

# RULE MAKING ACTIVITIES

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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.

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## Department of Civil Service

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### ERRATUM

Notices of Proposed Rule Makings Pertaining to Jurisdictional Classification, published in the August 2, 2006 issue of the *State Register* contained errors in the text of the rule. Following are the I.D. numbers and correct text of each proposal.

#### CVS-31-06-00004-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Bridge Authority, by adding thereto the position of  $\phi$ Toll Equipment Specialist (1).

#### CVS-31-06-00005-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of  $\phi$ Information Security Officer (1).

#### CVS-31-06-00006-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Parole," by adding thereto the position of  $\phi$ Supervising Parole Officer (Special Services) (1).

#### CVS-31-06-00007-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Thruway Authority, by adding thereto the position of  $\phi$ Director of Administrative Services (1).

#### CVS-31-06-00008-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of Parks, Recreation and Historic Preservation," by adding thereto the positions of  $\phi$ Heritage Trails Program Manager (1) and Heritage Trails Program Specialist (2).

#### CVS-31-06-00009-P

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Economic Development, by deleting therefrom the positions of  $\phi$ Commerce Policy Analyst 1 (9) and  $\phi$ Commerce Policy Analyst 2 (5) and by adding thereto the positions of Commerce Policy Analyst 1 (9) and Commerce Policy Analyst 2 (5).

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### Mohawk Correctional Facility

**I.D. No.** COR-18-06-00001-A

**Filing No.** 936

**Filing date:** Aug. 2, 2006

**Effective date:** Aug. 23, 2006

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

**Action taken:** Amendment of section 100.100(d) of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 70 and 89

**Subject:** Mohawk Correctional Facility.

**Purpose:** To rename the medical center at the facility.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-18-06-00001-P, Issue of May 3, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## Education Department

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

#### State Aid for Public Library Construction

I.D. No. EDU-34-06-00016-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 90.12 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 215 (not subdivided) and 273-a(5) and L. 2006, ch. 53, section 1

**Subject:** State aid for public library construction.

**Purpose:** To prescribe eligibility requirements and criteria for applications for State aid for library construction, and conform the commissioner's regulations to recent changes to Education Law, section 273-a

**Text of proposed rule:** 1. Subdivision (b) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective November 16, 2006, as follows:

(b) Application procedures. (1) Each *public* library system shall submit to the commissioner, no later than a prescribed date, *as part of a plan of service*, a plan by which it will accept, review, and make recommendations on applications as required by Education Law, section 273-a(2). [Such plans shall include a schedule of such actions, local funds matching requirements, planning and technical requirements, and procedures to be followed.]

(2) When the applicant is a library, the governing board of the system of which it is a member shall indicate to the commissioner its approval of such application by stating the extent to which the project for which State aid is requested will assist the applicant to provide more effective service within the system's standards of organization and service. [If the governing board of the system does not approve a member library's application, such application shall be submitted to the commissioner with an explanation of such nonapproval.]

(3) . . .

(4) The library system board shall rank the applications from its system area in order of its recommendations, giving particular attention to the service needs of any communities which are isolated or *economically disadvantaged*, or located beyond the reasonable service capabilities of other libraries which are members of such library system.

2. Paragraphs (2) and (4) of subdivision (c) of section 90.12 of the Regulations of the Commissioner of Education are amended, effective November 16, 2006, as follows:

(2) the nonstate share of the cost of the project is or will be available, that the project has been started or will begin within [90] 180 days after approval by the commissioner, and that the project will be completed promptly and in accordance with the application;

(4) [not more than 60 percent of the approved costs have been expended as of the date of the application] *the project has not been completed prior to the date of the application*;

3. Paragraph (4) of subdivision (d) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective November 16, 2006, as follows:

(4) the provision of library services in communities which are geographically isolated or *economically disadvantaged*; and

4. Subdivision (f) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective November 16, 2006, as follows:

(f) Schedule of payment of State aid for library construction. (1) [Fifty-] *Ninety*-percent payment of awarded State aid for approved costs of the project will be made after notification of applicant by the commissioner of approval for funding.

(2) [An additional 40-percent payment will be made after certification by the applicant that the project has been 50-percent completed in accordance with the approved application.

(3) The 10-percent final payment will be made after submission of satisfactory evidence that the project has been completed according to the approved application and has been accepted by the applicant.

5. Subdivision (g) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective November 16, 2006, as follows:

(g) Reports. The following reports shall be made to the commissioner on the forms and by the dates prescribed by the commissioner:

(1) . . .

(2) [Each library system board shall report on the status of any project for which an approved application was submitted to the commissioner, but for which no State aid was provided.

(3) Each library system board shall report on the status of each project submitted to the commissioner for which the system did not recommend approval.

(4) Each library system board shall report on the anticipated State aid necessary for eligible projects to be completed in its service area.

(3) *Upon request by the commissioner, each library system board shall submit an annual report detailing the status of each project for which an application was submitted by a member library and not recommended for approval, or was approved but for which no state aid was provided.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Janet M. Welch, State Librarian and Assistant Commissioner for Libraries, Education Department, Office of Cultural Education, Rm. 10C34, Albany, NY 12230, (518) 474-5930, e-mail: jwelch2@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by Law.

Educational Law section 215 authorizes the Regents, the Commissioner, or their representatives, to visit, examine and inspect education corporations and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 273-a provides for State aid for projects for the acquisition, construction, renovation and rehabilitation of buildings of public libraries and library systems chartered by the Regents of the State of New York or established by act of the Legislature, upon approval by the Commissioner of Education. Section 273-a(5) authorizes the Commissioner to adopt rules and regulations as are necessary to carry out the purposes and provisions of this section.

Section 1 of Chapter 53 of the Laws of 2006 appropriates \$14 million for public library construction and renovation projects pursuant to Education Law section 273-a.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes for State aid for library construction by prescribing eligibility requirements and criteria for evaluating grant proposals.

##### 3. NEEDS AND BENEFITS:

The proposed amendment is needed to ensure that the Commissioner's Regulations are in compliance with recent changes to Education Law section 273-a. Chapter 572 of the Laws of 2003 amended section 273-a to change the funding year from one year to three years and the payment year from 'January 1 through December 31' to 'July 1 through June 30.' Section 4 of Part O of Chapter 57 of the Laws of 2005 amended section 273-a to change the payment schedule from a 50/40/10 percent basis to a 90/10 percent basis. The proposed amendment will ensure that funds appropriated pursuant to Chapter 53 of the Laws of 2006 for public library construction and renovation projects are timely awarded pursuant to statutory requirements to eligible public library systems and public libraries.

The proposed amendment will also permit libraries greater flexibility in applying for grant funds. Projects that are not completed but are more than 60 percent complete will now be eligible for funding. Projects that will not be ready to start for up to 180 days will now be eligible for funding, as opposed to 90 days previously.

##### 4. COSTS:

(a) Costs to the State: none.

(b) Costs to local governments: none.

(c) Costs to private, regulated parties: none. The proposed amendment relates to State aid for public library systems and public libraries and does not affect private parties.

(d) Costs to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 273-a and provides greater flexibility to public libraries and public library systems applying for State aid for library construction, as more fully discussed under the Needs and Benefits section above, and does not impose any additional costs on the State, local governments, or the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment concerns applications for State aid for library construction and applies to all public library systems and public libraries seeking such aid, including public libraries established by local governments, but does not directly impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. The proposed amendment is needed to conform the Commissioner's Regulations to recent changes to Education Law section 273-a, as discussed in the Needs and Benefits section above. The library system board shall rank applications for State aid for library construction from its system area in order of its recommendations, giving particular attention to the service needs of any communities which are isolated or economically disadvantaged. In addition, an application submitted by a library system or a public library shall include an assurance that the project has not been completed prior to the date of the application.

#### 6. PAPERWORK:

Each public library system shall submit to the Commissioner, no later than a prescribed date, as part of a plan of service, a plan by which it will accept, review, and make recommendations on applications as required by Education Law section 273-a(2). Upon request by the Commissioner, each library system board shall submit an annual report detailing the status of each project for which an application was submitted by a member library and not recommended for approval, or was approved but for which no State aid was provided.

#### 7. DUPLICATION:

The proposed amendment duplicates no existing State or federal requirements and is necessary to conform the Commissioner's Regulations to recent changes to Education Law section 273-a.

#### 8. ALTERNATIVES:

There were no significant alternatives to the proposed amendment and none were considered.

#### 9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the federal government.

#### 10. COMPLIANCE STANDARDS:

It is anticipated that public library systems and public libraries will be able to achieve compliance with these changes within two weeks of adoption of the amended rule.

### **Regulatory Flexibility Analysis**

#### Small Businesses:

The proposed amendment concerns applications for State aid for library construction by public library systems and public libraries and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

#### Local Governments:

#### EFFECT OF RULE:

The proposed rule applies to public library systems and public libraries who seek State aid for library construction, including 395 public libraries established by local governments.

#### COMPLIANCE REQUIREMENTS:

The proposed rule applies to public library systems and public libraries who seek State aid for library construction, including those public libraries established by local governments, but does not directly impose any compliance requirements on local governments.

The proposed amendment is needed to conform the Commissioner's Regulations to recent changes to Education Law section 273-a. Chapter 572 of the Laws of 2003 amended section 273-a to change the funding year from one year to three years and the payment year from January 1 through December 31 to July 1 through June 30. Section 4 of Part O of Chapter 57 of the Laws of 2005 amended section 273-a to change the payment schedule from a 50/40/10 percent basis to a 90/10 percent basis. The proposed amendment will ensure that funds appropriated pursuant to Chapter 53 of

the Laws of 2006 for public library construction and renovation projects are timely awarded pursuant to statutory requirements to eligible public library systems and public libraries.

The proposed amendment will also permit libraries greater flexibility in applying for grant funds. Projects that are not completed but are more than 60 percent complete will now be eligible for funding. Projects that will not be ready to start for up to 180 days will now be eligible for funding, as opposed to 90 days previously.

The library system board shall rank applications for State aid for library construction from its system area in order of its recommendations, giving particular attention to the service needs of any communities which are isolated or economically disadvantaged. In addition, an application submitted by a library system or a public library shall include an assurance that the project has not been completed prior to the date of the application.

Each public library system shall submit to the Commissioner, no later than a prescribed date, as part of a plan of service, a plan by which it will accept, review, and make recommendations on applications as required by Education Law section 273-a(2). Upon request by the Commissioner, each library system board shall submit an annual report detailing the status of each project for which an application was submitted by a member library and not recommended for approval, or was approved but for which no state aid was provided.

#### PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

#### COMPLIANCE COSTS:

The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 273-a and provides greater flexibility to public libraries and public library systems in applying for State aid for library construction, and does not impose any compliance costs on local governments.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or compliance costs on local governments.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendment is needed to conform the Commissioner's Regulations to recent changes to Education Law section 273-a. The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those public libraries established by local governments, but does not directly impose any compliance requirements or costs on local governments. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on public libraries and public library systems. The proposed amendment will permit libraries greater flexibility in applying for grant funds. Projects that are not completed but are more than 60 percent complete will now be eligible for funding. Projects that will not be ready to start for up to 180 days will now be eligible for funding, as opposed to 90 days previously.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The recent legislation that provides \$14 Million in construction funding originated with the ten recommendations of the Regents Commission on Library Services. It is a component of the proposed New Century Libraries legislation, which was based on the recommendations made by the Commission after two years of studying the state's libraries, including 14 public meetings held throughout the state to solicit input from the public and the library community.

In addition, in 2003, staff of the New York State Library's Division of Library Development had a conference call with representatives of the Public Library System Directors Organization (PULISDO) and also attended the annual PULISDO meeting to discuss the construction program which resulted in suggestions for changing the program.

The proposed amendments to Regulation 90.12 are required by Education Law, and additional changes have been made to facilitate the application procedures at the recommendation of the state's public library systems.

### **Rural Area Flexibility Analysis**

#### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS' AND PROFESSIONAL SERVICES:

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those public libraries located in rural areas. The proposed amendment is needed to conform the Commissioner's Regulations to recent changes to Education Law section 273-a. Chapter 572 of the Laws of 2003 amended section 273-a to change the funding year from one year to three years and the payment year from January 1 through December 31 to July 1 through June 30. Section 4 of Part O of Chapter 57 of the Laws of 2005 amended section 273-a to change the payment schedule from 50/40/10 percent basis to a 90/10 percent basis. The proposed amendment will ensure that funds appropriated pursuant to Chapter 53 of the Laws of 2006 for public library construction and renovation projects are timely awarded pursuant to statutory requirements to eligible public library systems and public libraries.

The proposed amendment will also permit libraries greater flexibility in applying for grant funds. Projects that are not completed but are more than 60 percent complete will now be eligible for funding. Projects that will not be ready to start for up to 180 days will now be eligible for funding, as opposed to 90 days previously.

The library system board shall rank applications for State aid for library construction from its system area in order of its recommendations, giving particular attention to the service needs of any communities which are isolated or economically disadvantaged. In addition, an application submitted by a library system or a public library shall include an assurance that the project has not been completed prior to the date of the application.

Each public library system shall submit to the Commissioner, no later than a prescribed date, as part of a plan of service, a plan by which it will accept, review, and make recommendations on applications as required by Education Law section 273-a(2). Upon request by the Commissioner, each library system board shall submit an annual report detailing the status of each project for which an application was submitted by a member library and not recommended for approval, or was approved but for which no state aid was provided. The proposed amendment does not impose any additional professional services requirements.

### 3. COMPLIANCE COSTS:

The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 273-a and provides greater flexibility to public libraries and public library systems in applying for State aid for library construction, and does not impose any additional compliance costs on public libraries or public library systems located in rural areas.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those public libraries and public library systems located in rural areas. The proposed amendment is needed to conform the Commissioner's Regulations to recent changes to Education Law section 273-a. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on public libraries and public library systems. The proposed amendment will permit libraries greater flexibility in applying for grant funds. Projects that are not completed but are more than 60 percent complete will now be eligible for funding. Projects that will not be ready to start for up to 180 days will now be eligible for funding, as opposed to 90 days previously.

### 5. RURAL AREA PARTICIPATION:

The recent legislation that provides \$14 Million in construction funding originated with the ten recommendations of the Regents Commission on Library Services. It is a component of the proposed New Century Libraries legislation, which was based on the recommendations made by the Commission after two years of studying the state's libraries, including 14 public meetings held throughout the state to solicit input from the public and the library community.

In addition, in 2003, staff of the New York State Library's Division of Library Development had a conference call with representatives of the Public Library System Directors Organization (PULISDO) and also attended the annual PULISDO meeting to discuss the construction program which resulted in suggestions for changing the program.

The proposed amendments to Regulation 90.12 are required by Education Law, and additional changes have been made to facilitate the application procedures at the recommendation of the state's public library systems.

#### Job Impact Statement

The proposed amendment concerns applications for State aid for library construction by public library systems and public libraries and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no adverse impact on jobs or employment opportunities, no further measures

were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### Sanitary Condition of Shellfish Lands

**I.D. No.** ENV-24-06-00010-A

**Filing No.** 939

**Filing date:** Aug. 3, 2006

**Effective date:** Aug. 23, 2006

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

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

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 13-0307 and 13-0319

**Subject:** Sanitary condition of shellfish lands.

**Purpose:** To reclassify underwater lands for shellfishing to protect public health.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. ENV-24-06-00010-EP, Issue of June 14, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** William Hastback, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0479, e-mail: wghastba@gw.dec.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

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## Department of Health

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### EMERGENCY RULE MAKING

#### Expansion of the New York State Newborn Screening Panel

**I.D. No.** HLT-34-06-00007-E

**Filing No.** 943

**Filing date:** August 7, 2006

**Effective date:** August 7, 2006

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

**Action taken:** Amendment of sections 69-1.2 and 69-1.3 of Title 10 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** New York State Public Health Law Section 2500-a authorizes the Commissioner of Health to designate additional diseases or conditions for inclusion in the Newborn Screening Program test panel by regulation. This regulatory amendment adds one condition – galactosylceramidase deficiency, or Krabbe disease, a lipid storage disorder – to the 43 genetic/congenital disorders and one infectious disease that comprise New York State's newborn screening test panel, pursuant to existing 10 NYCRR Section 69-1.2. The Department of Health finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) requirements for this rule making would be contrary to the public interest and welfare.

Immediate implementation of the proposed screening for Krabbe disease is both feasible and obligatory at this time. A laboratory test method was recently reported in the medical literature as being capable of detecting Krabbe disease using a dried blood spot specimen (i.e., the typical newborn screening sample). Through pilot testing using residual newborn screening specimens stripped of all identifiers, the Department's Wadsworth Center Newborn Screening Program has determined that a scaled-up version of the recently developed test method could reproducibly generate reliable results for the large number of newborn specimens accepted by the Program. The required instrumentation (i.e., tandem mass spectrometers) is already in operation at the Department's Wadsworth Center laboratory dedicated to newborn screening. A system for follow-up and ensuring access to necessary treatment for identified infants is fully established and adequately staffed. Now that the Program is technically proficient in tandem mass spectrometry testing, experienced in spectrometric data collection and interpretation, and has demonstrated proficiency in triage and referral procedures, failure to include Krabbe disease testing immediately would mean infants would go untested, undetected, and may thus suffer irreversible nerve damage and an early death.

Affected infants typically succumb to Krabbe disease by two to five years of age after an agonizing clinical course. Newborns with Krabbe disease appear normal for the first few months of life, but manifest extreme irritability, spasticity, and developmental delay before six months of age. Without newborn screening, a child may not be recognized with Krabbe disease until he/she develops clinical signs and symptoms. Early detection through screening is critical to successful treatment of Krabbe disease with transplanted donor stem cells. The urgency of the Department's decision to avoid further delays in screening for Krabbe disease was underscored by recent clinical trial findings, published in the *New England Journal of Medicine* in May 2005, which concluded, "Transplantation of umbilical cord-blood from unrelated donors in newborns with infantile Krabbe's disease favorably altered the natural history of the disease. Transplantation in babies after symptoms had developed did not result in substantive neurologic improvement."

To avoid unnecessary and potential medically detrimental delays in screening newborns for Krabbe disease, the amended regulatory language in 10 NYCRR Section 69-1.2 is hereby adopted by emergency promulgation.

**Subject:** Expansion of Newborn screening panel.

**Purpose:** To add Krabbe disease to the newborn screening panel and clarify the requirement for timely specimen transfer.

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by Section 2500-a of the Public Health Law, existing Sections 69-1.2 and 69-1.3 of Subpart 69-1 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) are amended, to be effective upon filing of a Notice of Emergency Adoption with the Secretary of State, as follows:

Section 69-1.2 of Subpart 69-1 is amended as follows:

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 section 2500-a and section 2500-f of the Public Health Law shall be performed by the testing laboratory according to recognized clinical laboratory procedures.

(b) Diseases and conditions to be tested for shall include:

- argininemia (ARG);
- argininosuccinic acidemia (ASA);
- biotinidase deficiency;
- branched-chain ketonuria, also known as maple syrup urine disease (MSUD);
- carnitine palmitoyl transferase Ia deficiency (CPT-IA);
- carnitine palmitoyl transferase II deficiency (CPT-II);
- carnitine-acylcarnitine translocase deficiency (CAT);
- carnitine uptake defect (CUD);
- citrullinemia (CIT);
- cobalamin A,B cofactor deficiency (Cbl A,B);
- congenital adrenal hyperplasia (CAH);
- cystic fibrosis (CF);
- dienoyl-CoA reductase deficiency (DE REDUCT);
- galactosemia;
- galactosylceramidase deficiency (*Krabbe disease*);
- glutaric acidemia type I (GA-I);
- hemoglobinopathies, including homozygous sickle cell disease;
- homocystinuria;
- human immunodeficiency virus (HIV) exposure and infection;
- 3-hydroxy-3-methylglutaryl-CoA lyase deficiency (HMG);

- hyperammonemia/ornithinemia/citrullinemia (HHH);
- hypermethioninemia (HMET);
- hypothyroidism;
- isobutyryl-CoA dehydrogenase deficiency (IBG or IBCD);
- isovaleric acidemia (IVA);
- long-chain 3-hydroxyacyl-CoA dehydrogenase deficiency (LCHADD);
- malonic aciduria (MAL);
- medium-chain acyl-CoA dehydrogenase deficiency (MCADD);
- medium-chain ketoacyl-CoA thiolase deficiency (MCKAT);
- medium/short-chain hydroxyacyl-CoA dehydrogenase deficiency (M/SCHAD);
- 2-methylbutyryl-CoA dehydrogenase deficiency (2MBG);
- 3-methylcrotonyl-CoA carboxylase deficiency (3-MCC);
- 3-methylglutaconic aciduria (3MGA);
- 2-methyl 3-hydroxy butyryl-CoA dehydrogenase deficiency (2M3HBA);
- methylmalonic acidemia (Cbl C,D);
- methylmalonyl-CoA mutase deficiency (MUT);
- mitochondrial acetoacetyl-CoA thiolase deficiency (BKT);
- mitochondrial trifunctional protein deficiency (TFP);
- multiple acyl-CoA dehydrogenase deficiency (MADD, also known as GA-II);
- multiple carboxylase deficiency (MCD);
- phenylketonuria (PKU);
- propionic acidemia (PA);
- short-chain acyl-CoA dehydrogenase deficiency (SCADD);
- tyrosinemia (TYR); and
- very long-chain acyl-CoA dehydrogenase deficiency (VLCADD).

Section 69-1.3 of Subpart 69-1 is amended as follows:

Section 69-1.3 Responsibilities of the chief executive officer. The chief executive officer shall ensure that a satisfactory specimen is submitted to the testing laboratory for each newborn born in the hospital, or admitted to the hospital within the first twenty-eight (28) days of life from whom no specimen has been previously collected, and that the following procedures are carried out:

(a) The infant's parent is informed of the purpose and need for newborn screening, and given newborn screening educational materials provided by the testing laboratory.

\* \* \*

(g) All specimens shall be allowed to air dry thoroughly on a flat nonabsorbent surface for a minimum of four (4) hours prior to [transmittal] forwarding to the testing laboratory. All specimens shall be forwarded to the testing laboratory within twenty-four (24) hours of collection [by first class mail] using the testing laboratory's delivery service or [its] an equivalent arrangement designed to ensure delivery of specimens to the testing laboratory within no later than forty-eight (48) hours after collection.

**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 4, 2006.

**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-a requires institutions caring for infants 28 days of age or under to cause newborns to be tested for phenylketonuria, branched-chain ketonuria, homocystinuria, galactosemia, homozygous sickle cell disease, hypothyroidism, and other 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 for newborn testing, in accordance to the Department's mandate to prevent infant and child mortality, morbidity, and diseases and disorders of childhood. Pursuant to this authority, 43 genetic/congenital conditions and one infectious disease have been added to the newborn testing panel by regulatory amendment since initial 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 one condition – galactosylceramidase deficiency, or Krabbe disease – to the list of 43 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.

#### Needs and Benefits:

Data compiled from New York State’s Newborn Screening Program and other states’ programs have shown that timely intervention and treatment for metabolic disorders can drastically improve affected infants’ survival chances and quality of life. For Krabbe disease, early detection through screening is critical to successful treatment. Advancing technology, emerging medical treatments and rising public expectations for this critical public health program demand that the panel of screening conditions be expanded through this amendment of 10 NYCRR Section 69-1.2, which would add one inherited metabolic disorder to the scope of newborn screening services already provided by the Department’s Wadsworth Center.

The condition – Krabbe disease – is a lipid storage disorder, specifically, a leukodystrophy that results in degradation of myelin, the fat-like material that forms a protective sheath around nerve fibers. The condition is caused by a deficiency of the enzyme galactosylceramidase, and occurs with an incidence of approximately one in 100,000 births. Krabbe disease meets established criteria applied worldwide for inclusion into newborn screening program test panels. These criteria are: the condition must be medically significant; its incidence and prevalence must represent a matter of public health concern, or it 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 condition must be available and suitable for large-scale population screening; and early detection of the disorder during the neonatal period must allow for medical intervention effective in amelioration, or prevention of medical complications and other health consequences.

Affected infants typically succumb to Krabbe disease by two to five years of age after an agonizing clinical course. Newborns with the enzyme deficiency resulting in Krabbe disease appear normal for the first few months of life but manifest extreme irritability, spasticity, and developmental delay before six months of age. Regression in psychomotor development results in feeding difficulties and marked hypertonicity, and eventually progresses to loss of voluntary movement. The infants become deaf and blind, and are prone to pneumonia and other infections; death from infection is common. However, Krabbe disease can be treated if detected early. In fact, early detection through screening is critical to successful treatment of Krabbe disease. Treatment is primarily by hematopoietic stem cell transplant using donor cord blood samples. Without newborn screening, a child may not be recognized with Krabbe disease until he/she develops clinical signs and symptoms.

In 2004, a report in the scientific journal *Clinical Chemistry* detailed a laboratory test method capable of detecting Krabbe disease using a dried blood spot specimen (i.e., the typical newborn screening sample) and instrumentation – tandem mass spectrometers (MS/MS) – already in operation at the Department’s Wadsworth Center laboratory dedicated to newborn screening. Through pilot testing using residual newborn screening specimens stripped of all identifiers, the Department’s Newborn Screening Program has determined that a scaled-up version of the recently developed test method could reproducibly generate reliable results for the large number of specimens accepted by the Program. In addition, a 2005 report in the *New England Journal of Medicine* described a successful therapy for Krabbe disease using a stem cell transplant from cord blood donors to asymptomatic newborns known to have the disorder through a family history, i.e., an affected or deceased sibling.

#### Costs:

##### Costs to Private Regulated Parties:

Birth facilities will incur no new costs related to collection and submission of newborn blood specimens to the Program, since the same dried blood spot specimens now collected and forwarded to the Program for other currently available testing would also be tested for Krabbe disease, the additional disorder proposed by this amendment. Starting in 2005, the Department began to offer free-of-cost delivery services to deter birthing facilities from bundling specimens to save postage costs, and encourage timely shipment of individual newborn specimens; birthing facilities do not incur postage or other delivery costs for the pre-paid delivery service. Therefore, any cost incurred by a facility for postage or a courier to forward specimens to the testing laboratory would be voluntary.

The Program estimates that, following implementation of this proposal to add Krabbe disease screening to the existing newborn screening panel, 150 to 200 newborns would screen positive for the new condition annually. Since timing is crucial, i.e., treatment must be started early to be effective, newborns that screen positive – those with low activity of the affected enzyme, galactosylceramidase, as measured in the dried blood spot specimen – will undergo DNA-based molecular analysis, using the same specimen submitted for the initial enzyme test. Infants determined to carry mutations associated with Krabbe disease will require a confirmatory test that measures the level of enzyme activity using a liquid blood specimen to be collected by a practitioner and sent to a laboratory designated by the Department. Positive screening results are expected to be confirmed in an estimated 10 to 50 percent of infants who undergo the confirmatory enzyme activity testing. These 15 to 100 infants will be referred for additional diagnostic workup, including: a measurement of protein in spinal fluid; a brain stem evoked auditory response (BAER) test; and magnetic resonance imaging (MRI) to assess white matter in the brain. These diagnostic procedures will be conducted at a comprehensive hospital, such as an academic medical center or other facility with a neonatal intensive care unit. Results from the entire battery of tests will be reviewed by an advisory committee to the Department, comprised of experts in metabolic disorders and Krabbe disease detection and treatment, and representing facilities with a role in ensuring successful implementation of this proposal. If an infant is determined to be afflicted with Krabbe disease, a pre-established communications system will be activated, and plans for treatment begun immediately. The Department anticipates that more than 95 percent of referred infants will ultimately be found not to be afflicted with Krabbe disease, based on laboratory test and clinical assessment data.

Cost figures that follow are based on 100 as a high-end estimated number for infants whose positive screening tests are confirmed, and who will require additional testing and diagnostic services. Due to the relatively novel nature of the screening method, it is highly unlikely that confirmatory testing will substantiate results for all positive screening tests. As the Program gains experience with the testing and verifies clinical outcomes, it is reasonable to expect that the analytical cutoff will be adjusted to reduce the number of false positive results to as few as possible, while retaining the capability to capture all true positives and eliminate false negatives.

Specialized care centers (i.e., medical centers with facilities for, and staff expert in, diagnosis and treatment of inherited metabolic diseases), local hospitals designated by such centers, and pediatricians in private practice would likely incur minimal costs related to fulfilling their responsibilities for specimen collection to perform additional testing and referral of screening-positive infants for diagnostic services; such costs would be limited to human resources costs of approximately 0.5 person-hour. The Department expects facility/practitioner-incurred costs to be minimal since, on average, each involved facility/practitioner can expect to refer no more than one additional infant per year for confirmatory testing and clinical assessment; therefore, no additional staff would be required for these institutions and providers to comply with this proposal. Specialized care centers, and to a lesser extent local hospitals and independent providers, will incur additional human resources costs for supplying diagnostic and treatment services, and ongoing medical management to the approximately two to ten infants per year whose disorder is confirmed.

Costs of laboratory testing for infants who screen positive for Krabbe disease include an estimated \$200 for confirmatory enzyme analysis; and, for infants whose results are confirmed, another \$50 for measurement of protein in the infant’s spinal fluid, as well as the provider’s charge for a lumbar puncture.

For infants with a confirmed diagnosis of Krabbe disease, costs would also be incurred for required clinical services and procedures, including: medical and consultative services rendered by a neurologist, a developmental pediatrician and a hematologist with expertise in stem cell transplantation; HLA typing and chemotherapy to depress the immune system prior to transplant; MRI testing to monitor the affected infant’s brain post-transplant; and genetic counseling for the family. A facility could also incur costs related to treatment of confirmed infants, including costs for the stem cell transplantation procedure itself; and costs related to the infant’s occupying a bed in the neonatal intensive care unit, use of a surgical suite, and extended nursing care. The actual total cost of all requisite services and procedures to evaluate and treat a newborn with Krabbe disease cannot be assessed more exactly due to the large variations in charges for the professional component of specialists’ and ancillary providers’ services, and the scope of requisite services, including the length of time required for hospitalization. The Department provides the following prevailing rates, so that facilities and providers that may become involved in evaluation, treatment

and ongoing monitoring of affected infants may be better able to estimate costs: \$300 for a comprehensive-level office visit; \$150 for genetic counseling visits; and \$2,500 for post-transplant MRI services.

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 current newborn screening panel. 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.

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

##### Costs to State Government:

Although funding for the State's Newborn Screening Program requires State expenditures, proactively treating congenital abnormalities ultimately may result in savings by precluding the need for more financially burdensome medical and institutional services.

State-operated facilities providing birthing services, and infant follow-up and medical care would incur costs and savings as described above 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 would avoid medical complications, thereby reducing the average length of hospital stays and the 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 recently augmented by dedicated line-item funding for Program expansion. Starting in 2005, the Department assumed the costs of specimen submission by making pre-paid delivery services available to birthing facilities. The Program's budget includes \$90,000 for specimen delivery services; however, no part of the expenditure for these services is a direct result of this amendment. Rather, the Department's funding of delivery services is expected to deter birthing facilities from bundling specimens to save postage costs and encourage timely shipment of individual newborn specimens.

The Program expects to sustain minimal to no additional laboratory instrumentation costs related to this proposal, since the necessary technology – MS/MS instrumentation – is already in place. A system for follow-up and assured access to necessary treatment of identified infants is fully established. In order to accommodate a recent broad expansion of the testing panel, the Department has already bolstered staffing in the Program's follow-up unit to handle the increased number of screening-positive results, and interface with medical practitioners and facilities. No additional staff would be required as a result of this proposal.

The Department will incur costs, estimated at from \$3,800 to \$4,000 annually, to provide specimen collection kits, including materials and postage, to pediatricians for collecting liquid blood specimens from an estimated 200 presumptive-positive infants, and forwarding the specimens by overnight courier for confirmatory testing at one or more laboratories approved by the Department.

##### Costs to Local Government:

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

##### 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 of age or under, and, therefore, is subject to these regulations to the same extent as a private regulated party.

##### 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. Facilities that submit newborn specimens will sustain minimal to no increases in paperwork, specifically, only that necessary to conduct and document follow-up and/or referral activities.

##### Duplication:

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

##### Alternative Approaches:

Potential delays in detection of Krabbe disease until onset of clinical signs and symptoms would result in increased infant morbidity and mortality, and are therefore unacceptable. Given the strong indications that treatment is available to ameliorate adverse clinical outcomes in affected infants, the Department has determined that there are no alternatives to mandating newborn screening for this condition.

##### Federal Standards:

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

##### Compliance Schedule:

The director of the Newborn Screening Program has participated in discussions with representatives of the Governor's Office, the Health Commissioner's Office and the Department's Public Affairs Group to optimize coordinated notification of affected parties and implementation of this single additional test into the newborn screening program. Educational materials for parents and health care professionals have been updated with information on the expanded screening panel. The Program is collaborating with various Department offices, including the Office of Medicaid Management and the Office of Managed Care, to ensure adequate reimbursement and coverage inclusiveness for required follow-up services, including confirmatory and diagnostic testing, treatment and monitoring.

The Department is continuing to work with the State Newborn Screening Task Force members, directors of specialty care centers, national experts in Krabbe disease diagnosis and treatment, health care professionals, and payors on ongoing assessment of the scope of needed follow-up services and their availability. On January 13, 2006, the director of the Newborn Screening Program gave an invited presentation to the North-eastern New York Organization of Nurse Executives, regarding the Department's plans for including Krabbe disease in the screening panel and the expected impact of such plans on hospitals. On January 30, 2006, participants in a conference on Krabbe disease in New York City reviewed this State's Krabbe disease testing algorithm and plans to ensure the health care infrastructure's readiness to implement this proposal. In addition to staff from several Department offices with a role in the algorithm's implementation, representatives from specialty care centers, transplant facilities, advocacy organizations, a confirmatory testing laboratory, and other interested parties also attended the conference.

Strong support for the amendment is expected from patient advocacy organizations representing affected individuals and families, as well as the medical community at large. The Commissioner of Health is expected to notify all New York State-licensed physicians of this newborn screening panel expansion. The letter will also be distributed to hospital chief executive officers (CEOs) and their designees responsible for newborn screening, as well as other affected parties. There appears to be no potential for organized opposition. Consequently, regulated parties should be able to comply with these regulations as of their effective date, upon filing of a Notice of Emergency Adoption with the Secretary of State.

##### Regulatory Flexibility Analysis

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

This proposed amendment to add one new condition – a lipid storage disorder known as galactosylceramidase deficiency, or Krabbe disease – to the list of 43 genetic/congenital disorders and one infectious disease 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 of age or under, 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. No facility recognized as having medical expertise in clinical assessment and treatment of Krabbe disease is operated as a small business. Local government, including the New York City Health and Hospitals Corporation, operates 21 hospitals. 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 actual number of physicians 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 amend-

ment'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 the same newborn dried blood spot specimens now collected and mailed to the Program for other currently performed testing would also be used for the additional test 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 Krabbe disease, and assume referral responsibility for medical evaluation and additional testing. This anticipated increased burden is expected to have a 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 one to two per month 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, upon filing a Notice of Emergency Adoption with the Secretary of State.

#### Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staffs are expected to be able to assume any increase in workload resulting from the Program's newborn screening for Krabbe disease and identification of screening-positive infants. Infants with positive screening tests for Krabbe disease would be referred to a facility employing a physician and other medical professionals with expertise in Krabbe disease.

#### Compliance Costs:

Birthing facilities operated as small businesses and by local governments, and practitioners who are small business owners (e.g., 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 same dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test proposed by this amendment. However, such facilities, and, to a lesser extent, at-home birth attendants, would likely incur minimal costs related to following up infants screening positive for Krabbe disease, primarily because the testing proposed under this regulation is expected to result in, on average, fewer than one screening-positive infant per week at each of the 11 birthing facilities that are small businesses. Communicating the need and/or arranging referral for medical evaluation of one additional identified infant would require 0.5 person-hour, and these tasks are expected to be able to be accomplished with existing staff.

Affected small business, and government-operated hospitals and independent providers operating as a small business, such as primary and ancillary care providers (i.e., pediatricians, neurologists and hematologists), may incur additional human resources costs for supplying post-evaluation and treatment services, and ongoing medical management services to the approximately two to three screening-positive infants whose disorder is confirmed. Clinical services and procedures required for an affected infant could include: medical and consultative services rendered by a neurologist, a developmental pediatrician, and a hematologist with expertise in stem cell transplantation; a spinal tap for spinal fluid specimen collection; and genetic counseling for the family. It is unlikely that practitioners and facilities that are small businesses would incur costs related to treatment, such as costs for chemotherapy to depress the immune system prior to transplant; the transplantation procedure itself; laboratory testing; magnetic resonance imaging (MRI) to monitor the affected infant's brain post-transplant; and costs related to the infant's occupying a bed in the neonatal intensive care unit. The cost of all required services and procedures to evaluate and treat newborns with Krabbe disease born annually in New York State cannot be estimated due to large variations in charges for the professional component of specialists' and ancillary providers' services, and the scope of required services. The Department provides the following prevailing rates, so that small businesses that may become involved in treatment and ongoing care of affected infants may be better able to estimate costs: \$300 for a comprehensive-level office visit; \$150 for genetic counseling visits; \$2,500 for imaging services; and \$250 for confirmatory laboratory testing.

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 current newborn screening panel. 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.

#### 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 infant 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:

The feasibility of adding Krabbe disease to the State's newborn screening panel has been discussed with affected parties ever since the Department began testing for a number of new conditions using tandem mass spectrometry technology. Therefore, regulated parties that are small businesses and local governments have been aware of the Department's intention to include Krabbe disease in the panel for some time.

#### Rural Area Flexibility Analysis

##### Types of Estimated Numbers of Rural Areas:

Rural areas are defined as counties with a population of fewer than 200,000 residents; and, for counties with a population larger than 200,000, rural areas are defined as towns with a population density of 150 or fewer persons 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 a population density characteristic of rural areas.

This proposed amendment to add one new condition – galactosylceramidase deficiency or Krabbe disease, a lipid storage disorder – to the list of 43 genetic/congenital disorders and one infectious disease 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 of age or under, 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 are located in counties with low-population density townships. No facility recognized as having medical expertise in clinical assessment and treatment of Krabbe disease operates in a rural area. New York State licenses 67,790 physicians and certifies 350 licensed 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.

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

The Department expects that birthing 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. Collection and submission of blood specimens to the State's Newborn Screening Program will not be altered by this amendment, since the same dried blood spot specimens now collected and mailed to the Program for other currently available newborn testing would also be used for the additional test 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 Krabbe disease, and assume referral responsibility for medical evaluation and additional testing. This requirement is expected to affect minimally the ability of rural facilities to comply, as no such facility would experience an increase of more than one to two per month in infants requiring referral. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with these regulations as of their effective date, upon filing a Notice of Emergency Adoption with the Secretary of State.

#### Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staff are expected to be able to assume any increase in workload resulting from the Program's newborn screening for Krabbe disease and identification of screening-positive infants. Infants with a positive screening test for Krabbe disease will be referred to a facility employing a physician and other medical professionals with expertise in Krabbe disease.

#### 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 same dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test 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, since the proposed added testing is expected to result in no more than one additional referral per month. Communicating the need and/or arranging referral for medical evaluation of one additional identified infant would require 0.5 person-hour, and these tasks are expected to be able to be accomplished with existing staff. The Department estimates that more than 95 percent of infants will be ultimately found not to be afflicted with the target condition, based on clinical assessment and confirmatory testing data.

Rural providers, including clinical specialists (i.e., medical geneticists) and primary and ancillary care providers (i.e., pediatricians, neurologists and hematologists), may incur additional human resources costs for providing post-evaluation and treatment services, and ongoing medical management to the approximately two to three infants per year whose disorder is confirmed. Clinical services and procedures required for an affected infant could include: medical and consultative services rendered by a neurologist, a developmental pediatrician, and a hematologist with expertise in stem cell transplantation; a spinal tap procedure for spinal fluid specimen collection; laboratory testing; and genetic counseling for the family. It is unlikely that facilities in rural areas would incur costs related to treatment, such as costs for chemotherapy to depress the immune system prior to transplant; the transplantation procedure itself; magnetic resonance imaging (MRI) to monitor the affected infant's brain post-transplant; and costs related to the infant's occupying a bed in the neonatal intensive care unit. The cost of all requisite services and procedures to evaluate and treat infants with Krabbe disease born annually in New York State cannot be estimated due to large variations in charges for the professional component of specialists' and ancillary providers' services, and the scope of requisite services, including the length of time required for hospitalization. To the extent specialized services would be delivered in a rural area, the Department provides the following prevailing rates, so that rural providers who may become involved in treatment and ongoing care of affected infants may be better able to estimate costs: \$300 for a comprehensive-level office visit; \$150 for genetic counseling visits; \$2,500 for imaging services; and \$250 for confirmatory laboratory testing.

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. 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.

#### 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 expanded testing to statewide infant 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 changes to present collection, reporting, follow-up and recordkeeping practices.

#### Rural Area Participation:

The feasibility of adding Krabbe disease to the newborn screening panel has been discussed with affected parties ever since the Department began testing for a number of new conditions using tandem mass spectrometry technology. Therefore, regulated parties located in rural areas have been aware of the Department's intention to include Krabbe disease in the panel for some time.

#### 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 one condition – a lipid storage disorder known as Krabbe disease – to the scope of newborn screening services already provided by the Department. It is expected that no regulated parties will experience other than minimal impact on their workload, and therefore none will need to hire new personnel. Therefore, this proposed amendment carries no adverse implications for job opportunities.

## Insurance Department

### EMERGENCY RULE MAKING

#### Processing of Claims

**I.D. No.** INS-34-06-00001-E

**Filing No.** 937

**Filing date:** Aug. 2, 2006

**Effective date:** Aug. 2, 2006

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

**Action taken:** Addition of Part 56 (Regulation 183) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4304, 4305 and 4802; and art. 49

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

**Specific reasons underlying the finding of necessity:** Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new Part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare.

**Subject:** Rules relating to processing of claims.

**Purpose:** To clarify when plans may exclude coverage for cosmetic surgery.

**Text of emergency rule:** A new Part 56 of Title 11 NYCRR (Regulation No. 183) is adopted to read as follows:

Section 56.0 Preamble. Section 52.16(c)(5) of Part 52 of this Title (Regulation 62), permits insurers and health maintenance organizations (HMOs) that are required to provide coverage for surgical services, to exclude coverage of cosmetic surgery. Part 52 does not define cosmetic surgery, but does provide examples of two types of reconstructive surgeries that may never be considered cosmetic. Subsequent to the promulgation of Part 52, Title I and Title II of Article 49 of the Insurance Law and Public Health Law were enacted that require medical necessity denials to be subject to utilization review and external appeal. The Insurance Department has found inconsistencies among insurers and HMOs as to when denials of surgery are considered medical necessity denials and subject to utilization review and external appeal. Section 56.3 of this Part and an amended section 52.16(c)(5) of Part 52 of this Title clarify that, whenever surgery is a covered benefit under certain policies, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Titles I and II of Article 49 of the Insurance Law and Public Health Law, except in certain cases when the claim or request for surgery is identified by one of the codes in subdivision (f) of section 56.3 of this Part and is submitted without medical information.

Section 56.1 Applicability. This Part shall be applicable to policies that provide hospital, surgical or medical expense coverage.

Section 56.2 Definitions. The following words or terms shall have the following meanings when used in this Part:

(a) Health care professional means an appropriately licensed, registered or certified health care professional pursuant to title eight of the education law or a health care professional comparably licensed, registered or certified by another state.

(b) Health care provider means a health care professional or a facility licensed pursuant to article 28, 36, 44 or 47 of the public health law or a facility licensed pursuant to article 19, 23, 31 or 32 of the mental hygiene law.

(c) Health plan means an insurer or health maintenance organization (HMO) that has issued a policy that provides hospital, surgical or medical expense coverage.

(d) Medical information means any medical data, written explanation from a health care professional, or medical record.

Section 56.3 Claim review requirements for surgical services.

(a) A claim or request for coverage of reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child that has resulted in a functional defect shall not be considered by a health plan to be cosmetic. Reconstructive surgery may however be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(b) A claim or request for coverage of surgery other than for the surgical services described in subdivision (a) or (c) of this section that is considered by a health plan to be cosmetic shall be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(c) A claim or request for coverage of surgery, other than a request for pre-authorization, that is solely identified by one of the codes in subdivision (f) of this section and is submitted to a health plan without any accompanying medical information, may be denied by a health plan as cosmetic without subjecting the request to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law, provided that:

(1) notice of the denial includes a clear statement describing the basis for the denial;

(2) notice of the denial includes a statement that the insured has a right to a medical necessity review if the insured or the insured's health care provider believes the claim or request involves issues of medical necessity and submits medical information;

(3) if a medical necessity review is requested and medical information is submitted, the health plan treats the request as a utilization review appeal pursuant to section 4904 of the Insurance Law or Public Health Law; and

(4) if the health plan denies coverage of the procedure after receipt of medical information, the health plan issues a final adverse determination in compliance with section 4904(c) of the Insurance Law and section

410.9(e) of Part 410 of this Title (Regulation 166) or section 4904(3) of the Public Health Law and 10 NYCRR 98-2.9(e), as applicable.

(d) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan with accompanying medical information, the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(e) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan as a pre-authorization request without accompanying medical information, the necessary information shall be requested as required by section 4905(k) of the Insurance Law or section 4905(11) of the Public Health Law and the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(f) Common Procedural Terminology (CPT code [copyright] and Description

11200 Removal of skin tags, multiple fibrocuteaneous tags, any area; up to and including 15 lesions

11201 Removal of skin tags; each additional 10 lesions

11950 Subcutaneous injection of filling material (eg, collagen); 1 cc or less

11951 Subcutaneous injection of filling material (eg, collagen); 1.1 to 5.0 cc

11952 Subcutaneous injection of filling material (eg, collagen); 5.1 to 10.0 cc

11954 Subcutaneous injection of filling material (eg, collagen); over 10.0 cc

15775 Punch graft for hair transplant; 1 to 15 punch grafts

15776 Punch graft for hair transplant; more than 15 punch grafts

15780 Dermabrasion; total face (e.g. for acne scarring, fine wrinkling, rhytids, general keratosis)

15781 Dermabrasion, segmental, face

15782 Dermabrasion, regional, other than face

15783 Dermabrasion, superficial, any site, (eg, tattoo removal)

15786 Abrasion; single lesion (eg, keratosis, scar)

15787 Abrasion; each additional four lesions or less

15788 Chemical peel, facial; epidermal

15789 Chemical peel, facial; dermal

15790 Chemical peel; total face

15791 Chemical peel; face, hand or elsewhere

15792 Chemical peel, nonfacial; epidermal

15793 Chemical peel, nonfacial; dermal

15810 Salabrasion; 20 sq cm or less

15811 Salabrasion; over 20 sq cm

15819 Cervicoplasty

15820 Blepharoplasty, lower eyelid;

15821 Blepharoplasty, lower eyelid; with extensive herniated fat pad

15824 Rhytidectomy; forehead

15825 Rhytidectomy; neck with platysmal tightening (platysmal flap, P-flap)

15826 Rhytidectomy; glabellar frown lines

15828 Rhytidectomy; cheek, chin, and neck

15829 Rhytidectomy; superficial musculoaponeurotic system (SMAS) flap

15832 Excision, excessive skin and subcutaneous tissue (including lipectomy); thigh

15833 Excision, excessive skin and subcutaneous tissue (including lipectomy); leg

15834 Excision, excessive skin and subcutaneous tissue (including lipectomy); hip

15835 Excision, excessive skin and subcutaneous tissue (including lipectomy); buttock

15836 Excision, excessive skin and subcutaneous tissue (including lipectomy); arm

15837 Excision, excessive skin and subcutaneous tissue (including lipectomy); forearm or hand

15838 Excision, excessive skin and subcutaneous tissue (including lipectomy); submental fat pad

15839 Excision, excessive skin and subcutaneous tissue (including lipectomy); other area

15876 Suction assisted lipectomy; head and neck

15877 Suction assisted lipectomy; trunk

15878 Suction assisted lipectomy; upper extremity

15879 Suction assisted lipectomy; lower extremity

17340 Cryotherapy (CO2 slush, liquid N2) for acne

17360 Chemical exfoliation for acne (eg, acne paste, acid)

17380 Electrolysis epilation, each 1/2 hour  
 19316 Mastopexy  
 19355 Correction of inverted nipples  
 21120 Gentioplasty; augmentation (autograft, allograft, prosthetic material)  
 30430 Rhinoplasty, secondary; minor revision (small amount of nasal tip work)  
 36468 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); limb or trunk  
 36469 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); face  
 36470 Injection of sclerosing solution; single vein  
 36471 Injection of sclerosing solution; multiple veins, same leg  
 69090 Ear piercing  
 69300 Otoplasty, protruding ear, with or without size reduction  
 S0500 Laser in situ keratomileusis  
 S0810 Photorefractive keratectomy  
 S0812 Phototherapeutic keratectomy  
 65760 Keratomileusis  
 65765 Keratophakia  
 65767 Epikeratoplasty  
 65771 Radial keratotomy  
 (CPT [copyright] 2005 American Medical Association. All Rights Reserved.)

**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 October 30, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

#### **Consolidated Regulatory Impact Statement**

1. Statutory Authority: The Superintendent's authority for the addition of Part 56 to Title 11 of NYCRR (Regulation 183) and for the Thirty-fifth Amendment to Part 52 of Title 11 NYCRR (Regulation 62) is derived from Sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802 and Article 49 of the Insurance Law.

Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations affecting HMOs and effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Section 3201 authorizes the Superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Sections 3216 and 3217 authorize the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance. Section 3221 sets forth standard health insurance policy provisions.

Section 4235 establishes requirements for group accident and health insurance.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity corporations and non-profit health or hospital corporations, including requirements pertaining to minimum benefits of individual and small group contracts. Sections 4303, 4304 and 4305 set forth required benefits and standard provisions in group, blanket and group remittance contracts.

Section 4802 establishes the grievance procedures for all insurers which offer a managed care product.

Article 49 establishes the utilization review and external review requirements for all insurers subject to Article 32 or 43 of the Insurance Law or any organization licensed under Article 43 of the Insurance Law.

2. Legislative Objectives: The statutory sections mentioned above contain standard provisions for accident and health insurance coverage and set forth the Superintendent's power to promulgate regulations governing minimum standards for the form, content and sale of such coverage. The promulgation of Regulation 183 and the amendment to Section 52.16(c)(5) of Regulation 62 further the legislative goal of having meaningful health insurance coverage available to the insurance-buying public in this state while at the same time providing reasonable regulation to ensure consistency in the application of permissible exclusions in such coverage.

The cosmetic surgery exclusion set forth in Regulation 62 predates Article 49 of the Insurance Law and Article 49 of the Public Health Law

which provide for internal and external appeal of medical necessity denials. Subsequent to the promulgation of Article 49, the Insurance Department has found inconsistencies among health maintenance organizations (HMOs) and insurers as to what they consider to be medically necessary surgery and what they consider to be cosmetic. The Insurance Department and Health Department have advised health plans that cosmetic surgery denials must be subject to the utilization review and external review requirements. However, some health plans have questioned the Department's position in cases involving procedures usually considered to be cosmetic when medical information is not submitted.

By clarifying the requirements relating to the cosmetic surgery exclusion, the Superintendent is furthering the legislative intent set forth in Article 49 of the Insurance Law and Article 49 of the Public Health Law which require health plans to conduct utilization reviews to determine if services are medically necessary, and then provide external appeal rights if services are denied. The amendment of Regulation 62, and the addition of new Regulation 183, is necessary to establish uniformity among health plans and ensure that cosmetic surgery denials are given the appropriate review.

3. Needs and Benefits: The Insurance Law and corresponding regulations require most insurers to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits plans to exclude coverage for cosmetic surgery but provides an exception to the cosmetic surgery exclusion for reconstructive surgery. However, the reconstructive surgery exception is not the only type of surgery that would not be cosmetic. The amendment to Regulation 62 and the new Regulation 183 clarify that whenever surgery is a covered benefit, a determination that the surgery is cosmetic is a medical necessity determination that must be subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law.

To address the concerns of health plans that certain procedures usually considered cosmetic would be subject to the utilization review and external review requirements when medical information is not submitted, Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law and Public Health Law. However, if a request for surgery identified by a code on the designated list is submitted with medical information, or as a preauthorization request, then the Article 49 utilization review process must be followed to adjudicate the claim. In addition, if the automatic denial process is used for the designated codes, the denial must explain that the insured may request a medical necessity review and submit medical information, in which case the plan must review as a utilization review appeal and provide external appeal rights.

The requirements established in these regulations, and the list of procedures set forth in Table 1 of the new Regulation 183, are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Interested parties agreed that it is in the best interest of both health plans and consumers for there to be uniformity among the plans when making coverage decisions, and these regulations are intended to establish such uniformity. Representatives of insurers and HMOs also expressed concern about the cost of a clinical peer review when services usually considered to be cosmetic are reviewed retrospectively and medical information has not been submitted. The list of procedures in Regulation 183 that may be denied without such review addresses this concern while still ensuring that consumer utilization review and external appeal rights are not compromised. Striving to minimize the costs of health insurance and protecting the interests of consumers who purchase health insurance and are important functions of the Superintendent. These regulations accomplish both and ensure that there is uniformity among health plans when making coverage determinations.

4. Costs: The regulations apply only to insurers and HMOs issuing insurance policies that exclude cosmetic surgery. Any costs imposed on regulated parties as a result of the regulations will be minimal as they involve only clarification of existing optional insurance policy provisions. Actual costs to insurers and HMOs will be limited to the time that product compliance personnel will spend in implementing any accompanying changes to their claims procedure or making any filings.

The regulations may indirectly affect health care providers since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to

be cosmetic. However, current law permits insurers and HMOs to request medical information in order to make a claim determination.

The costs to the Insurance Department will be limited to the time spent by existing staff to review products submitted by insurers for compliance.

There should be no costs associated with these regulations to state or local government.

5. Local Government Mandates: The regulations impose no new programs, services, duties or responsibilities on any county, city, town, village, school district or fire district.

6. Paperwork: The regulations do not impose any additional paperwork requirements on insurers or HMOs. Insurers and HMOs are currently required by law to make form and utilization review report filings with the Department. HMOs and insurers are also currently permitted to request medical information from providers and consumers and therefore it is unlikely that any greater burden would be imposed on providers or consumers.

7. Duplication: The regulations do not duplicate standards of either the federal or other state governments. The regulations set standards applicable to health insurance coverage for New York State.

8. Alternatives: The regulations were developed through meetings with interested parties. Alternatives such as precluding plans from denying procedures when medical information is not submitted, or including an expanded list of procedures, were both discussed but the Insurance Department and Health Department determined that the list of procedures included the regulation is the most appropriate to meet the needs of health plans and protect consumers. The Department also considered whether these requirements could be established through guidelines, and determined that regulations would be needed to integrate the new requirements with existing requirements and to ensure uniformity and consistency in application.

9. Federal Standards: The U.S. Department of Labor Claims Payment Regulation, 29 C.F.R. 2560.503 issued pursuant to the Employee Retirement Income Security Act (ERISA) creates federal standards for the treatment of medical necessity denials and the processing of such claims. However, this regulation does not provide any specific federal standards or requirements for the form, content and sale of health insurance coverage for surgical services.

10. Compliance Schedule: Regulated parties should be able comply with the regulations immediately. Insurers and HMOs have been made aware of the requirements in the regulations through meetings and Department correspondence. In addition, the Insurance Department has always instructed insurers and HMOs that they must treat cosmetic surgery denials as medical necessity denials. The regulations merely clarify this instruction and provide an option for claims processing when medical information is not submitted.

#### **Consolidated Regulatory Flexibility Analysis**

1. Effect of the rule: These regulations will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees. These regulations may indirectly affect health care providers since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. These regulations do not apply to or affect local governments.

2. Compliance requirements: These regulations will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Professional services: Small businesses or local governments should not need professional services to comply with the regulations.

4. Compliance costs: These regulations will not impose any compliance costs upon small businesses or local governments. The Insurance Law and Public Health Law currently permit health plans to request medical information from providers and their patients in order to make coverage determinations.

5. Economic and technological feasibility: Small businesses or local governments should not incur an economic or technological impact as a result of the regulations.

6. Minimizing adverse impact: These regulations apply to the insurance market throughout New York State. The same requirements will apply uniformly, and do not impose any adverse or disparate impact on HMOs, insurers, health care providers or consumers.

7. Small business and local government participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. This notice was intended to provide small businesses with the opportunity to participate in the rule making process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

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

1. Types and Estimated Number of Rural Areas: Insurance companies and health maintenance organizations (HMOs) to which these regulations apply do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13). Some of the home offices of these companies lie within rural areas. These regulations may also indirectly affect health care providers, including providers located in rural areas; since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic.

2. Reporting, Recordkeeping and Other Compliance Requirements, and Professional Services: Insurance companies and HMOs may have to modify their claim processing procedures and/or make new filings to the Insurance Department to conform to the regulations. No professional services will be necessary to comply with the proposed rule. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Costs: The costs to regulated parties as a result of the regulations will be limited to the costs associated with the time that product compliance personnel will spend in implementing any modified claims procedures, or making any necessary filings.

4. Minimizing Adverse Impact: These regulations apply uniformly to entities that do business in both rural and nonrural areas of New York State. These regulations do not impose any additional burden on persons located in rural areas and the Insurance Department does not believe that the regulations will have an adverse impact on rural areas.

5. Rural Area Participation: Notice of the regulations was published in the Insurance Department's Regulatory Agenda. Although there was no specific effort to obtain rural area input during the development of the regulations, interested parties, including health plan representatives, were consulted through direct meetings during the development of the regulations.

#### **Consolidated Job Impact Statement**

This proposed addition of a new Part 56 and the Thirty-fifth Amendment to Part 52 of 11 NYCRR will not adversely impact job or employment opportunities in New York. It is likely to have no impact as it merely involves a slight modification to existing health insurance policy provisions and the associated claims processing procedures.

## **EMERGENCY RULE MAKING**

### **Minimum Standard for the Form, Content and Sale of Health Insurance**

**I.D. No.** INS-34-06-00002-E

**Filing No.** 938

**Filing date:** Aug. 2, 2006

**Effective date:** Aug. 2, 2006

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

**Action taken:** Amendment of section 52.16(c)(5) (Regulation 62) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802; and art. 49

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

**Specific reasons underlying the finding of necessity:** Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new Part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare.

**Subject:** Minimum standards for the form, content, and sale of health insurance.

**Purpose:** To clarify when plans may exclude coverage for cosmetic surgery.

**Text of emergency rule:** Paragraph (5) of subdivision (c) of Section 52.16 of Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations is amended to read as follows:

(5) cosmetic surgery, except that cosmetic surgery shall not include reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child which has resulted in a functional defect. *However, if the policy provides hospital, surgical or medical expense coverage, including a policy issued by a health maintenance organization, then coverage and determinations with respect to cosmetic surgery must be provided pursuant to Part 56 of this Title (Regulation 183);*

**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 October 30, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-34-06-00001-E, Issue of August 23, 2006.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-34-06-00001-E, Issue of August 23, 2006.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-34-06-00001-E, Issue of August 23, 2006.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-34-06-00001-E, Issue of August 23, 2006.

## **EMERGENCY RULE MAKING**

### **Physicians and Surgeons Professional Insurance Merit Rating Plans**

**I.D. No.** INS-34-06-00004-E

**Filing No.** 940

**Filing date:** Aug. 4, 2006

**Effective date:** Aug. 4, 2006

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

**Action taken:** Amendment of Part 152 (Regulation 124) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and 2343(d) and (e) and L. 2002, ch. 1, part A, section 42 as amd. by L. 2002, ch. 82, part J section 16; and L. 2005, ch. 420

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

**Specific reasons underlying the finding of necessity:** Section 42 of Part A of Chapter 1 of the Laws of 2002, requires that any physician, surgeon or dentist who wants to participate in the excess medical malpractice insurance program established by the Legislature in 1986 must participate in a proactive risk management course. Section 42 authorized the Superintendent to promulgate regulations that provide for the establishment and administration of such plans. Section 42, as originally enacted on January 25, 2002, established an effective date of July 1, 2003 for participation in these courses. However, on May 29, 2002, Section 16 of Part J of Chapter 82 of the Laws of 2002 was enacted and the effective date was amended to July 1, 2002. Chapter 420 of the Laws of 2005 was enacted and amended the requirement for taking the follow-up course for eligibility in the excess medical malpractice insurance program from once every year to once every two years.

It is essential that this amendment be promulgated on an emergency basis so that insurers are made aware of the requirements for proactive risk management courses and have the courses in place as soon as possible. Insureds must be able to avail themselves of these courses as soon as possible so that they may participate in the excess medical malpractice insurance program. This is especially important for those insureds who are presently insured in the excess medical malpractice insurance program. It is vital that their insurance be maintained on a continuous basis not only for their financial protection but also to preserve the rights of claimants who suffer injury as a result of medical malpractice. In order for their insurance to be maintained on a continuous basis, the insureds must be informed of the time frame when these courses must be completed.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Physicians and surgeons professional insurance merit rating plans.

**Purpose:** To establish guidelines and requirements for medical malpractice merit rating plans and risk management plans.

**Substance of emergency rule:** Section 152.1 is amended by adding paragraph (e) which details the statutory authority for proactive risk management programs.

Section 152.2 is amended by adding definitions for the terms physician, excess medical malpractice program and insurer.

Section 152.6 contains the standards for risk management programs in which insureds participate in order to receive premium credits. This section is amended to provide that these courses may be offered in an internet-based format.

Section 152.7 is amended by specifying how risk management programs, provided in an internet-based format, may be implemented.

Section 152.8 is renumbered to be Section 152.12 and a new Section 152.8 is added to provide the standards for proactive risk management programs which are provided for insureds who wish to qualify for the excess medical malpractice insurance programs established by the Legislature.

A new Section 152.9 is added to provide eligibility requirements for participation in the excess medical malpractice insurance program.

A new Section 152.10 is added to provide coordination of the excess medical malpractice risk management courses with risk management courses that are offered for the purpose of providing premium credits.

A new Section 152.11 is added to provide guidelines for insurers in implementing risk management programs administered for insureds who wish to qualify for participation in the excess medical malpractice insurance program established by the Legislature.

Section 152.12 is amended to provide requirements for insurers conducting audits of insureds or for insureds to conduct self-review surveys. A new provision is added requiring insurers to report, by territory and medical specialty, the number of insureds participating in risk management programs who qualify for the excess medical malpractice insurance program.

**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 1, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2343(d) provides that the Superintendent shall, by regulation, establish a merit rating plan for physicians professional liability insurance. Section 2343(e) provides that the Superintendent may approve malpractice insurance premium reductions for insured physicians who successfully complete an approved risk management course, subject to standards prescribed by the Superintendent by regulation. Section 42 of Part A of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005, requires that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature in 1986 participate in a proactive risk management program. Section 42 authorizes the Superintendent to promulgate regulations which provide for the establishment and administration of these risk management courses.

2. Legislative objectives: The objective of Section 2343(d) was the establishment, by the Superintendent, by regulation, of a merit rating plan for physicians professional liability insurance that was reasonable and not unfairly discriminatory, inequitable, violative of public policy or contrary to the best interests of the people of New York. The regulation was to include reasonable standards to be applied to merit rating plans submitted by insurers for approval by the Superintendent. Those standards are to be used to arrive at premium rates, surcharges and discounts based on an evaluation of the insured, geographical areas, specialties of practice, past and prospective loss and expense experience for medical malpractice insurance and any other factors deemed relevant in a system of merit rating.

The objective of Section 2343(e) was to permit insurers to provide premium credits for successful completion of risk management programs approved by the Superintendent.

The objective of Section 42 of Part A of the Laws of 2002 was to require that all physicians, surgeons and dentists participating in the excess

medical malpractice insurance program established by the Legislature participate in a proactive risk management program.

An effective risk management program would provide insureds with an overview of the causes of malpractice claims, emphasize communication skills and improved patient rapport skills, and focus on improving procedures. This should reduce the frequency and severity of medical malpractice claims. The intent of this amendment is to effectuate that objective.

3. Needs and benefits: The first amendment to Part 152 established standards under which risk management programs may be approved by the Superintendent. Successful completion of approved risk management programs permitted credits to be applied to physicians professional liability programs.

At the time that amendment was promulgated, all risk management courses were conducted in a classroom setting in a lecture format. Since that time, advances in technology have made Internet-based home study courses available in an array of disciplines. Insurers have requested that they be permitted to take advantage of this technology and offer Internet-based risk management courses to their medical malpractice insureds. Offering Internet-based risk management courses will allow insureds increased flexibility in participating in these courses. This may result in more insureds completing the courses, which should ultimately translate into better patient care and reductions in the incidence and cost of medical malpractice claims.

The enactment of Section 42 of Part A of Chapter 1 of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005 requires that, as of July 1, 2002, physicians, surgeons and dentists participate in a proactive risk management program in order to be eligible to participate in the excess medical malpractice insurance program established by the Legislature.

4. Costs: This rule imposes no compliance costs upon state or local governments.

There are no additional costs imposed upon regulated parties by the provisions of this amendment since, for the purposes of obtaining a premium credit, insurers are not required to offer risk management courses to their insureds, and those that offer risk management courses will not be required to include an Internet-based version. However, if they do offer these courses, these provisions offer regulated parties another option in offering risk management courses to their insureds. It is likely that it is more cost effective to offer Internet-based risk management courses to insureds in addition to, or in place of risk management courses in the lecture format. Courses conducted in a lecture format entail costs of hiring instructors, printing course materials and renting physical settings that can accommodate, and are convenient to, as many insureds that are eligible to attend.

In addition, insured physicians taking the Internet-based courses would not incur any transportation expenses that are associated with attending lecture format risk management courses. Furthermore, physicians would not have to schedule time away from their practice since these courses could be taken on line at virtually any time.

While insurers will incur additional costs when offering proactive risk management programs for the purpose of insurer eligibility in the excess medical malpractice insurance program, the statute provides that these costs will be reimbursed from funds available pursuant to Section 51 of Part A of Chapter 1 of the Laws of 2002. Reimbursement will be made according to procedures to be established by the Superintendent.

Although insurers have offered risk management programs, for the purpose of obtaining premium credits, for almost ten years, there are additional requirements specified in Section 42 of Chapter 1 of the Laws of 2002 for proactive risk management courses.

In order to satisfy the statutory requirement that these courses be proactive, insurers will also be required to conduct risk management audit at least once every two years, either by the insurer or by a self-review survey completed by the insured. There will be costs associated with developing the audit procedure, training people to conduct the audits, visiting insureds' practice settings to do the audit and implementing any necessary follow-up procedures after the results of the audit are analyzed.

These new requirements must be incorporated into the course and the course must be submitted to the superintendent for approval.

In addition, Section 42 requires that, in order for a dentist to participate in the excess medical malpractice program, he or she must participate in a proactive risk management program. Dental malpractice insurance carriers will incur costs necessary to set up proactive risk management courses, since up to this point the requirements of this Part with respect to risk management courses set up for purposes of premium credits did not apply to them.

Although the statute does not permit insurers to assess any fees against insureds for participating in these courses, insureds may have to schedule time away from their practice to participate in these risk management courses. However, it should be noted that participation in a proactive risk management course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, it is anticipated that completion of the excess medical malpractice risk management program will allow an insured physician to receive credit for Category 1 continuing medical education.

5. Local government mandates: This rule does not impose any mandates on local government.

6. Paperwork: There are paperwork requirements imposed by the provisions of the amendment on insurers with respect to offering an internet based risk management course. An insurer that decides to offer an Internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an Internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a location where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to develop new procedures for the purposes of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork burden should be minimal since insurers are already required to submit similar statistics regarding other risk management courses.

7. Duplication: This amendment will not duplicate any existing federal or state law.

8. Alternatives: The alternative of not permitting Internet-based risk management courses to be offered by insurers is not a viable alternative. The Department is of the opinion that technological advances in this area should be made available to insurers and insureds. By permitting the availability of these types of courses, it is expected that more insured physicians will be able to take these courses and the benefits of risk management will improve the quality of care provided to their patients.

Consideration was given to permitting insurers to provide non-Internet-based home study courses to their insureds. However, the Department is of the opinion that such home study courses do not afford insurers the ability to properly monitor the effectiveness of the course and to verify that the insured physician is actually taking the course as do other formats. Currently, when offering a risk management course in the lecture format, attendance must be taken of participants both before and after the lecture and admittance to the course is closed at a certain time after the start of the course. With Internet-based risk management courses, the insured physician will be required to affirm that they have read the content of the course, taken any quizzes and completed the required project. In addition, insureds will be given an individual password to use and the length of time spent on the Internet taking the course can be tracked by the insurer.

Since the proactive risk management course is required by statute, the Department could not consider the alternative of not implementing it. Although an internet based format is not directly addressed in the mandatory statute, the rule provides for this option in order to provide flexibility to both insurers and physicians, surgeons and dentists who must take such courses to qualify for the excess medical malpractice insurance coverage and to maintain consistency between the risk management credit course which is voluntary, and the course that must be taken by all insureds wishing to qualify for the excess medical malpractice insurance program.

9. Federal standards: There are no minimum standards of the federal government for the same or similar areas.

10. Compliance schedule: The provisions of this amendment will apply immediately. As required by statute, insurers must have a proactive risk management course available for their insureds in order for insureds to

participate in the excess medical malpractice insurance program. It is expected that insurers will be able to comply with the new provisions in a relatively short period of time since most medical malpractice insurers already have had other risk management programs approved by the superintendent. In order to facilitate compliance with this statute, extensive discussions have been held by the Department with the major medical malpractice insurers in this state and the Medical Society of the State of New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

Since the offering of risk management courses for the purpose of premium credits is optional for insurers, there is no compliance schedule with respect to the offering of these courses in an internet-based format. An insurer may offer an internet-based risk management course to its insureds as soon as the Department determines that the course is in compliance with the provisions of this Part.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies licensed to do business in New York State and self-insurers, none of which fall within the definition of "small business".

The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized property/casualty insurers and determined that none of them would fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees. Self-insurers typically have to be large enough to have the financial ability to self insure losses and the Department has never been provided information to indicate that any of the self-insurers are small businesses.

This rule will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Although they are not regulated parties, this part affects physicians, surgeons and dentists, some of whom may be considered small businesses as they are required to attend proactive risk management courses if they wish to be eligible to participate in the excess medical malpractice insurance program. This may entail scheduling time away from their medical practice in order to participate in these courses. However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, by providing insurers with the option of offering risk management programs in an internet-based format, physicians should be able to save time and money by taking these courses in their home or office at a time convenient to them as opposed to attending these courses when conducted in a lecture format.

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

1. Types and estimated number of rural areas: Insurers and self-insurers covered by this regulation do business in every county in this state, including rural areas as defined under Section 102 (1) of the State Administrative Procedure Act. Other affected parties, such as physicians, surgeons and dentists, conduct their practices throughout the state.

2. Reporting, recordkeeping and other compliance requirements: There are paperwork requirements imposed by the provisions of this amendment on insurers with respect to offering an internet-based risk management course. An insurer that decides to offer an internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a setting where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to develop new procedures for the purpose of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork should have a minimal impact since insurers are already required to submit similar statistics regarding other risk management courses.

3. Costs: This rule imposes no compliance costs upon state or local governments.

It is not expected that insurers would incur undue expenses in offering internet-based risk management courses to their insureds for the purpose of obtaining premium credits. In fact, it is likely that it is more cost effective to offer internet-based risk management courses to insureds in addition to, or in place of, risk management courses in the lecture format.

Insureds would not be unduly affected by participating in internet-based risk management courses and would probably incur time and financial savings since they would be able to take these courses in their home or office at a time convenient to them.

Insurers will incur additional costs when offering proactive risk management programs to insureds for the purpose of eligibility in the excess medical malpractice insurance program. However, the statute provides that their costs will be reimbursed from statutory funds according to procedures to be established by the Superintendent. Insurers must offer these courses, and on a biennial basis, conduct risk management audits or have insureds conduct self-audits. These new requirements are statutorily mandated, but should not impose any undue hardships for insurers.

However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

It should also be noted that portions of the excess medical malpractice risk management programs will be reviewed by the Medical Society of the State of New York for qualification as Category 1 of continuing medical education credit. Therefore, an insured who successfully completes this course will qualify both for continuing medical education and for participation in the excess medical malpractice insurance program.

4. Minimizing adverse impact: The regulation applies to regulated parties that do business throughout New York State and does not impose any adverse impact on rural areas. Permitting insurers to offer risk management courses in an internet-based format should benefit insureds in rural areas through savings of time and money. Instead of traveling to central locations throughout the state to attend these courses in a lecture format, they can take the courses on computers in their home or office at a time convenient to them.

5. Rural area participation: The Department met extensively with the major medical malpractice insurers in New York State to solicit their opinions on the subject of proactive risk management programs. The Department also solicited input from the Medical Society of the State of New York in order that these courses would qualify for continuing medical education credit. Their comments were taken into account in developing the provisions of this Part.

#### **Job Impact Statement**

This rule should not have any adverse [ss9][cf3n][cad142][rs9]impact on jobs and employment opportunities in this State since it merely sets forth guidelines that medical malpractice insurers must follow when developing statutorily prescribed proactive risk management programs that must be submitted to the Superintendent for approval. It also permits insurers to offer risk management courses in an internet-based format.

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## New York State 911 Board

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### INFORMATION NOTICE

#### NOTICE OF PROPOSED AMENDMENT

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service

suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

*Proposed Amendments to Minimum Standards Regarding Equipment, Facilities and Security for Public Safety Answering Points.* Summary. At its meeting of August 2, 2006, the Board proposed an amendment to the standards relating to minimum standards regarding equipment, facilities and security for public safety answering points (PSAPs). This amendment clarifies the wording of the standard for the equipment capability of intelligent workstations (IWS). As originally adopted, the standard appears to require that the PSAP has the option of being able to process either 10 digits of ANI information or 20 digits of ALI information. The amendment makes it clear that there is in fact no option: the PSAP must be capable of processing 10 digits of ANI as well as 20 digits of ALI. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

Further information, contacts: Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of Counsel, 41 State Street, Suite 830, Albany NY 12231, fax: 518-473-9211, phone: 518-474-6740

Text of proposed rule: Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Section 5203.2(a), is amended to read as follows:

§ 5203.2 Equipment.

(a) Intelligent Workstations (IWS).

(1) All PSAPs shall have the ability to integrate multiple systems (CAD, IWS, and Mapping) into one operational system.

(2) All PSAPs shall have the ability to accept and process 10 digits of ANI information [or] and 20 digits (10 ANI & 10 pANI) of ALI information.

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## Niagara Frontier Transportation Authority

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### NOTICE OF ADOPTION

#### **Procurement Guidelines**

**I.D. No.** NFT-21-06-00005-A

**Filing No.** 941

**Filing date:** Aug. 7, 2006

**Effective date:** Aug. 23, 2006

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

**Action taken:** Amendment of section 1159.4 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1299-e(5) and 1299-t

**Subject:** The Niagara Frontier Transportation Authority's procurement guidelines.

**Purpose:** To make technical corrections and conform to Federal law.

**Text or summary was published** in the notice of proposed rule making, I.D. No. NFT-21-06-00005-P, Issue of May 24, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott St., Buffalo, NY 14203, (716) 855-7398, e-mail: Ruth\_Keating@nfta.com

**Assessment of Public Comment**

The agency received no public comment.

## Public Service Commission

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

#### Temporary Waivers/Suspensions of Certain Provisions of Consolidated Edison Company of New York, Inc.'s Electric Tariff

**I.D. No.** PSC-34-06-00003-EP

**Filing date:** Aug. 3, 2006

**Effective date:** Aug. 3, 2006

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

**Action taken:** The commission, on Aug. 3, 2006, adopted an order in Case 06-E-0894 approving on an emergency basis, a waiver/suspension of certain tariff provisions contained in Consolidated Edison Company of New York, Inc.'s schedule for electric service, P.S.C. Nos. 9, 2-Retail Access, SC 14RA and PASNY No. 4.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

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

**Specific reasons underlying the finding of necessity:** Immediate adoption is necessary to temporarily waive and/or suspend certain tariff provisions of Consolidated Edison Company of New York, Inc. (Con Edison) in order to facilitate the ability of customers located in Queens and Westchester County to recover from the hardships associated with power outages that occurred in those areas from July 17, 2006 through July 25, 2006 and to ensure that customers are not charged for the time period in which they did not have electric service.

**Subject:** Temporary waivers/suspensions of certain provisions of Consolidated Edison Company of New York, Inc.'s electric tariff.

**Purpose:** To approve waivers/suspensions of certain provisions of Consolidated Edison Company of New York, Inc.'s electric tariff for two billing cycles.

**Substance of emergency/proposed rule:** The Public Service Commission approved on an emergency basis a waiver/suspension of certain provisions contained in Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule for electric service for two billing cycles to facilitate the ability of customers located in Queens and Westchester County to recover from the hardships associated with power outages that occurred in those areas from July 17, 2006 through July 25, 2006 and to ensure that customers are not charged for the time period in which they did not have electric service. The Commission also directed Con Edison to refrain from terminating or disconnecting customers in the same areas for the same period of time.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The rule will expire October 31, 2006.

**Text of rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, 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.

(06-E-0894SA1)

### NOTICE OF ADOPTION

#### Market Supply Charge Complaint by Strategic Power Management, Inc. against Orange and Rockland Utilities, Inc.

**I.D. No.** PSC-05-06-00018-A

**Filing date:** Aug. 2, 2006

**Effective date:** Aug. 2, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order directing Orange and Rockland to file tariff amendments to modify the calculation and presentation of its market supply charge based on a complaint filed by Strategic Power Management, Inc.

**Statutory authority:** Public Service Law, section 66(1)

**Subject:** Strategic Power Managements, Inc. complaint against Orange and Rockland regarding its market supply charge.

**Purpose:** To consider the complaint.

**Substance of final rule:** The Commission adopted an order directing Orange and Rockland to file tariff amendments to modify the calculation and presentation of its market supply charge based on a complaint filed by Strategic Power Management Inc., 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.

(06-M-0003SA1)

### NOTICE OF ADOPTION

#### Transfer of Water Plant Assets between H and H Budd Earth Moving and Excavating Co., Inc. and Spring Glen Lake Water Company LLC

**I.D. No.** PSC-06-06-00016-A

**Filing date:** Aug. 7, 2006

**Effective date:** Aug. 7, 2006

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

**Action taken:** The commission, on July 19, 2006, adopted an order approving the transfer of the water plant assets of H and H Budd Earth Moving and Excavating Co., Inc. to Spring Glen Lake Water Company LLC.

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

**Subject:** Transfer of water plant assets.

**Purpose:** To transfer the water plant assets of H and H Budd Earth Moving and Excavating Co., Inc. to Spring Glen Lake Water Company LLC.

**Substance of final rule:** The Commission adopted an order approving the transfer of the water plant assets of H and H Budd Earth Moving and Excavating Co., Inc. to Spring Glen Lake Water Company LLC, 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.

(06-W-0060SA1)

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

**Inter-Carrier Telephone Service Quality Standards and Metrics  
by the Carrier Working Group**

**I.D. No.** PSC-34-06-00008-P

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

**Proposed action:** The commission is considering modification to existing inter-carrier telephone service quality measures and standards as proposed by the Carrier Working Group and recommended by staff.

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

**Subject:** Inter-carrier telephone service quality standards and metrics.

**Purpose:** To incorporate appropriate modifications to the existing inter-carrier telephone service quality measures and standards.

**Substance of proposed rule:** The Commission is considering modifications to the New York State Inter-Carrier Service Quality Guidelines (the C2C Guidelines), which were established, and are routinely updated, in Case 97-C-0139. Revisions to the C2C Guidelines are proposed by the Carrier Working Group (CWG), an industry group that meets regularly and whose active participants includes the incumbent and competitive local exchange telecommunications carriers in New York State and the staff of the Department of Public Service. Department staff will be making recommendations to modify the C2C Guidelines applicable to Verizon New York Inc. and Frontier Telephone of Rochester, which may be derived by consensus of the Carrier Working Group or by analysis of the CWG parties' non-consensus positions. The specific modifications to the C2C Guidelines being considered by the Commission in this action include: administrative changes, *i.e.*, non-process changes of a clerical nature or that correct minor errors and modifications developed by the Joint Subcommittee which incorporate the findings of audits conducted in other state C2C proceedings; modifications to the Ordering metric measuring Billing Completion Notification; and, modifications that remove certain products from measurement in the Billing domain. The most recent version of the C2C Guidelines is available at: <http://www.dps.state.ny.us/Version12EastC2CguidelinesBlackline.pdf>.

A link to the Commission Order approving the most recent version of the C2C Guidelines is available at <http://www.dps.state.ny.us/carrier.htm>

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(97-C-0139SA26)

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

**Inter-Carrier Telephone Service Quality Standards and Metrics  
by the Carrier Working Group**

**I.D. No.** PSC-34-06-00009-P

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

**Proposed action:** The commission is considering modification to existing inter-carrier telephone service quality measures and standards as proposed by the Carrier Working Group and recommended by staff.

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

**Subject:** Inter-carrier telephone service quality standards and metrics.

**Purpose:** To review recommendations from the Carrier Working Group to incorporate appropriate modifications to the existing inter-carrier telephone service quality measures and standards.

**Substance of proposed rule:** The Commission is considering modifications to the New York State Inter-Carrier Service Quality Guidelines (the C2C Guidelines), which were established, and are routinely updated, in Case 97-C-0139. Revisions to the C2C Guidelines are proposed by the Carrier Working Group (CWG), an industry group that meets regularly and whose active participants includes the incumbent and competitive local exchange telecommunications carriers in New York State and the staff of the Department of Public Service. Department staff will be making recommendations to modify the C2C Guidelines applicable to Verizon New York Inc. and Frontier Telephone of Rochester, which may be derived by consensus of the Carrier Working Group or by analysis of the CWG parties' non-consensus positions. The specific modifications to the C2C Guidelines being considered by the Commission in this action include: administrative changes (*i.e.*, non-process changes of a clerical nature or that correct minor errors) and a proposal to streamline the C2C Guidelines and remove certain metrics. The most recent version of the C2C Guidelines is available at: <http://www.dps.state.ny.us/Version12EastC2CguidelinesBlackline.pdf>.

A link to the Commission Order approving the most recent version of the C2C Guidelines is available at <http://www.dps.state.ny.us/carrier.htm>

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(97-C-0139SA27)

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

**Economic Development Programs by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-34-06-00010-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 whether to approve, modify or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 19 to become effective Nov. 1, 2006.

**Statutory authority:** Public Service Law, sections 65, 66, 66(12), 66(12-b)

**Subject:** Economic development programs.

**Purpose:** To cap bills under its economic development programs.

**Substance of proposed rule:** The Commission is considering Rochester Gas and Electric Corporation's (RG&E) request to update its electric tariff, P.S.C. No. 19, to cap bills under its Economic Development Programs. The proposal is being made to ensure that customers participating in RG&E's Economic Development Programs do not pay more for electric service than they would have paid if they were not participating in the programs. The Commission may approve, reject or modify, in whole or in part, RG&E's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.  
(02-E-0198SA9)

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

**Net Metering Service to Electric Utility Consumers**

**I.D. No.** PSC-34-06-00011-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 the adoption of the net metering standard identified in amendments to the Public Utility Regulatory Policies Act (16 U.S.C. section 2601 *et seq.*), and the resolution of related issues, as discussed in the order instituting proceedings and notice soliciting comments, issued Aug. 4, 2006 in Case 06-E-0761.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), 66(1), (2), (5), (27), 66-j, 66-l and 67; and 16 U.S.C. section 2621

**Subject:** Net metering service to electric utility consumers.

**Purpose:** To consider the adoption of the net metering standard.

**Substance of proposed rule:** The Public Service Commission is considering the adoption of the net metering standard identified in amendments to the Public Utility Regulatory Policies Act (16 U.S.C. § 2601 *et seq.*), and the resolution of related issues, as discussed in the Order Instituting Proceedings and Notice Soliciting Comments, issued August 4, 2006 in Case 06-E-0761. The Commission may adopt, reject or modify the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.  
(06-E-0761SA1)

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

**Time-Based Metering and Communications Services to Electric Utility Consumers**

**I.D. No.** PSC-34-06-00012-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 the adoption of the time-based metering and communications standard identified in amendments to the Public Utility Regulatory Policies Act (16 U.S.C. section 2601 *et seq.*), and the resolution of related issues, as discussed in the order instituting proceedings and notice soliciting comments, issued Aug. 4, 2006 in Case 06-E-0868.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), 66(1), (2), (5), (27), 66-j, 66-l and 67; and 16 U.S.C. section 2621

**Subject:** Time-based metering and communications services to electric utility consumers.

**Purpose:** To consider the adoption of the time-based metering and communications standard.

**Substance of proposed rule:** The Public Service Commission is considering the adoption of the time-based metering and communications standard identified in amendments to the Public Utility Regulatory Policies Act (16 U.S.C. § 2601 *et seq.*), and the resolution of related issues, as

discussed in the Order Instituting Proceedings and Notice Soliciting Comments, issued August 4, 2006 in Case 06-E-0868. The Commission may adopt, reject or modify the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.  
(06-E-0868SA1)

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

**Submetering of Electricity by Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC**

**I.D. No.** PSC-34-06-00013-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 whether to grant, deny or modify, in whole or part, the petition filed by Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC, to submeter electricity at 67 Wall St., New York, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To submeter electricity at 67 Wall St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC, to submeter electricity at 67 Wall Street, New York, New York.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.  
(06-E-0891SA1)

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

**Meramec Bushing Current Transformer by Meramec Electrical Products Incorporated**

**I.D. No.** PSC-34-06-00014-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, a petition filed by Meramec Electrical Products Incorporated, for approval of Meramec bushing current transformer.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters, transformers, and auxiliary devices – case 279.

**Purpose:** To permit electric utilities in New York State to use the Meramec bushing current transformer.

**Substance of proposed rule:** The Commission will consider a request from Meramec Electrical Products Incorporated for the approval to use the Meramec Electrical Products Bushing Current Transformer in New York State. According to Meramec Electrical Products, the Bushing Current Transformer is capable of providing revenue metering class accuracy, and has been tested to meet the compliance accuracy requirements as stated in ANSI 12.11 and IEEE C57.13 test specifications. In accordance with 16 NYCRR Part 93, National Grid New York, has submitted a letter of intent to use the Bushing Current Transformer in its customer billing applications, if approved.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(06-E-0906SA1)

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

**Actaris Metering Systems' Dattus FM Gas Meter by KeySpan Energy Delivery**

**I.D. No.** PSC-34-06-00015-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, reject or modify, in whole or in part, an application by KeySpan Energy Delivery for the approval of the Dattus FM Gas Meter, manufactured by Actaris Metering Systems.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Case 6480 – NYCRR Part 227, approval of types of gas meters and accessories.

**Purpose:** To permit gas utilities in New York State to use Actaris Metering Systems, Dattus FM Gas Meter.

**Substance of proposed rule:** The Commission will consider a request from KeySpan Energy Delivery for the approval to use the Actaris Metering Systems Dattus FM Gas Meter. The Dattus FM Gas Meter is based on new technology that senses gas flow using fluidic oscillation technology. According to KeySpan Energy Supply, the Dattus FM Gas Meter is capable of providing metering class accuracy in commercial and industrial accounts, and has been tested to meet the accuracy requirements as stated in ANSI B109 test specifications.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(06-G-0932SA1)

**Department of Taxation and  
Finance**

**NOTICE OF ADOPTION**

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel**

**I.D. No.** TAF-24-06-00008-A

**Filing No.** 942

**Filing date:** August 7, 2006

**Effective date:** August 7, 2006

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

**Action taken:** Amendment of section 492.1(b)(1)(xlii) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); 528(a) and (c); and L. of 2006, ch. 35

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

**Purpose:** To amend the fuel use tax rates and aggregate rates per gallon of the fuel use tax on motor fuel and diesel motor fuel and jointly administered art. 13-A carrier tax for the calendar quarter beginning April 1, 2006, and ending June 30, 2006; reflect recently enacted legislation that implements a State sales and use tax reduction on sales of such fuel; calculate such rates on an average basis for this three month period pursuant to section 528(c) of the Tax Law.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. TAF-24-06-00008-EP, Issue of June 14, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**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

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

**Taxation of Corporate Partners**

**I.D. No.** TAF-34-06-00005-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 1-2.6 and Parts 3 and 4 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; and 1096(a)

**Subject:** Taxation of corporate partners.

**Purpose:** To provide guidance with regard to the computation of the business corporation franchise tax imposed by art. 9-A of the Tax Law for corporations that are partners in partnerships or that are members of limited liability companies that are treated as partnerships under art. 9-A.

**Substance of proposed rule (Full text is posted at the following State website: [www.nystax.gov](http://www.nystax.gov)):** This proposal amends the Business Corporation Franchise Tax Regulations, as published in Subchapter A of Chapter 1 of Title 20 NYCRR, relating to the taxation of corporate partners.

Section 1 amends the definition of a partnership contained in section 1-2.6 of the regulations to include limited liability companies that have elected to be treated as partnerships under Federal regulations.

Sections 2, 3 and 4 amend sections 3-1.2, 3-2.1 and 3-3.1 of the regulations, respectively, to cross reference taxpayers to Subpart 3-13 for rules relating to corporate partners.

Section 5 amends section 3-3.2(a)(1) of the regulations relating to the definition of investment capital to delete cross references to former sections 3-6.3(e) and (f) relating to mergers and acquisitions which have been repealed. In addition, it sets forth the rule, with respect to a taxpayer that is a partner in a partnership using the aggregate method or that is a foreign corporate limited partner which has made an election with respect to such

partnership pursuant to section 3-13.5 of this proposal, that the election to treat cash as business or investment capital is made at the partner level and that the partner takes into account its proportionate part of partnership items constituting cash.

Section 6 amends section 3-3.2(a)(2)(vii) of the regulations relating to the definition of investment capital to provide, with respect to a taxpayer that is a partner in a partnership using the aggregate method or that is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to section 3-13.5 of the proposal, that in determining whether a stock, bond or other security is held for sale to customers in the regular course of business that, with respect to items held by such partnership, we look at the item itself to see if it is held as inventory by the partnership for sale to its customers in the regular course of its business.

Section 7 amends section 3-3.2(d)(2)(ii) of the regulations relating to the definition of investment capital to provide, with respect to a taxpayer that is a partner in a partnership using the aggregate method or that is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to section 3-13.5 of the proposal, that the determination of whether a taxpayer is principally engaged in the lending of funds is made at the partner level and that the partner takes into account its distributive share of gross receipts from the partnership in making such determination.

Section 8 conforms section 3-3.3(d) of the regulations relating to the definition of business capital to the amendment made by section 5.

Section 9 amends section 3-4.1 of the regulations to cross reference taxpayers that are partners in partnerships to Subpart 3-13 for rules relating to corporate partners.

Section 10 amends section 3-5.1(b)(1) of the regulations relating to the computation of the tax measured by the fixed dollar minimum to capture the general executive officer concept at the partnership level.

Sections 11 amends the definition of the term subsidiary contained in section 3-6.2 of the regulation to provide that stock of a corporation owned through a partnership is not directly owned by the taxpayer and therefore does not meet the definition of a subsidiary. It also provides an example illustrating the rule.

Section 12 amends the definition of subsidiary capital contained in section 3-6.3 of the regulations to provide that where a taxpayer owns directly more than 50 percent of the stock of a corporation that any stock of such corporation owned by a partnership in which the taxpayer is a partner qualifies as subsidiary capital. Conversely, it provides that where a taxpayer does not directly own more than 50 percent of the stock of a corporation, any stock of such corporation owned by a partnership in which the taxpayer is a partner does not qualify as subsidiary capital but may qualify as investment capital. It also provides examples illustrating the rules.

Sections 13 and 14 amend sections 3-11.1 and 3-12.1 of the regulations, respectively, to cross reference taxpayers to Subpart 3-13 for rules relating to corporate partners.

Section 15 amends the index of Subpart 3-13, Corporate Partners, to facilitate the amendments thereto.

Section 16 renumbers section 3-13.1 to 3-13.5, repeals sections 3-13.2 and 3-13.3 and adds new sections 3-13.1, 3-13.2, 3-13.3 and 3-13.4.

(a) Section 3-13.1 provides that except for a foreign corporate limited partner that has made an election with respect to a partnership pursuant to section 3-13.5 of the proposal, that a taxpayer that is a partner in a partnership shall compute its tax under either the aggregate or entity method and provides a general description of each method.

(b) Section 3-13.2 sets forth the determination of the applicable method (aggregate or entity) of computing the tax under Article 9-A of the Tax Law. It provides that a taxpayer must use the aggregate method in computing its tax if it has access to the necessary information and provides criteria where the taxpayer is presumed to have access to such information. In addition, it provides that the taxpayer may overcome the presumptions and be allowed to use the entity method if it can establish and certifies that the information is not obtainable. It further provides how the determination is made with respect to lower tier partnerships. It also provides definitions of terms contained within the presumptions.

(c) Section 3-13.3 sets forth the computation of tax under the aggregate method. It provides that a taxpayer shall take into account its distributive share of partnership items of receipts, income, gain, loss and deduction and its proportionate part of each partnership asset and liability and activity in computing its tax bases under Article 9-A of the Tax Law. It retains the existing source and character rules in current section 3-13.2. In addition, it provides that a taxpayer's proportionate part of assets and liabilities and activities shall be determined in accordance with the taxpayer's capital

interest in the partnership unless it does not properly reflect the taxpayer's share of partnership items constituting business and investment income. In such cases, the taxpayer's proportionate part is determined using the percentage resulting from the manner in which the partners divide the partnership profits or losses. It also provides that an allocation (commonly referred to as a special allocation) of an item, amount or activity, even if recognized for federal income tax purposes, will not be recognized if it has as a principal purpose the avoidance or evasion of New York State tax and sets forth criteria for determining whether a principal purpose is the avoidance or evasion of tax. Lastly it provides specific rules relating to the computation of each tax base under Article 9-A of the Tax Law.

(d) Section 3-13.4 sets forth the computation of tax under the entity method. It provides that, in computing each tax base under Article 9-A of the Tax Law, a corporate partner is treated as owning an interest in the partnership entity and that the interest is an intangible asset which is business capital. It also provides specific rules relating to the computation of each tax base under Article 9-A.

Sections 17 and 18 make technical and clarifying amendments to section 3-13.5, as renumbered by section 16 of the proposal, relating to foreign corporate limited partners. In addition, section 17 amends subdivision (a) of section 3-13.5 to provide that if the taxpayer does not have the information necessary to compute its tax as prescribed in such section, it may treat its distributive share of partnership items as business income and its interest in the partnership as business capital. It further provides how such amounts shall be allocated.

Section 19 adds a new section 3-13.6 which retains the rules in current section 3-13.3 relating to tiered partnerships and makes technical and clarifying amendments thereto.

Section 20 adds a new section 3-13.7 that provides for the treatment of a gain or loss resulting from the sale of a partnership interest.

Section 21 amends section 4-1.1 of the regulations to cross reference taxpayers to Subpart 3-13 for rules relating to corporate partners and section 4-6.5 for allocation rules relating to corporate partners.

Section 22 amends section 4-2.2 of the regulations to set forth the determination of the principally engaged test with respect to taxpayers engaged in the conduct of aviation or in the conduct of a railroad or trucking business. In addition, it provides how such determination is made in the case of a taxpayer that is a partner in a partnership using the aggregate method or that is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to section 3-13.5 of the proposal.

Section 23 makes technical and clarifying amendments to paragraphs (1) and (2) of subdivision (a) of section 4-6.5 relating to the allocation rules for a taxpayer that is a partner in a partnership using the aggregate method. In addition, it sets forth rules that provide for inter-entity eliminations and exclusions in the property and receipts factors in computing the business allocation percentage and alternative business allocation percentage.

Section 24 renumbers paragraphs (3) and (4) of subdivision (a) of section 4-6.5 to (4) and (6), respectively, and adds new paragraphs (3) and (5). New paragraph (3) provides examples illustrating the inter-entity eliminations and exclusions discussed in section 23. No amendments are made to renumbered paragraph (4). New paragraph (5) sets forth the allocation rules for a taxpayer using the aggregate method that is principally engaged in the conduct of aviation or in the conduct of a railroad or trucking business.

Section 25 makes technical and clarifying amendments to paragraph (6) of subdivision (a) of section 4-6.5, as renumbered by section 24, relating to the computation of the investment allocation percentage.

Section 26 reletters subdivisions (b), (c) and (d) of section 4-6.5 to (c), (d) and (e), respectively, repeals subdivision (e) and adds a new subdivision (b). New subdivision (b) sets forth the allocation rules for a taxpayer using the entity method. It provides that a taxpayer using the entity method shall allocate its distributive share of partnership items of income, gain, loss and deduction included in its business income and alternative business income by its business allocation percentage computed pursuant to section 4-2.2 of the regulations. Such percentage is computed without regard to its distributive share of any partnership items of income, gain, loss and deduction and its proportionate part of the partnership's assets, liabilities and activities. In addition, it provides that if using such percentage does not properly reflect the taxpayer's business activity in New York State, the taxpayer shall use any other method that the Commissioner determines results in a proper reflection of the taxpayer's business activity in New York State.

Section 27 makes technical and clarifying amendments to subdivision (c) of section 4-6.5, as relettered by section 26, relating to the computation

of the business allocation percentage for taxpayers that are foreign corporate limited partners.

Section 28 renumbers paragraph (4) of subdivision (c) of section 4-6.5, as relettered by section 26 of this proposal, to paragraph (5) and adds a new paragraph (4). New paragraph (4) sets forth the allocation rules for taxpayers that are foreign corporate limited partners that are principally engaged in the conduct of aviation or in the conduct of a railroad or trucking business. No amendments are made to paragraph (5) relating to the computation of the investment allocation percentage for a foreign corporate limited partner.

Section 29 provides that the amendments shall apply to taxable years beginning on or after January 1, 2007.

**Text of proposed rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn\_Kaltenborn@tax.state.ny.us

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

#### **Regulatory Impact Statement**

1. Statutory authority: Tax Law, sections 171, subdivision First; and 1096(a) authorize the Commissioner of Taxation and Finance to make reasonable rules consistent with law that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. This authority also provides for the adoption of rules that are appropriate to carry out and administer the New York State Franchise Tax on Business Corporations imposed by Article 9-A of the Tax Law.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives in order to provide comprehensive guidance regarding the computation of tax under Article 9-A of the Tax Law for corporations that are partners in partnerships or that are members of limited liability companies (LLCs) treated as partnerships under Article 9-A. For purposes of this Regulatory Impact Statement, the term "partnership" also includes an LLC treated as a partnership under Article 9-A and the term "partner" also includes a member of such an LLC.

3. Needs and benefits: It has become more common for corporations to be partners in partnerships. Although an estimate of the number of corporate partners is not available, the number of partnerships and LLCs operating in the State has grown significantly. The number of partnerships has increased from 75,315 in 1980 to 191,287 in 2004. LLCs, a new form of organization in the 1990's, have increased from 19,189 in 1999 to 56,170 in 2005. A partnership or LLC could have many corporate partners and a corporation could be a partner or member in many partnerships or LLCs. It became apparent that corporate partners were taking various filing positions on their returns. This led to requests for advice from the Audit Division, taxpayers and practitioners regarding the computation of the business corporation franchise tax for a corporate partner. Seeing a need to provide guidance in this area, the Department enlisted the aid of representatives from several large corporations, trade and professional associations, and the New York City Department of Finance, as well as tax practitioners. The proposed rule is the product of a consultative process with this working group and to a large extent reflects a consensus of the working group. The Department also requested comments from the Tax Section of the New York State Bar Association on a draft of the rule. The Tax Section issued a report on March 2, 2006, indicating its general support for the rule. The Department made further modifications to the draft based on this report. Significant alternatives raised by the Tax Section that were not incorporated in the proposed rule are included in the Alternatives section of this Regulatory Impact Statement.

The purpose of the rule is to set forth both existing and new Department policy regarding the computation of tax under Article 9-A of the Tax Law for corporations that are partners. The rule largely conforms to the Federal provisions relating to the taxation of partnerships and their partners. The rule provides that a taxpayer that is partner shall compute its tax with respect to its interest in the partnership under the aggregate or entity method as applicable per the rule. Under the aggregate method, a corporate partner takes into account its distributive share of receipts, income, gain, loss or deduction and its proportionate part of assets, liabilities and transactions from the partnership. Under the entity method, a corporate partner is treated as owning an interest in a partnership entity. The interest is consid-

ered an intangible asset that constitutes business capital. In addition, the rule specifies the computation of the tax bases under each method. The rule also makes several clarifying and technical amendments.

The amendments codify both existing and new Department policy regarding the taxation of corporate partners under Article 9-A. The proposed rule will provide taxpayers and practitioners with information about these policies. These amendments will provide a positive impact on taxpayers that are partners in partnerships and practitioners since the rule clarifies how to properly compute the tax. The rule makes it clear that the preferred approach is to use the aggregate method. However, if the corporate partner is unable to obtain the necessary information to use the aggregate method, the rule allows the corporate partner to use the entity method.

The aggregate method of taxation for a corporate partner is existing policy under Article 9-A regulations. The rule further clarifies the computation of the tax bases under Article 9-A for a corporate partner under the aggregate method. This clarification benefits taxpayers and practitioners by providing guidance as to how to compute a corporate partner's tax under the aggregate method.

A change in policy contained within the amendments relates to the treatment of stock of a corporation owned by the partnership. Prior to these amendments, stock of a corporation owned by the partnership was taken into account by a corporate partner in determining whether such other corporation was a subsidiary of the corporate partner and, hence, whether the stock of such corporation was considered subsidiary capital. An existing rule contained in Section 3-6.2(b) of the regulations requires direct ownership of stock when determining whether a corporation is a subsidiary so that stock owned through a corporate structure consisting of tiers of corporations is not considered. The amendments extend this treatment to include stock owned by a partnership. This rule will provide consistency in that direct ownership is required in all cases; it does not matter whether the stock is owned through tiers or chains of corporations and/or partnerships. Neither situation constitutes direct ownership.

The Department recognizes there are certain instances where a taxpayer is unable to obtain the necessary information from a partnership in order to file under the aggregate method. The amendments codify the entity method for these instances. This alternative method helps eliminate confusion and makes it easier for taxpayers to comply with the Tax Law.

#### 4. Costs:

(a) Costs to regulated persons: The rule does not impose any new reporting, recordkeeping or other compliance costs on regulated persons. The rule benefits regulated persons by providing important guidance needed for proper computation and reporting of taxes. Since the changes are largely clarifying in nature, the impact of the rule on tax liability for regulated parties is estimated to be none or minimal. The change in policy regarding the determination of subsidiary capital may have an impact on the tax liability of some taxpayers. The impact of this change on a particular taxpayer, which could be positive or negative, will depend on the specific circumstances of the taxpayer. We estimate that this change will have no net impact on taxpayers as a whole.

(b) Costs to the agency and to the State and local governments for the implementation and continuation of this rule: It is estimated that the implementation and continued administration of this rule will have no costs to this agency, New York State, or its local governments. As indicated, the rule provides guidance on how to compute the tax under Article 9-A for taxpayers that are corporate partners. Since the changes are largely clarifying in nature, the revenue impact is estimated to be none or minimal. The change regarding the determination of subsidiary capital is estimated to have no net revenue impact.

(c) Information and methodology: These conclusions are based upon an analysis of the rule from the Department's Technical Services Division, Office of Counsel, Taxpayer Services and Revenue Division, Office of Tax Policy Analysis, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau. No quantitative information was available to determine the tax liability impact on taxpayers and the revenue impact on the State and local governments. Our analysis relied on discussions with the working group, which included a cross section of industries and interests, on the effect of each aspect of the rule. It was thought that any positive or negative impacts on an individual firm would vary over time and that logically consistent rules applied on a continuing basis would provide fiscal neutrality.

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

6. Paperwork: The rule imposes no reporting requirements, forms, or other paperwork upon regulated parties beyond those required by existing

law and regulations. The Department has been working on developing a form by which partnerships would furnish information to their corporate partners to facilitate the partners' computation of tax. The Tax Section Report supports development of such a form. This rule does not require such a form, however, and if developed, it will be prescribed under authority apart from this rule.

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

8. Alternatives: One alternative considered with the working group was to only provide for the aggregate method of taxation. However, it was decided that there are taxpayers that are corporate partners that need another method where they are unable to obtain the necessary information from the partnership in order to use the aggregate method. To address this, the regulation provides for the entity method.

An additional alternative was considered in determining whether a taxpayer needed to use the aggregate method of taxation. The draft rule addressed in the Tax Section Report provided that a corporate partner would be presumed to have access to the information if it had a 1% or greater interest in the partnership. The Tax Section Report suggested that this threshold should be 10% and also suggested a monetary threshold of a \$10 million interest in the partnership. The Department considered the suggestion and raised the threshold to 5% and added a monetary threshold of a \$5 million interest in the partnership. The Department considers a 5% or \$5 million interest to represent a significant interest which should appropriately give rise to the presumption of having information. In any event, it is a presumption, which can be overcome by the taxpayer if it can show that it is unable to obtain the necessary information.

The Tax Section Report also suggested that the stock of a corporation owned by the partnership should be considered in determining whether such corporation is a subsidiary of the corporate partner and whether the stock of such corporation constitutes subsidiary capital. The Department thinks the better view, which is reflected in the rule, is that the stock is not considered. We believe it is important to be consistent with the established rule that a corporation must directly own, not through tiers or chains of corporations, the stock of a corporation for such corporation to be considered its subsidiary (20 NYCRR 3-6.2(b)). Whether the stock is owned through tiers of partnerships or tiers of corporations should not be determinative. If the rule were different depending on whether the entity in the middle of the chain is a partnership or a corporation, there would be both opportunities for manipulation and a trap for the unwary. Furthermore, it is not clear from the Tax Section suggestion how the rule would work if the middle entity were an LLC, which may elect to be treated as a partnership or as a corporation for Federal income (and therefore NYS business corporation franchise) tax purposes. Also, under the Tax Section alternative, there would be significant issues on how to compute expenses directly and indirectly attributed to subsidiary capital or to the income therefrom.

Lastly, another alternative was considered with respect to the entity method of taxation. One practitioner suggested that where it is apparent that the partnership holds almost exclusively items that would qualify as investment capital, there should be an exception to the rule that an interest in the partnership is business capital and allocated by the business allocation percentage. It was agreed that no change should be made to the rule in this regard because it is not feasible to define this type of partnership and because the rule already provides the Commissioner with the authority to make a discretionary adjustment to the business allocation percentage where it does not properly reflect the business income, capital or activity of the taxpayer in New York State.

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

10. Compliance schedule: The amendments will take effect when the Notice of Adoption is published in the State Register and shall apply to taxable years beginning on or after January 1, 2007.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: The adoption of comprehensive rules with regard to the computation of tax under Article 9-A of the Tax Law for corporations that are partners in partnerships or members of limited liability companies that are treated as partnerships under Article 9-A is applicable to all businesses, large and small. The amendments will provide guidance concerning the tax computation for corporate taxpayers subject to the Business Corporate Franchise Tax imposed by Article 9-A of the Tax Law that are partners in partnerships. We do not have information to estimate the number of these partners that might be small businesses with any degree of certainty. Local governments are not affected.

2. Compliance requirements: No additional time is needed in order to comply with this rule.

3. Professional services: No additional professional services beyond those already employed by a small business in preparing its taxes will be required to comply with this rule.

4. Compliance costs: See Part 4 of the "Regulatory Impact Statement for this rule. There would no variation in costs for small businesses.

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

6. Minimizing adverse impact: The rule does not distinguish between affected small businesses and other types of businesses. The rule places no additional burdens on small businesses or local governments.

7. Small business and local government participation: The following organizations have been given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors; the Small Business Council of the New York State Business Council; and the Retail Council of New York State. In addition, drafts of this rule were sent to the following: the Business Council of New York State, the New York State Bar Association, the Association of Bar of the City of New York, the New York City Department of Finance; and the Department's working group on the taxation of corporate partners, as mentioned in the "Regulatory Impact Statement".

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

1. Types and estimated numbers of rural areas: The purpose of these amendments is to provide comprehensive guidance with regard to the computation of tax under Article 9-A of the Tax Law for corporations that are partners in partnerships or members of limited liability companies that are treated as partnerships under Article 9-A. Some taxpayers affected by these rules may be located in rural areas throughout the State. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: No additional time is needed in order to comply with this rule. No additional professional service will be required to comply with this rule.

3. Costs: See Part 4 of the "Regulatory Impact Statement" for this rule. There are no variations in costs for public or private concerns in rural areas.

4. Minimizing adverse impact: The rule does not distinguish between rural areas and non-rural areas, nor is the rule explicitly designed to affect rural areas.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors; the Small Business Council of the New York State Business Council; and the Retail Council of New York State. In addition, drafts of this rule were sent to the following: the Business Council of New York State, the New York State Bar Association, the Association of Bar of the City of New York, the New York City Department of Finance; and the Department's working group on the taxation of corporate partners, as mentioned in the "Regulatory Impact Statement".

#### **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. The purpose of the rule is to provide comprehensive guidance with respect to the computation of tax under Article 9-A of the Tax Law for corporations that are partners in partnerships or members of limited liability companies that are treated as partnerships under Article 9-A. The rule also makes clarifying and non-substantive technical changes.

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

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel**  
I.D. No. TAF-34-06-00006-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)(1) 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, 2006, and ending Dec. 31, 2006; 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:** Pursuant to the authority contained in subdivision First of section 171, subdivision (c) of section 301-h, subdivision 7 of section 509, subdivision (b) of section 523, and subdivision (a) of section 528 of the Tax Law, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act in the absence of the Commissioner of Taxation and Finance, hereby proposes to make and adopt the following amendments to the Fuel Use Tax Regulations, as published in Article 3 of Subchapter C of Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xiii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xliii) July - September 2006					
14.0	22.0	37.9	14.0	22.0	36.15
(xliv) October - December 2006					
14.0	22.0	37.9	14.0	22.0	36.15

**Text of proposed rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn\_Kaltenborn@tax.state.ny.us

**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.