

Revised Regulatory Impact Statement for new Part 400 to 23 NYCRR.

1. Statutory authority: The authority of the Superintendent of Financial Services (“Superintendent”) to promulgate new Part 400 to 23 NYCRR derives from Financial Services Law Sections 202, 301, 302 and Article 6 and Insurance Law Section 301.

Section 202 of the Financial Services Law establishes the office of the Superintendent and designates the Superintendent as the head of the Department of Financial Services (“Department”).

Section 301 of the Financial Services Law authorizes the Superintendent to take such action as the Superintendent deems necessary to protect and educate users of financial products and services.

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

Article 6 of the Financial Services Law establishes an independent dispute resolution (“IDR”) process through which a dispute involving a bill for emergency services or a surprise bill may be resolved. This law grants the Superintendent the power to certify entities performing the IDR and authorizes the Superintendent to promulgate regulations establishing standards for the IDR process.

2. Legislative objectives: In 2012, the Department released “An Unwelcome Surprise,” a report detailing the issues that lead to consumers receiving unexpected medical bills from out-of-network providers. The report stated that unexpected and sometimes excessive medical bills from out-of-network providers contribute to the growing problem of consumer medical debt, which continues to be a significant cause of personal bankruptcy. The report found that consumers have experienced surprise bills when they do everything they can to stay in-network, yet receive bills from non-participating providers. The report also found that there are often high and unexpected bills for emergency care. Chapter 60 of the Laws of 2014 added a new Article 6

to the Financial Services Law to address this problem. Article 6 provides that consumers must be held harmless for out-of-network emergency bills and surprise bills, and directs the provider and the health plan to work out payment for these bills. Article 6 establishes an IDR process by which a dispute involving a bill for emergency services or a surprise bill may be resolved. The statute also gives the Superintendent the authority to grant and revoke certifications of independent dispute resolution entities (“IDREs”) and to adopt rules necessary in order to implement the IDR process.

3. Needs and benefits: Article 6 establishes an IDR process by which a dispute for a bill for emergency services or a surprise bill may be resolved. This rule is necessary in order to implement the IDR process required under the statute.

This rule details certification requirements for IDREs, and requires each proposed IDRE to demonstrate that it meets these requirements. The rule prohibits a proposed IDRE and its reviewers from having affiliations with entities involved in the dispute because of a potential conflict of interest.

The rule sets forth the responsibilities of health care plans, providers, patients and IDREs in relation to the IDR process and details the process to submit disputes regarding emergency services and surprise bills. The rule provides that once a dispute is submitted for review by an IDRE, the parties must provide certain information specified by the statute. Within three days of receipt of a dispute, the IDRE shall screen the application for conflicts of interest, review the application to determine if the dispute is eligible for the IDR process and, if necessary, contact the parties for additional information needed to determine eligibility. Within three days of determining that the dispute is eligible, the IDRE shall send notification of the assignment to the parties and ask for all information to be submitted within five business days. The IDRE may direct the parties to attempt a good faith negotiation for settlement and the IDRE must have the dispute reviewed by a neutral and impartial reviewer with knowledge of billing and usual, customary, and reasonable rates, in consultation with a

licensed physician in active practice. The IDRE must make a determination within 30 days of receipt of the request for independent dispute resolution, choosing either the provider bill or the health plan payment.

The rule establishes requirements for record retention and compliance by IDREs and describes how payment for the independent dispute resolution process will work. The losing party pays the cost of the dispute resolution with an exception for a patient who brings a dispute, does not prevail, and for whom payment would pose a hardship.

4. Costs: Insurers and providers should incur minimal additional costs to comply with the requirements of the rule. This rule implements the IDR process required by Financial Services Law Article 6. The minimal costs for physicians may include costs to provide an assignment of benefits form with bills for out-of-network services, although some physicians may have similar processes already. If a physician or other provider submits a dispute for resolution, the person or persons who already handle billing for the physician or provider would most likely be able to submit the dispute. Other costs include the cost of the IDR process, which is paid by the losing party to the dispute as required by Financial Services Law Article 6. The Department will contract with IDREs and approve the fees the IDREs charge for the IDR process. The minimal costs for insurers may also include costs to provide insureds with notice about a surprise bill and information how to proceed. However, insurers currently provide an explanation of benefits to insureds and the requisite notice may be contained within the existing explanation of benefits or accompany it in order to mitigate costs.

The Department will incur costs to implement the independent dispute resolution process as the Department is responsible for overseeing the process and certifying the IDREs. However, these costs will be incurred due to the statute. Moreover, the costs to the Department should be minimal as the independent dispute resolution entities will conduct the actual review of the disputes. There are no costs to any other state government agency or local government.

5. Local government mandates: The rule imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: This rule implements the IDR process by which a dispute for a bill for emergency services or a surprise bill may be resolved and identifies the information that must be submitted to the IDRE, as required pursuant to Financial Services Law Article 6. Health care plans, providers and patients will need to submit an application in order to pursue a dispute. This rule also requires an IDRE to retain case records in accordance with 11 NYCRR 243 for audit and examination for a period of six years from the date of the IDRE's determination. The IDRE must maintain on file each attestation required to be submitted under the rule for six years from the date of the determination. The rule further requires an IDRE to provide the Superintendent data, information and reports as the Superintendent determines necessary to evaluate the dispute resolution process within two business days or such other period acceptable to the superintendent.

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

8. Alternatives: This rule implements the IDR process for bills for emergency services and surprise bills. The Department met with stakeholders during the development of the rule. Alternatives were suggested during these meetings regarding the reviewer of the dispute. Suggested alternatives included to have the dispute reviewed solely by a physician reviewer, solely by a non-physician reviewer, solely by a retired physician, solely by an in-network physician and solely by an out-of-network physician. Financial Services Law Section 601 requires that IDREs use licensed physicians in active practice in the same or similar specialty as the physician providing the service that is the subject of the dispute. The Department decided that IDREs must use a non-physician reviewer to render a determination in consultation with a physician reviewer. The regulation also includes standards to prohibit conflicts of interest. The Department believes this approach is consistent with the law, will ensure fair decisions, and will help to minimize the costs of the review.

The Department also considered alternatives regarding the notice that the health plan must send to the insured and non-participating provider when a claim for a surprise bill is received. The Department originally considered requiring health plans to send a detailed notice upon receipt of a potential surprise bill to both the insured and the non-participating provider. Stakeholders indicated that, without an assignment of benefits form, health plans would be unable to determine whether a claim may be for a surprise bill upon receipt and that it would be cumbersome to send the notice in response to all claims involving the services of non-participating providers. Therefore, the rule requires health plans to provide detailed notice to the insured and non-participating provider only when an assignment of benefits form is submitted with the claim or the health plan otherwise determines that the claim is for a surprise bill. When the health plan receives a claim that may be a surprise bill but is not submitted with an assignment of benefits form, the health plan must send an abbreviated notice to the insured directing the insured to contact the health plan or visit its website for information regarding surprise bills.

A suggested alternative was to require the IDRE to divulge the name of the reviewer and reviewing physician. As with the current External Appeal process for independent review of utilization review denials by health plans, anonymity provides the reviewer and the reviewing physician the ability to independently determine the dispute without the concern that they could be contacted by a party involved in the dispute. The IDREs may have difficulty attracting reviewers and physicians to their panels if their identity is revealed. The IDRE will provide a biography of the reviewer and the reviewing physician in order to show that they meet the required qualifications.

A suggestion was made to permit IDRE determinations to be reconsidered. Financial Services Law Sections 605(c) and 607(c) provide that the determination of the IDRE is binding but admissible in court proceedings and reconsideration is not contemplated.

A suggestion was made to prohibit information from being submitted to the IDRE regarding in-network rates, Medicare and Medicaid rates. Financial Services Law Section 604 sets forth the criteria that the IDRE must consider, which includes UCR and does not include other rates. However, the Law does not prohibit any other information from being submitted. Nevertheless, the IDRE is not bound by any other additional information submitted.

9. Federal standards: Public Health Service Act Section 2719A (42 U.S.C. § 300gg-19a) requires health care plans to cover emergency services. Federal regulations implementing this law (45 CFR § 147.138(b)) require health care plans and insurers to reimburse out-of-network providers of emergency services the greatest amount of the following three amounts: (1) the amount negotiated with in-network providers for the emergency service, excluding any in-network copayment or coinsurance; (2) the amount for the emergency service calculated using the same method the plan generally uses to determine payments for out-of-network services, excluding any in-network copayment or coinsurance; or (3) the amount that would be paid under Medicare (Part A or B of Title XVIII of the Social Security Act) for the emergency service, excluding any in-network copayment or coinsurance. Health care plans must reimburse out-of-network providers of emergency services at least the amount described in the federal rule but may pay the out-of-network provider additional amounts. The IDR process established under this rule will allow health care plans and providers to dispute amounts above the federal requirement.

10. Compliance schedule: The rule will take effect on March 31, 2015 and will affect health care services provided on and after March 31, 2015.

## Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments for new 23 NYCRR 400

1. Effect of the rule: This rule affects all health maintenance organizations (“HMOs”) and insurers authorized to do business in New York State that use the independent dispute resolution (“IDR”) process set forth in the regulation to resolve disputes for bills for emergency services and surprise bills. Based upon information that those HMOs and insurers have provided in their annual statements and filed with the Department of Financial Services (“Department”), they are not “small businesses” as defined in State Administrative Procedures Act Section 102(8) because they are not independently owned and operated and do not employ 100 or fewer employees.

Small businesses that may be impacted by this rule include physicians and certain other health care providers that participate in the IDR process. The Department does not maintain records of the number of physicians and health care providers licensed in this state. However, the Department has established no reporting requirements with respect to those small businesses. The rule is likely to have a favorable economic impact on small businesses that opt to utilize the IDR process to resolve disputes with insurers, rather than retain attorneys to resolve those disputes on their behalf in court.

This rule does not apply to or affect local governments.

2. Compliance requirements: This regulation will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The regulation only implements the IDR process for bills for emergency services and surprise bills as required pursuant to Financial Services Law Article 6.

3. Professional services: This regulation does not require any small business affected by this rule to use any professional services to comply with this regulation. Local governments are not affected by the rule, and thus will have no need for such services.

4. Compliance costs: This rule will have no impact on compliance costs for local governments, and may only have a minimal impact on compliance costs for small businesses. Those costs may include costs to provide an assignment of benefits form with bills for out-of-network services, although some physicians may have similar processes already. Other costs include the cost of the IDR, which is paid by the losing party to the dispute. However, the rule only establishes standards for an IDR process that is prescribed by statute. Furthermore, any costs to small businesses to participate in the IDR process should be much less than costs to litigate a bill dispute in court.

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

6. Minimizing adverse impact: This rule should have no adverse impact on small businesses or local governments because it only establishes standards for an IDR process prescribed by statute, and participation in the IDR process is voluntary. The rule may have a positive economic impact on providers who obtain favorable determinations with respect to disputes with insurers regarding reimbursement for emergency services and surprise bills.

7. Small business and local government participation: Interested parties, including small businesses, were afforded the opportunity to comment on this regulation, and the Department held numerous meetings with stakeholders to discuss the regulation. Interested parties were also given an opportunity to comment on the proposed rulemaking that was published in the State Register on December 31, 2014.

Revised statement setting forth the basis for the finding that new Part 400 to 23 NYCRR will not have a substantial adverse impact on job and employment opportunities.

The Department of Financial Services finds that this rule should have no substantial adverse impact on job or employment opportunities in New York. The rule implements Article 6 of the Financial Services Law, which establishes an independent dispute resolution (“IDR”) process by which health maintenance organizations, insurers, physicians, and in certain cases, patients and other health care providers may submit a dispute involving bills for emergency services and surprise bills for IDR. Article 6 provides that the Superintendent shall select and certify an independent dispute resolution entity (“IDRE”) to oversee the IDR process. Serving as an IDRE is voluntary.

Because Article 6 requires the IDRE to utilize licensed physicians for the IDR process, this rulemaking is likely to promote job and employment opportunities in the State.

Revised statement setting forth the basis for the finding that new Part 400 to 23 NYCRR will not impose adverse economic impact or compliance requirements on rural areas.

The Department of Financial Services (“Department”) finds that this rule does not impose any additional burden on persons located in rural areas and that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in rural and non-rural areas of New York State.

Interested parties, including those located in rural areas, were given an opportunity to comment on the drafting of this rule and the Department held several meetings with HMOs, insurers, physicians, other providers and consumer groups. Interested parties were also given an opportunity to comment on the proposed rulemaking that was published in the State Register on December 31, 2014.