

Regulatory Impact Statement for the Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

1. Statutory authority: Financial Services Law Sections 202 and 302 and Insurance Law Sections 301, 2601, and 5221 and Article 51.

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, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Financial Services Law, Insurance Law, or any other law, and to prescribe regulations interpreting the Insurance Law.

Insurance Law Section 2601 prohibits insurers from engaging in unfair claim settlement practices and requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

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

Insurance Law Article 51 establishes a no-fault insurance system for persons injured in motor vehicle accidents. Insurance Law Section 5108(b) authorizes the Superintendent to adopt the fee schedules prepared and established by the Chair of the Workers’ Compensation Board (the “Chair”) and to promulgate fee schedules for health care benefits payable under the no-fault system for any services for which the Chair has not prepared and established fee schedules. Section 5108(c) prohibits a provider of health services, as defined in Article 51, from requesting or demanding payment in addition to the amount authorized pursuant to Insurance Law Section 5108.

2. Legislative objectives: To establish schedules of maximum permissible charges for professional health services payable as no-fault insurance benefits to contain the costs of no-fault insurance.

3. Needs and benefits: In 2007, when the Chair established a durable medical equipment (“DME”) fee schedule, the former Insurance Department repealed its 2004 no-fault DME fee schedule and adopted the Chair’s DME fee schedule. In June 2021, the Chair adopted, via regulation, expansive amendments to its DME fee

schedule to take effect on April 4, 2022. The Chair's amendment updates the list of DME supplies that are available; increases the reimbursement amount for those supplies; and creates a prior authorization process for certain DME supplies listed in the fee schedule for which no reimbursement amount is assigned and for DME supplies that are not listed in the fee schedule. As a result of these amendments, the Chair eliminated the lesser of acquisition cost plus 50% or usual and customary fee calculation for unlisted DME supplies. The Chair also required that all DME supplies be provided by Medicaid-enrolled DME suppliers and capped the total accumulated rental charge for DME supplies listed in the Chair's DME fee schedule to the purchase price of those supplies.

With respect to the Chair's amendment to the Chair's DME fee schedule to apply a prior authorization process for certain DME supplies, this process does not apply to no-fault insurance pursuant to 11 NYCRR Section 68.1(b)(1). Therefore, for DME supplies not listed in the Chair's DME fee schedule and for DME supplies listed in the Chair's DME fee schedule for which no fee has been assigned because the DME supplies require prior authorization under workers' compensation, the amendment provides that the maximum permissible purchase charge or the total accumulated rental charge for such DME supplies shall be the lesser of the: (1) acquisition cost (i.e., the line-item cost from a manufacturer or wholesaler net of any rebates, discounts, or other valuable considerations, mailing, shipping, handling, insurance costs or any sales tax) to the provider plus 50%; or (2) usual and customary price charged by DME providers to the general public. This is the same standard that the Chair used prior to amending the workers' compensation regulations. Additionally, the amendment establishes a cap on the total accumulated rental charge for DME supplies for the purpose of no-fault like the Chair's DME fee schedule. The cap is the purchase price for those supplies in order to maintain a consistent reimbursement methodology for both listed and unlisted DME supplies and to safeguard against the unwarranted depletion of patients' \$50,000 no-fault insurance benefits as a result of unlimited rental charges that could far exceed the purchase price of the supplies.

This amendment also provides that the workers' compensation requirement that Medicaid-enrolled DME suppliers provide all DME supplies does not apply to no-fault insurance. Insurance Law Article 51 does not require that a provider of health services rendered to a no-fault patient be authorized by the Department to render such services, nor does the Insurance Law impose any additional licensing or registration requirements on such providers.

4. Costs: This amendment does not impose any compliance cost on insurers, self-insurers, including self-insured local governments, or health service providers because this amendment only establishes the maximum reimbursement (that is 150% of acquisition cost) allowed in the no-fault system for the purchase and total accumulated rental of DME supplies not listed in the Chair's DME fee schedule and for DME supplies listed in the Chair's DME fee schedule for which no fee has been assigned because the DME supplies require prior authorization under workers' compensation.

5. Local government mandates: This amendment does not impose any program, service, duty, or responsibility upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This amendment does not impose any additional paperwork on any persons affected by the amendment.

7. Duplication: This rule does not duplicate, overlap, or conflict with any existing state or federal rule.

8. Alternatives: For DME supplies not listed in the Chair's DME fee schedule and for DME supplies that require prior authorization under workers' compensation and do not have a reimbursement amount in the Chair's DME fee schedule, the Department considered permitting reimbursement at the prevailing rate in the geographic location of the provider for the purpose of no-fault, but determined that doing so would result in significantly inflated purchase prices for DME supplies or limitless rental charges for those supplies that could far exceed the purchase price, resulting in the rapid depletion of patients' \$50,000 no-fault insurance benefits and a significant increase in litigation over reimbursement rates for DME supplies.

9. Federal standards: The amendment does not exceed any minimum federal standards for the same or similar subject areas.

10. Compliance schedule: This amendment shall take effect upon the filing of the Notice of Emergency Adoption with the Secretary of State.

Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

1. Effect of the rule: This amendment affects insurers, self-insurers, including self-insured local governments, and health service providers (collectively, “affected persons”). Industry has asserted that certain insurers, such as mutual and co-op insurers, fall within the definition of a “small business” as defined in State Administrative Procedure Act Section 102(8). In addition, certain self-insurers, such as taxis, may be small businesses and most health service providers are small businesses.

2. Compliance requirements: This amendment will not impose any additional reporting, recordkeeping, or other compliance requirements on any affected persons that may be small businesses or local governments affected by this rule.

3. Professional services: An affected person that may be a small business or local government should not need any professional services to comply with this amendment.

4. Compliance costs: This amendment does not impose any additional compliance costs on affected persons that may be small businesses or local governments because this amendment only establishes the maximum reimbursement (that is 150% of acquisition cost) allowed in the no-fault system for the purchase and total accumulated rental of durable medical equipment (“DME”) supplies not listed in the Official New York Workers’ Compensation DME Fee Schedule (“Fee Schedule) and for DME supplies listed in the Fee Schedule for which no fee has been assigned because the DME supplies require prior authorization under workers’ compensation.

5. Economic and technological feasibility: An affected person that may be a small business or local government should not incur any economic or technological impact as a result of this amendment.

6. Minimizing adverse impact: This amendment should not have an adverse impact on an affected person that may be a small business or local government because the amendment uniformly affects all affected persons.

7. Small business and local government participation: Interested parties, including small businesses and local governments, will be given an opportunity to review and comment on the amendment once it is published in the State Register and posted on the Department's website.

Rural Area Flexibility Analysis for the Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

1. Types and estimated numbers of rural areas: Health service providers, insurers, and self-insurers, including self-insured local governments, affected by this amendment do business in every county in this state, including rural areas as defined in State Administrative Procedure Act Section 102(10).

2. Reporting, recordkeeping, and other compliance requirements; and professional services: This amendment will not impose any additional reporting, recordkeeping or other compliance requirements on insurers, self-insurers, including self-insured local governments, and health service providers affected by this amendment.

Insurers, self-insurers, including self-insured local governments, and health service providers affected by this amendment should not need to retain professional services to comply with this amendment. This amendment only establishes the maximum reimbursement allowed, for purposes of no-fault insurance, for the purchase and total accumulated rental of DME supplies not listed in the Official New York Workers' Compensation Durable Medical Equipment ("DME") Fee Schedule ("Fee Schedule") and for DME supplies listed in the Fee Schedule for which no fee has been assigned because the supplies require prior authorization under workers' compensation.

3. Costs: This amendment does not impose any additional costs on insurers, self-insurers, including self-insured local governments, and health service providers, because this amendment only establishes the maximum reimbursement (that is 150% of acquisition cost) allowed in the no-fault system for the purchase and total accumulated rental of DME supplies not listed in the Fee Schedule and for DME supplies listed in the Fee Schedule for which no fee has been assigned because the DME supplies require prior authorization under workers' compensation.

4. Minimizing adverse impact: This amendment uniformly affects insurers, self-insurers, including self-insured local governments, and health service providers throughout New York State. Therefore, it does not impose any adverse impact on rural areas.

5. Rural area participation: Interested parties, including those located in rural areas, will be given an opportunity to review and comment on the amendment once it is published in the State Register and posted on the website of the Department of Financial Services.

Statement Setting Forth the Basis for the Finding that the Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83) Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities

This amendment should not have a substantial adverse impact on jobs or employment opportunities in New York State. The amendment only establishes, for the purpose of no-fault insurance, the maximum reimbursement allowed for the purchase and total accumulated rental of DME supplies not listed in the Official New York Workers' Compensation Durable Medical Equipment ("DME") fee schedule and for DME supplies listed in such DME fee schedule for which no fee has been assigned because the DME supplies require prior authorization under workers' compensation.