecting the revision of the City of New York tax tables and the newly added City tax table benefit recapture contained in Chapter 63 of the Laws of 2003. This rule benefits taxpayers by providing City of New York withholding rates that more accurately reflect the current income tax rates. If this rule was not promulgated, the use of the existing withholding tables would cause some under withholding for some taxpayers.

In order to have these provisions in place by July 1, 2003, the rule was previously adopted as an emergency measure on July 1, 2003. The emergency measure is scheduled to expire on September 28, 2003. The proposal to make the rule permanent was published in the *State Register* on August 13, 2003, but the permanent rule will not be effective until the date that the Notice of Adoption is published in the *State Register*. The earliest date the Notice of Adoption may be published is October 15, 2003. This emergency readoption is necessary to extend the life of these provisions past October 15, 2003, and ensure the continuation of withholding rates that more accurately reflect the current income tax rates.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Administrative Code of the City of New York already mandate withholding in amounts that are substantially equivalent to the amounts of City of New York personal income tax on residents reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendix 10-C of Title 20 NYCRR to the rates of the City of New York personal income tax on residents, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to revise the City of New York personal income tax on residents withholding tables and other methods arises due to the statutory change in the rates of City of New York personal income tax on residents, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Management Services Bureau, Operations Support Bureau and Bureau of Fiscal Management.

5. Local government mandates: Any local governments, as employers, maintaining an office or transacting business within New York City, who have a City of New York resident as an employee, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers have been sent copies of the new tables and other methods as part of the employer's guide which is routinely revised.

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

8. Alternatives: Since section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods. The only alternative to promulgating this rule would be to allow the withholding tables adopted as an emergency measure to lapse. That alternative, however, would require that employers withhold at rates that no longer reflect the personal income tax rates of the City of New York which will be in effect for the 2003 tax year.

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

10. Compliance schedule: Affected employers have received the required information in sufficient time to implement the revised City of New York withholding tables and other methods for wages and other compensation paid on or after July 1, 2003.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, which are currently subject to the City of New York withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised City of New York withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms or other paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any of such services.

4. Compliance costs: Small businesses and local governments are already subject to the City of New York withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division

of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

#### **Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, who is currently subject to the City of New York withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The number of employers that are also public or private interests in rural areas cannot be determined with any degree of certainty. According to information supplied by the former New York State Office of Rural Affairs, there are 44 counties throughout New York State that are rural areas (having a population of less than 200,000) and 71 towns in the remaining 18 counties of New York State that are rural areas (with population densities of 150 people or less per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised City of New York withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms or other paperwork.

Further, many employers currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the City of New York withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these City of New York changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law or the Administrative Code of the City of New York that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

#### **Job Impact Statement**

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. These amendments provide new City of New York withholding tables and other methods, applicable for compensation paid on or after July 1, 2003, which reflect the revision of the tax tables and the addition of the tax table benefit recapture enacted in Chapter 63 of the Laws of 2003. The rule also reflects the increase of the City of New York supplemental withholding tax rate applied to supplemental wage payments.

## **EMERGENCY RULE MAKING**

### **Estimated Tax on Sales or Transfers of Real Property by Nonresident Taxpayers**

**I.D. No.** TAF-36-03-00007-E

**Filing No.** 927

**Filing date:** Aug. 26, 2003

**Effective date:** Aug. 26, 2003

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

**Action taken:** Addition of Part 163 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 663; and 697(a)

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

**Specific reasons underlying the finding of necessity:** Section 663 of the Tax Law requires nonresident taxpayers to estimate and pay the personal income tax liability on the gain, if any, on sales or transfers of real property within New York State. Section 663 was added by V3 of chapter 62 of the Laws of 2003, and is effective Sept. 1, 2003. The Commissioner of Taxation and Finance is required by section 663 to promulgate regulations implementing the section. An emergency action is necessary for the commissioner to adopt regulatory amendments to comply with the above requirements and the requirements of the State Administrative Procedure Act.

**Subject:** Estimated tax on sales or transfers of real property by nonresident taxpayers.

**Purpose:** To implement the estimated tax on sales or transfers of real property by nonresident taxpayers as required by new section 663 of the Tax Law.

**Text of emergency rule:** Section 1. A new part 163 is added to such regulations to read as follows:

#### **PART 163**

#### **ESTIMATED PERSONAL INCOME TAX DUE UPON THE SALE OR TRANSFER OF REAL PROPERTY BY A NONRESIDENT TAXPAYER**

##### **Section 163.1 General and definitions.**

(a) Section 663 of the Tax Law requires that a nonresident taxpayer must estimate and pay the personal income tax liability on the gain, if any, upon the sale or transfer of real property within New York State. For purposes of this requirement, the following rules and definitions apply:

(1) "Date of sale or transfer" is the date the deed affecting the conveyance is delivered by the seller or transferor to the transferee.

(2) "Nonresident taxpayer." (i) A nonresident taxpayer is an individual who qualifies as a nonresident individual under section 605(b)(2) of the Tax Law, or an estate or trust that qualifies as a nonresident estate or trust under section 605(b)(4) of the Tax Law, on the date of sale or transfer of real property.

(ii) An individual who is not domiciled in New York State but who may be considered a resident of New York State for tax purposes under section 605(b)(1)(B) of the Tax Law at the end of a taxable year, by virtue of maintaining a permanent place of abode in New York State for substantially all of the taxable year and by spending in aggregate more than one hundred eighty-three days of the taxable year in New York State, is a nonresident for purposes of this requirement unless the individual has already qualified as a resident on the date of sale or transfer of real property. (See section 105.20 of this Title concerning qualifying as a resident under section 605(b)(1)(B)).

(3) "Gain" on the sale or transfer has the same meaning as used in section 1001 of the Internal Revenue Code as that section applies to the sale or transfer of real property.

(4) "Sale or transfer of real property" means the change of ownership of a fee simple interest in real property by any method.

(5) "Seller or transferor" means the individual, estate, or trust making the sale or transfer of a fee simple interest in real property.

##### **Section 163.2 Estimation of tax due.**

(a) A nonresident taxpayer must estimate the personal income tax due on a form prescribed by the commissioner, using an estimated tax rate that equals the highest rate of tax for the taxable year provided in section 601 of the Tax Law. The estimated tax due will equal the gain, if any, multiplied by that rate. The amount of the gain used in the computation is equal to the amount reportable for federal income tax purposes for the taxable year.

(b) If the real property being sold or transferred is located partly within and partly without New York State, then the nonresident taxpayer must estimate the tax due using only the portion of the gain reasonably attributable to the portion of the real property located within New York State.

(c) If the nonresident taxpayer is an estate or trust, it must estimate the tax due based on the gain, if any, computed without reduction for any distribution of income to the beneficiaries during the tax year of the sale or transfer.

##### **Section 163.3 Filing, payment, and certification.**

(a) A nonresident taxpayer must file the estimated tax form with the commissioner, along with payment of any estimated tax due, using the procedures prescribed in such form and accompanying instructions. Except for a nonresident taxpayer who meets one of the exemptions from the requirements described in section 163.4 of this Part, all nonresident taxpayers who are sellers or transferors of real property within New York State must file the estimated tax form whether or not they have a gain.

(b) After the required form and payment have been received, the commissioner will provide the nonresident taxpayer with a certification of receipt of the filing and payment made by the taxpayer. This certification will be provided only when the estimated tax shown due on the form, if any, is paid in full.

**Section 163.4 Exemption from requirements.**

(a) Section 663(d) of the Tax Law provides that the requirements of section 663 do not apply where:

(1) the real property being sold or transferred is the principal residence of the seller or transferor within the meaning of section 121 of the Internal Revenue Code (see subdivision (b) of this section);

(2) the seller or transferor is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration (see definition of "consideration" in section 575.1(d) of this Title); or

(3) the seller or transferor, or transferee is an agency or authority of the United States of America, an agency or authority of New York State, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or a private mortgage insurance company.

(b) The principal residence exemption set forth in paragraph (a)(1) of this section applies only where the property being sold or transferred is used exclusively as the principal residence of the seller or transferor. If the property being sold or transferred includes both the principal residence and other property, then the taxpayer must file and pay any estimated tax due based on the gain from the other property.

**Section 163.5 Certification requirements for recording of deed.**

(a) No deed shall be recorded by any recording officer unless the recording officer has received with respect to every seller or transferor who is an individual, estate or trust: (1) a certification by the commissioner that the individual, estate or trust has filed and paid the estimated tax due, if any, or, (2) a certification by the individual, estate or trust that section 663 is inapplicable to the sale or transfer. The method for taxpayers to make the latter certification is prescribed in forms and instructions. For purposes of section 663(e), a recording officer means the county clerk of the county, except in a county having a register, where it means the register of the county, or in the city of New York where it means the city register.

Section 2. These amendments shall take effect on the day such amendments are filed with the Department of State, and shall apply to all sales or transfers of real property within New York State by taxpayers subject to Article 22 of the Tax Law on or after September 1, 2003.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 23, 2003.

**Text of emergency rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

**Regulatory Impact Statement**

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; Section 663(f) of the Tax Law as added by Chapter 62 of the Laws of 2003 provides that the Commissioner shall promulgate rules and regulations implementing the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers; and section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax.

2. Legislative objectives: The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers, contained in section 663 of the Tax Law. Section 663 was added by part V3 of Chapter 62 of the Laws of 2003.

3. Needs and benefits: New section 663(f) of the Tax Law provides that the Commissioner shall promulgate rules and regulations implementing the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers. The adoption of this regulation will satisfy that requirement. The rule will benefit taxpayers by providing guidance about the new statutory requirements by clarifying (1) who the new law applies to, (2) what sales or transfers are covered by the law, and (3) how the exceptions to the requirements apply to taxpayers.

4. Costs: There are no fiscal or nonfiscal costs related to the promulgation of the regulation to the State, to this agency, to local governments, or to regulated parties beyond those imposed by the statute. This analysis is

based on a review of the statutory provisions and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Bureau of Fiscal Management, and Planning and Management Analysis Bureau.

5. Local government mandates: Although there are certain requirements imposed on local recording officers concerning the recording of deeds described in the regulation, the requirements are imposed by section 663 of the Tax Law rather than by this regulation.

6. Paperwork: Since the requirements for nonresident taxpayers to estimate the tax upon the sale or transfer of real property within New York State were established by new section 663 of the Tax Law, any paperwork required is attributable to the statute and not the regulation.

7. Duplication: There are no relevant rules which are duplicated, overlapped, or in conflict with the regulation.

8. Alternatives: Because the regulation is specifically required by section 663(f) of the Tax Law, no significant alternative to promulgating the regulation was considered.

9. Federal standards: The rule does not exceed any federal minimum standard for the same or similar subject area.

10. Compliance schedule: Section 663 of the Tax Law, which imposes new requirements on nonresident taxpayers and local recording officers, applies to sales or transfers of real property within New York State on or after September 1, 2003. This effective date is set by Section 2 of Part V3 of Chapter 62 of the Laws of 2003 and the regulation will require no additional schedule of compliance. These regulatory amendments provide guidance to help these groups comply with the requirements imposed by the statute.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because this rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The rule does not distinguish between different types and sizes of regulated parties.

The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property by nonresident taxpayers, contained in section 663 of the Tax Law. Section 663 was added by part V3 of Chapter 62 of the Laws of 2003. These regulatory amendments contain guidance about the new requirement for nonresident taxpayers to estimate the tax due on the sale or transfer of real property within New York State. There are also certain new requirements imposed on local recording officers concerning the recording of deeds described in the regulation amendments. However, neither the requirements for the local recording officers nor the requirement for nonresident taxpayers are imposed by this rule, but are imposed by new section 663 of the Tax Law.

The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Small Business Council of the New York State Business Council, the Division of Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors, and the Office of Local Government and Community Services of the New York State Department of State. Also, industry comment was requested from the following organizations: the Real Estate Section of the New York State Bar Association, the New York State Association of Counties on behalf of the County Clerks' Association, the New York State Land Title Association, and the Real Estate Board of New York.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between regulated parties located in different geographical areas.

The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers, contained in section 663 of the Tax Law. Section 663 was added by part V3 of Chapter 62 of the Laws of 2003. These regulatory amendments contain guidance about the new requirement for nonresident taxpayers to estimate the tax due on the sale or transfer of real property within New York State. There are also certain new requirements imposed on local recording officers concerning the recording of deeds described in the regulation amendments. However, neither the requirements for the local

recording officers nor the requirement for nonresident taxpayers are imposed by this rule, but are imposed by new section 663 of the Tax Law.

**Job Impact Statement**

A Job Impact Statement is not being submitted with this rule because it is anticipated that the rule will have no adverse impact on jobs and employment opportunities. The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers, contained in section 663 of the Tax Law. Section 663 was added to the Tax Law by part V3 of Chapter 62 of the Laws of 2003. Neither section 663 nor the rule imposes any additional tax liability. While the regulatory amendments contain guidance about new requirements for nonresident taxpayers and local recording officers, these requirements are not imposed by this rule, but are imposed by new section 663 of the Tax Law.

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

**Fuel Use Tax**

**I.D. No.** TAF-36-03-00006-P

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

**Proposed action:** Amendment of section 492.1(b) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b) and 528(a)

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Oct. 1, 2003, and ending Dec. 31, 2003, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

**Text of proposed rule:** Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xxxii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xxxii) July-September 2003					
10.5	18.5	32.5	11.0	19.0	31.25
(xxxii) October-December 2003					
9.5	17.5	31.5	9.9	17.9	30.15

**Text of proposed rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153

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

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

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

**Office of Temporary and Disability Assistance**

**NOTICE OF ADOPTION**

**Food Stamp Certification Periods**

**I.D. No.** TDA-49-02-00010-A

**Filing No.** 925

**Filing date:** Aug. 26, 2003

**Effective date:** Sept. 10, 2003

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

**Action taken:** Amendment of section 387.17(a) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 95

**Subject:** Food stamp certification periods.

**Purpose:** To extend from 12 months to 24 months the food stamp certification period for households in which all adult members are elderly or disabled.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TDA-49-02-00010-P, Issue of December 10, 2002.

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

**Text of rule and any required statements and analyses may be obtained from:** Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

**Assessment of Public Comment**

During the public comment period for the proposed regulatory amendments concerning food stamp certification periods, the Office of Temporary and Disability Assistance (OTDA) received comments from one social services district. No changes were made to the proposed amendments as a result of the comments.

The social services district requested that the proposed amendments contain language stating that OTDA approval is necessary in order for a social services district to assign 12-month certification periods for earned income cases. The district also requested that the proposed amendments clarify the six-month reporting requirements for earned income cases.

This Office will respond to the social services district that 01 ADM 9 specifies in detail the requirements regarding the six-month reporting procedures. In addition, 02 ADM 7 permits unearned income cases to be placed in the six-month reporting system. Additional information concerning food stamp reporting requirements and certification periods is contained in 03 INF 10. The proposed amendments provide that six-month reporting is the reporting system to be used in the State for earned income cases and provide some general information concerning the certifications required under that reporting system.

**NOTICE OF ADOPTION**

**Eligibility for Food Stamps**

**I.D. No.** TDA-49-02-00011-A

**Filing No.** 924

**Filing date:** Aug. 26, 2003

**Effective date:** Sept. 10, 2003

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

**Action taken:** Addition of sections 358-2.28 and 358-2.29 and amendment of sections 358-3.1(f)(9) and (10), 358-3.1(f), 387.7(a) and (g), 387.14(g)(1)(ii) and 387.17 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 95

**Subject:** Eligibility for food stamps.

**Purpose:** To implement Federal requirements concerning the food stamp application and certification processing requirements.

**Text of final rule:** Sections 358-2.28 and 358-2.29 are added to read as follows:

358-2.28 *Notice of missed interview.*

*Notice of missed interview means a notice sent by a social services district informing an applicant or recipient that they have missed a sched-*

uled food stamp eligibility or recertification interview and advising them that it is their responsibility to reschedule the interview.

**358-2.29 Request for contact notice.**

*Request for contact notice means a notice sent by a social services district advising a household that information needs to be verified or clarified during its food stamp certification period.*

Paragraphs (9) and (10) of subdivision (f) of section 358-3.1 are amended and paragraphs (11) and (12) are added to read as follows:

(9) you are a member of a class of public assistance recipients for whom either State or Federal law requires an automatic grant adjustment unless the reason for your appeal is the incorrect computation of your grant; [or]

(10) you are a foster family care services recipient, a foster family caregiver, or a respite caregiver pursuant to section 505.29 of this Title, and a sponsoring agency terminates the foster family caregiver's or the respite caregiver's authority to provide foster family care services or a social services district or the [department] office terminates its contract with a sponsoring agency[.]; or

(11) you have been sent a request for contact notice in order to verify or clarify information during your food stamp certification period; or

(12) you have been sent a notice of missed interview informing you that you have missed a scheduled food stamp eligibility or recertification interview and advising you that it is your responsibility to reschedule the interview.

Section 387.7(a) is amended to read as follows:

(a) Except as provided in this Part, all applicant households including those submitting applications by mail, shall have face-to-face interviews [prior to initial certification and all subsequent recertifications] *scheduled on a specific day and at a specific time if the household is not interviewed on the same day it applies. Households in which all adults are elderly or disabled must have face-to-face interviews conducted at initial certification and at least once every 24 months unless waived for hardship circumstances as described in subdivision (b) of this section. Except for households in which all adults are elderly or disabled, face-to-face interviews must be conducted at initial certification and at least once every 12 months thereafter unless waived for hardship circumstances as described in subdivision (b) of this section. Earned income cases are handled in accordance with the provisions of section 387.17(d) of this Part. Social services districts must contact households having certification periods greater than 12 months no later than the last working day of the 12th month. The contact may be through interview, telephone, scheduled home visit or questionnaire sent by mail.*

Section 387.7(g) is amended to read as follows:

(g) If the applicant fails to appear for a scheduled interview, the interview shall be rescheduled, *if requested by the household*, without requiring the household to provide good cause for failing to appear. In the event the applicant does not appear for the rescheduled interview, the [local department] *social services district* need not initiate any action to schedule further interviews unless specifically requested to do so by the applicant[s]. *However, if a household misses a scheduled interview in connection with a determination of initial eligibility, the social services district must send the household a notice of missed interview informing the household of its responsibility to reschedule the interview. At recertification, a notice of missed interview is only required if the household has submitted its application for recertification.*

Subparagraph (ii) of paragraph (1) of subdivision (g) of section 387.14 is amended to read as follows:

(ii) A deduction shall be allowed only in the month the expense is billed or otherwise becomes due, regardless of when the household intends to pay the expense. One-time-only expenses may be averaged over the entire certification period in which they are billed. Households reporting one-time-only medical expenses may elect to either a one-time deduction or to have the expenses averaged over the remaining months of the certification period. *In addition, households with certification periods of greater than 12 months may, at their option, choose to have the one-time only medical expenses averaged over the remainder of the first 12 months of the certification period. If the change is reported after the 12th month, it may be allowed either in one month or averaged over the remainder of the certification period.*

Subdivision (a) of section 387.17 is amended by adding new paragraphs (4) and (5) to read as follows:

(4) *Social services districts may lengthen a household's certification period as long as the total months of the certification period does not exceed the limits described in subdivision (a)(2)(i) through (vi) of this*

*section. In extending certification periods, a notice of intent must be sent advising the household of its new certification period ending date.*

(5) *Social services districts may only shorten a household's certification period when the social services district either receives verified information that the household is ineligible for food stamps or the household has failed to cooperate with the social services district in clarifying its circumstances. When a certification period is shortened pursuant to this paragraph, a notice of adverse action must be sent to the household.*

Subparagraph (iv) of paragraph (9) of subdivision (d) of section 387.17 is repealed and subparagraph (v) is renumbered subparagraph (iv).

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 358-2.28, 358-2.29 and 387.7(a).

**Text of rule and any required statements and analyses may be obtained from:** Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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

Although changes were made to the proposed regulations as published in the *State Register*, the changes do not require that the regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis or job impact statement be revised.

**Assessment of Public Comment**

This assessment describes the comments received on the proposed regulations concerning Food Stamp eligibility and certification periods. The purpose of the proposed regulations was to implement final federal regulations promulgated on November 21, 2000.

During the public comment period, the Office of Temporary and Disability Assistance (OTDA) received comments from one social services district and one public interest legal assistance organization.

The public interest legal assistance organization offered the following comments:

**Comment:** The commentator suggested that OTDA was not fully implementing the provisions of 7CFR 273.2(e)(2) with regard to the waiving of in-office interviews because the proposed regulation does not require the State agency to notify a household that it will waive a face-to-face interview on a case-by-case basis; and the proposed regulation contains an overly restrictive definition of hardship in that it requires a household to be unable to appoint an authorized representative before a waiver of an in-office interview is considered.

**Response:** OTDA is in compliance with the requirements of federal regulations 7CFR 273.2(e)(2) with regard to the waiving of the in-office interview. While the proposed regulation itself does not require OTDA specifically to notify a household of its right to request a waiver of the in-office interview, OTDA is fully compliant with the requirement set forth in 7CFR 273.2(e)(2), as both manual as well as system generated client action taken and recertification notices contain language advising households of their right to request a waiver of the in-office interview. The client informational booklets have also been updated to reflect the addition of this language.

As to the commentator's suggestion that the proposed regulation contains an overly restrictive definition of hardship as it requires a household to first be unable to appoint an authorized representative before a waiver of the in-office interview is considered, the commentator's suggestion has been noted and will be considered in future amendments.

**Comment:** The commentator suggested that OTDA amend the proposed regulation to add language that the in-office interview will be waived upon request for all households in which all of its members are elderly or disabled with no earned income as a means to increase participation for this vulnerable population.

**Response:** The commentator's suggestion has been noted and will be considered in future amendments.

The social services district offered the following comments:

**Comment:** The commentator noted that the proposed regulations at 18 NYCRR 358-2.28 and 358-2.29 are worded in the second person whereas the other definitions contained in 18 NYCRR Part 358 are presently worded in the third person.

**Response:** We agree. The proposed regulations have been amended to reflect the comment.

**Comment:** The commentator suggested that the proposed regulation should make it clear that recipients of supplemental security income are on a 24 month recertification cycle, with a mail-in contact at the 12 month point that does not require any response from the recipient.

**Response:** We disagree. The proposed amendments to 18 NYCRR 387.17 make it clear that the certification period for households in which all the adult members are elderly/disabled can be up to 24 months. The

household will receive a change report form at the 12 month contact point advising them that no response is required if there are no changes to report.

Comment: The commentator suggested that the proposed amendments to 18 NYCRR 387.7(a) is unclear as worded with respect to certification periods for households with earned income.

Response: We agree. The proposed regulation has been revised to clarify that earned income cases are handled in accordance with the provisions of 18 NYCRR 387.17(d).

Comment: The commentator suggested that the proposed amendment to 18 NYCRR 387.14(g)(1)(ii) is confusing with respect to one-time medical expenses.

Response: We disagree. The proposed regulation is correct as worded and reflects federal policy.

Comment: The commentator suggested that the proposed amendment to 18 NYCRR 387.17(a)(5) is unclear with respect to the request for contact notice because it does not advise districts that 10 days notice is required prior to terminating a case.

Response: We disagree. The proposed addition of 18 NYCRR 387.17(a)(5) clearly states that a notice of adverse action must be sent prior to terminating a case. The notice of adverse action is defined in 18NYCRR 358-2.3. In addition, timely notice is defined in 18NYCRR 358-2.23.

**NOTICE OF ADOPTION**

**Food Stamp Reporting**

**I.D. No.** TDA-23-03-00002-A

**Filing No.** 930

**Filing date:** Aug. 26, 2003

**Effective date:** Sept. 10, 2003

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

**Action taken:** Amendment of sections 358-3.3(e)(3), 387.14(a)(5)(ii)(b) and 387.17 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 95

**Subject:** Food stamp reporting.

**Purpose:** To establish new requirements for reporting to social services districts information concerning eligibility for food stamps.

**Text of final rule:** Paragraph (3) of subdivision (e) of section 358-3.3 is amended to read as follows:

As a recipient of food stamp benefits you have the right to an adequate notice sent no later than the date of the proposed action when the social services agency action results from information you furnished on a [quarterly] *periodic* report [, or]. *As a recipient of food stamp benefits, you have the right to an adequate and timely notice* because you failed to return a [quarterly] *periodic* report required by section 387.17(d) of this Title.

Clause (b) of subparagraph (ii) of paragraph (5) of subdivision (a) of section 387.14 is amended to read as follows:

(b) failure to comply with the [monthly] *periodic* reporting requirements in accordance with section 387.17(d) of this Part; or  
Section 387.17(a)(2)(vi) is amended to read as follows:

(vi) for all cases subject to [quarterly] *six-month* reporting under subdivision (d) of this section, the [eligibility and] certification [periods] *period* will, notwithstanding any other provision of this subdivision, be six months, *except for those households residing within social services districts that have been given written permission by the Office of Temporary and Disability Assistance to lengthen the certification periods to more than six-months but not longer than 12 months. For those social services districts authorized to lengthen the certification periods beyond six months, households subject to six-month reporting shall be required to submit a periodic report in the sixth month in accordance with subdivision (e) of this section;* and

The title and paragraphs (1) through (4) of subdivision 387.17(d) are repealed and a new title and paragraphs (1) through (4-a) are added to read as follows:

387.17(d) *Six-month reporting.*

(1) *The following definitions are used in this subdivision:*

(i) *Six-month reporting refers to a reporting system used for households with earned income in accordance with instructions from the Office of Temporary and Disability Assistance. It is a system in which information concerning the incomes and circumstances of food stamp recipient households with earned income are required to report every six months at recertification or to submit a periodic report. Households that are subject to six-month reporting are required to report only changes in*

*the amount of gross monthly income exceeding 130 percent of the monthly federal poverty income guideline for their household size. In addition, households with able-bodied adults without dependents who are subject to the six-month reporting rules as described in paragraph (4) of this subdivision must also report changes in work status that affect food stamp eligibility.*

(ii) *Periodic report means a form upon which a recipient household that is subject to six-month reporting reports income and household circumstances for food stamps for the most recent six-month period. Households are required to file such a report for social services districts that have been given written permission by the Office of Temporary and Disability Assistance to have certification periods of seven full months or greater. The social services district must act on any change reported by such households on the periodic report in accordance with subdivision (e)(6) of this section. A periodic report is considered complete when the household has:*

(a) *answered all questions;*

(b) *provided verification of all reported income; and*

(c) *signed and dated the report on or after the last day of the fifth month of the report period.*

(iii) *Primary source means information received from employers concerning wages paid to a household, computer match information about federal benefits received from the Social Security Administration, information from the New York State Department of Labor or local district employment contractor that a food stamp recipient has failed to comply with a food stamp work requirement, a determination by a court, administrative hearing or disqualification consent agreement of an intentional program violation, or actions taken by other programs under the authority of a social services district that affect budgeting for food stamps.*

(iv) *Process month means the month in which information contained in a periodic report or obtained during certification is reviewed. With respect to information obtained at recertification, the process month is the last month of the authorization period. A new food stamp budget is required to be authorized in the month following the month of a process month with respect to the information obtained if the information indicates a change has occurred and a new benefit level is to be determined as a result of the change.*

(v) *Verified upon receipt means that information is received from the primary source and it is not questionable. A report of a change in income cannot be considered as verified upon receipt unless it includes an exact new income amount, effective date of receipt and any other information needed to recalculate the food stamp benefit amount. When information has been reported to another program area directly administered by the local social services district such as medicaid, or family and children services and the information is verified by that program, then the change must be considered verified by the food stamp division of the local social services district and acted upon by that division if it would affect benefits or eligibility for food stamp benefits.*

(2) *For any month that a household's gross income exceeds 130 percent of poverty, the household must report their monthly income by the tenth day of the month following the month in which they exceeded the limit. If a food stamp household subject to six-month reporting fails, without good cause, to return a completed periodic report by the tenth day of the process month, the social services district must send a timely and adequate notice of discontinuance. Any changed circumstances reported on the periodic report that results in changes in benefits must be noticed to households using adequate notice.*

(3) *Group home households/residents with earned income are excluded from food stamp six-month reporting rules if they are in receipt of supplemental security income (SSI) or social security disability benefits. Households eligible for a transitional benefit alternative are exempt from reporting changes in the monthly gross income level while they are in the transitional benefit period. At the end of the transitional benefit period, households subject to the six-month reporting rules will be required to certify that their gross income does not exceed 130 percent of poverty. Households with certification periods of less than six-months in duration are excluded from the six-month reporting rules.*

(4) *Households subject to six-month reporting rules with able bodied adults without dependent(s) (ABAWD) may be required by the social services district to report on a monthly basis changes in working hours that would affect food stamp eligibility.*

(4-a) *For a household subject to the food stamp six-month reporting rules, the social services district must act on reported changes that affect food stamp eligibility and benefit amounts only if the information is:*

(i) that the total monthly household income exceeds 130 percent of poverty;

(ii) verified upon receipt;

(iii) reported on the food stamp periodic report;

(iv) reported at recertification;

(v) reported pursuant to temporary assistance reporting requirements and the action is taken on the temporary assistance budget. However, if a household in receipt of temporary assistance and food stamps fails to submit a temporary assistance quarterly report, no action for discontinuance of food stamps for failure to submit the report can be taken;

(vi) voluntarily reported and verified and the information increases the food stamp benefit;

(vii) that a household requests to have its food stamp case closed;

or

(viii) that a household member does not meet ABAWD requirements.

For households in receipt of temporary assistance and food stamps subject to the six-month reporting rules, workers in the social services districts must not act on, or compute food stamp overpayment amounts for, change reports other than those listed in the subparagraphs of this paragraph.

Paragraphs (5), (6), (8) and (9) of section 387.17(d) are amended to read as follows:

(5) If the recipient responds to the discontinuance notice and submits a completed report before the effective date of the discontinuance, the social services district must accept the completed [quarterly] periodic report and void the notice of discontinuance.

(6) Good cause for failure to submit a completed [quarterly] periodic report.

(i) Good cause for failure to return a completed [quarterly] periodic report by the end of the process month exists only in the following situations:

(a) the recipient has a physical or mental condition which prevents complete reporting;

(b) the failure of the recipient to submit a complete report is directly attributable to [department] Office of Temporary and Disability Assistance or social services district error; or

(c) there are other extenuating circumstances under which the recipient cannot reasonably be expected to fulfill the responsibility to report for reasons beyond the recipient's control.

(8) Average monthly income is applied against need to determine the amount of food stamp benefits for each calendar month of a [benefit quarter] certification period. The amount of average earned income applied must be recalculated at recertification and when a [quarterly] periodic report is received by the agency. *Adjustments to benefits will be made prospectively whenever information is received in accordance with paragraph (4) of this subdivision.* [Adjustments will be made prospectively whenever information affecting benefits is submitted, including information submitted other than in a quarterly report. Information upon which adjustments will be made includes such information as:

(i) loss of employment;

(ii) change in status of the recipient from part-time to full-time employment or the converse;

(iii) increase or decrease in income expected to last at least 30 days;

(iv) increase or decrease in number of hours worked per pay period expected to last at least 30 days; or

(v) receipt income from additional source of any kind.]

[Information used by a social services district to make an adjustment may come from any source. It may be submitted voluntarily or, with respect to a recipient of PA, in a report of new or increased income pursuant to section 351.24(d) of this Title;]

(9) Verification required with the periodic report. (i) The household must provide verification of current income and any child care costs incurred in the most recent month whether or not changes have occurred in such amounts. Failure to provide verification of current income will result in closure of the food stamp case. Failure to provide verification of child care costs will result in loss of child care deductions.

(ii) The household must provide verification of any other reported changes in household circumstances. The social services district must act on any change which would produce a decrease in benefits whether or not it is verified, but must not act on an unverified change which would produce an increase in benefits.

(iii) A social services district must afford a household the opportunity to verify child care costs and costs identified in subparagraph (ii) of this paragraph in accordance with paragraph (e)(3) of this section with respect to any change which it has initially failed to verify in the [quarterly] periodic report. Changes reported in a [quarterly] periodic report will be considered as having been reported on the date the report is received.

[(iv) If a reported change raises significant issues of eligibility, the period of certification may be shortened, and the household may be required to attend a face-to-face recertification interview.

(v) [(iv) A social services district [may] must not require verification of information prior to the most recent calendar month for a periodic report. A social services district must not require verification of changes reported outside of the periodic report and recertification that are not required to be reported by a household that is subject to six-month reporting.

Section 387.17(e)(1)(i) is amended to read as follows:

(i) changes in the sources of income, or changes in the amount of gross monthly earned income of more than \$100, gross monthly unearned income from private sources of more than \$100 or [changes in the amount of] gross monthly unearned income from public sources of more than \$25. This requirement does not include changes in the public assistance grant;

Section 387.17(e)(4) is repealed and a new section 387.17(e)(4) is added to read as follows:

(4) Households subject to six-month reporting rules are not required to submit any reports of changes other than changes in monthly gross income that exceed 130 percent of the monthly federal poverty income guidelines for their household size except as otherwise set forth in this paragraph. Households subject to six-month reporting rules with certification periods of seven full months or greater must submit a periodic report for the most recent six-month period. Households with able bodied adults without dependants (ABAWDs) who are subject to six-month reporting rules as set forth in paragraph (4) of subdivision (d) of this section must report as required by the social services district to meet ABAWD requirements.

Section 387.17(e)(5) is amended to read as follows:

(5) Changes reported over the telephone by non-six-month reporting households or in person by [the] all food stamp [household] households shall be acted upon in the same manner as those reported on the State-prescribed change report form. A supply of these report forms shall be provided to the applicant/recipient of food stamps at initial certification and at recertification interviews.

Section 387.17(e)(6)(iv) is amended to read as follows:

(6)(iv) The local department shall act upon changes that decrease a household's benefit level or make a household ineligible to participate in the food stamp program no later than the allotment for the month following the month in which the notice of adverse action period has expired, provided a fair hearing and continuation of benefits have not been requested. Verification of changes that decrease benefit levels must be obtained prior to recertification except as specified for [monthly reporting] cases subject to six-month reporting rules in subdivision (d) of this section.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 387.17(d)(1)(i), (v) and (e)(4).

**Text of rule and any required statements and analyses may be obtained from:** Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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

Although changes were made to the proposed amendments, the changes do not require that the regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis or job impact statement be revised.

**Assessment of Public Comment**

During the public comment period for the proposed amendments concerning food stamp reporting, the Office of Temporary and Disability Assistance received comments from two State agencies.

One agency requested that the proposed amendments to section 387.17(d)(1)(i) be revised to clarify that all households with an able-bodied adult without dependents, including those subject to the six-month reporting requirement, must also report changes in work status. This clarifying change was made.

One agency requested that section 387.17(d)(1)(v) be revised to clarify the responsibility of the staff of the local social services district concerning the treatment of information concerning a change in income that is verified by a program area directly administered by the district. This clarifying change was made.

No other changes were made as a result of the comments.