Regulatory Impact Statement for the Proposed Ninth Amendment to 11 NYCRR 65-3 (Insurance Regulation No. 68-C).

1. Statutory authority: Sections 202 and 302 of the Financial Services Law, and Sections 301 and 5221 and Article 51 of the Insurance Law.

Financial Services Law Section 202 establishes the office of the Superintendent of Financial Services (“Superintendent”).

Financial Services Law Section 302 and Insurance Law Section 301 authorize the Superintendent to effectuate any power accorded by, and prescribe regulations interpreting, the Financial Services Law, Insurance Law, or any other applicable law.

Insurance Law Section 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation with respect to the payment of no-fault benefits to qualified persons.

Article 51 of the Insurance Law governs the no-fault insurance system.

2. Legislative objectives: Article 51 of the Insurance Law is popularly referred to as the “no-fault law.” No-fault legislation was introduced to rectify problems that were inherent in the existing tort system with respect to motor vehicle accidents, under which injured parties sought claims settlement and the prompt payment of health care and loss of earnings benefits. Article 51 applies both to insurance provided by motor vehicle insurance companies and entities permitted to self-insure under the Vehicle and Traffic Law (collectively “insurers”).

3. Needs and benefits: Pursuant to 11 NYCRR 65-3.11, an eligible injured person (“EIP”) may currently assign to his or her treating provider all of the EIP’s rights, privileges, and remedies to payment for health care services to which the EIP is entitled under Article 51. Once the treating provider properly executes an assignment of benefits form, the provider is entitled to receive payment from the no-fault insurer or to file a dispute in arbitration or court if the claim is denied, even though in certain circumstances the EIP may be more
suitable to contest the denial. Of particular concern is when the EIP violates a condition of the policy by failing to appear for an independent medical examination or an examination under oath (collectively referred to as “examination”).

This entitlement has been subjected to widespread abuse by unscrupulous medical mills that often obtain patients from accident “runners” who are paid to steer injured persons to the mills, or are persons who are part of a staged accident ring. These EIPs are unlikely to appear for an examination, and if an insurer denies a claim on that basis, the medical mills – armed with an executed assignment that permit them to contest the denial – will file multiple cases in court or arbitration (a separate filing for each health service provider) and oftentimes in multiple jurisdictions, in the hope that insurers will offer to settle cases rather than pay multiple attorney’s fees to litigate these cases, even though the denials of these cases have merit.

The amendment will allow an insurer to void an assignment where the insurer denies the claim because the EIP failed to appear for an examination. This will mean that only the EIP may litigate the denial. This should reduce the number of hearings because the disposition of the case would apply to all related claims of the EIP arising out of the accident.

This amendment should reduce the number of filings in court and arbitration since EIPs connected to staged accident rings or otherwise engaged in fraudulent activities concerning no-fault are unlikely to contest insurers’ denials for failing to appear for an examination. However, this amendment should not impact the rights of legitimate EIPs and treating providers. An EIP continues to be able to challenge improper denials, such as when the EIP had a valid reason for failing to appear for the examination.

Hospitals are excepted from this amendment because they are unlikely to participate in fraudulent activity such as staged accidents, and by law must treat all injured persons, as opposed to other health service providers who may opt not to treat an EIP, particularly one the provider may suspect is engaging in insurance fraud.
This amendment also does not vitiate an insurer’s obligation to comply with all requirements when requesting that an EIP appears for an examination. The amendment requires insurers to maintain a list of all claims that have been denied based on an EIP’s failure to appear for an examination and for which the insurer voids the assignment, so the Department may monitor any abusive practices by insurers resulting from the amendment’s implementation.

4. Costs: Any cost impact on insurers, self-insurers and state and local government, to the extent that they are self-insurers, is likely to be minimal. The amendment will require insurers and self-insurers to include a notice to the EIP and the provider when voiding an assignment and maintain a copy of all denials based on an EIP’s failure to appear for an examination and where the insurer or self-insurer opts to void the assignment based on the denial. Providing the notice to the EIP and the provider when issuing an NF-10 form may add a negligible cost. The recordkeeping requirement should not impose an undue burden on authorized insurers because they are already subject to the recordkeeping requirements prescribed in 11 NYCRR 243 (Insurance Regulation 152). Self-insurers are unlikely to incur any significant costs because it is likely that they already maintain such records in the ordinary course of business. In fact, the Department anticipates that the amendment will reduce costs to insurers and self-insurers, especially attorney’s fees associated with handling multiple filings and backlog of pending lawsuits and arbitrations. Because the amendment should result in only one hearing on the issue of whether the EIP failed to appear for an examination, insurers and self-insurers will only incur one set of attorney’s fees to litigate the matter.

This amendment should have no cost impact on EIPs. The regulation does not require an EIP to be represented in court or arbitration by an attorney. If the EIP opts to retain an attorney and prevails, the insurer is responsible for paying the EIP’s attorney’s fees pursuant to 11 NYCRR 65-4.6(c), which permits the prevailing attorney to be paid $70 per hour, up to a maximum of $1,400 for litigating the policy issue, in addition to up to $80 per hour for each appearance before the arbitration forum or court.
Health service providers also should experience no cost impact. A provider always has the option to collect its fees directly from the EIP. Since a legitimate EIP would likely contest the denial, if the EIP is successful, the provider will get paid without having to pursue the assignment itself. If the EIP is unsuccessful, the provider is in no worse position than if it had been unsuccessful in bringing the action to court or arbitration.

5. Local government mandates: This rule does not impose any requirement upon a city, town, village, school district, or fire district except where the local government is a self-insurer. In that case, the local government will have to include a notice to the EIP and the provider when voiding the assignment and maintain records of the denials, but it is likely that the local government would do that anyway.

6. Paperwork: This amendment does not impose any additional paperwork on any persons affected by the rule. However, insurers should generate less paperwork because they no longer will be required to file separate responses in multiple lawsuits involving the same denial.

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

8. Alternatives: The Department considered, as an alternative, creating a separate arbitration proceeding for denials based on an EIP’s failure to appear for an examination. This proceeding would have solely focused on resolving the basis for the denial at one hearing before any other issues, such as medical necessity, are heard at the arbitration proceeding. The Department decided that this approach would be too complex because it would require an insurer to notify all interested parties – health service providers – of the hearing, some of which may be unknown at the time of the hearing if they have not yet filed claims with the insurer. A separate arbitration proceeding also would increase the costs of administering the no-fault arbitration system.

9. Federal standards: There are no minimum federal standards for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: The amendment shall take effect on July 1, 2019 and shall apply to all claims arising from accidents occurring on and after that date.
Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Proposed Ninth Amendment to 11 NYCRR 65-3 (Insurance Regulation No. 68-C).

1. Effect of the rule: This amendment, which gives an insurer the option to void an assignment when it denies a claim for the failure of an eligible injured person (“EIP”) to appear for an independent medical examination or an examination under oath (collectively referred to as “examination”), affects no-fault insurers authorized to do business in New York State and self-insurers of no-fault benefits. The Department is unaware of any insurer writing automobile liability insurance that is a “small business” as defined in State Administrative Procedure Act Section 102(8) as being both independently owned and having less than one hundred employees. The Department of Financial Services (“Department”) does not have any information to indicate that any self-insurer, which must have the financial ability to self-insure losses, is a small business as defined in State Administrative Procedure Act Section 102(8).

Local government units make independent determinations on the feasibility of becoming self-insured for no-fault benefits or having these benefits provided by authorized insurers. There are no provisions in the State’s financial security laws that require local governments to report to the Departments of Financial Services or Motor Vehicles whether they are self-insured. Therefore, the Department has no way to estimate how many local government units are self-insured for no-fault benefits.

Health service providers are small businesses that may be impacted by this rule. However, their participation in the no-fault system is optional and the Department has established no preauthorization or reporting requirements with respect to these small businesses. Additionally, providers have the option to collect fees for their services directly from the EIPs. Furthermore, because the Department does not maintain records of the number of health service providers licensed in this state, the number of such providers rendering services to injured persons eligible for no-fault benefits, or the number of attorneys that represent such providers in no-
fault disputes, the Department is not able to estimate the number of health service providers that will be affected by this rule.

2. Compliance requirements: The proposed amendment imposes compliance requirements on local governments, to the extent that they are self-insurers, because the amendment requires self-insurers to maintain a copy of all denials based on an EIP’s failure to appear for an examination and where the self-insurer opts to void the assignment based on the denial. The rule does not impose any compliance requirements on health service providers that are small businesses other than to use the no-fault forms mandated by the regulation, but that is an existing requirement.

3. Professional services: This amendment does not require any small business or local government, to the extent that it is a self-insurer affected by the amendment, to use any professional services beyond those currently used to comply with this rule.

4. Compliance costs: Any cost impact to self-insurers and state and local government, to the extent that they are self-insurers, is likely to be minimal. The amendment requires insurers and self-insurers to maintain a copy of all denials based on an EIP’s failure to appear for an examination and where the insurer or self-insurer opts to void the assignment based on the denial. This requirement should not impose an undue burden on authorized insurers because they are subject to the recordkeeping requirements prescribed in 11 NYCRR 243 (Insurance Regulation 152). Self-insurers are unlikely to incur any significant costs because it is likely that they already maintain such records in the ordinary course of business. In fact, the Department anticipates that the amendment will reduce costs to insurers and self-insurers, especially attorney’s fees associated with handling multiple filings and backlog of pending lawsuits and arbitrations. Because the amendment should result in only one hearing on the issue of whether the EIP failed to appear for an examination, insurers and self-insurers will only incur one set of attorney’s fees to litigate the matter.
The Department anticipates that no health service provider that is a small business will experience a cost increase as a result of this amendment, because providers may require payment for services directly from an EIP.

5. Economic and Technological feasibility: Small businesses and local governments affected by this amendment should not incur any economic or technological impact as a result of this amendment, because the amendment does not impact the economy or require the use of technology.

6. Minimizing adverse impact: This rule should have no adverse impact on legitimate small businesses or local governments, to the extent that they are self-insurers, affected by this amendment. As explained in item 4 above, health service providers may pursue payment directly from the EIP and any recordkeeping costs incurred by local governments should be minimal, since it is likely that they already maintain the records in the ordinary course of business.

7. Small business and local government participation: Interested parties, including small businesses and local governments, will be given the opportunity to comment on the proposed rule during the comment period after it is published in the State Register.
Statement Setting Forth the Basis for Finding that the Proposed Ninth Amendment to 11 NYCRR 65-3 (Insurance Regulation 68-C) Will Not Impose an Adverse Economic Impact or Compliance Requirements on Rural Areas.

The Department of Financial Services (the “Department”) finds that the proposed rule does not impose any additional burden on persons located in rural areas, and will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.
Statement Setting Forth the Basis for the Finding that the Proposed Ninth Amendment to 11 NYCRR 65-3 (Insurance Regulation No. 68-C) Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities.

The proposed rule should have no adverse impact on jobs or employment opportunities in this state, because it only gives an insurer the option to void an assignment when the insurer issues a denial based on the failure of an eligible injured person (“EIP”) to attend an independent medical examination or examination under oath. Therefore, only an EIP may contest such a denial in court or arbitration.

The proposed rule may promote jobs and employment opportunities for attorneys if an EIP opts to be represented by an attorney in court or arbitration to contest an insurer’s denial.