Assessment of public comments for the consolidated 15th amendment to Part 27 (Insurance Regulation 41), 10th amendment to Part 60-1 (Insurance Regulation 35-A), 7th amendment to Part 60-2 (Insurance Regulation 35-D), new Part 60-3 (Insurance Regulation 35-E), 3rd amendment to Part 65-1 (Insurance Regulation 68-A), 8th amendment to Part 65-3 (Insurance Regulation 68-C), 6th amendment to Part 65-4 (Insurance Regulation 68-D), 6th amendment to Part 169 (Insurance Regulation 100), and 17th amendment to Part 216 (Insurance Regulation 64) of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR").

The New York State ("NYS") Department of Financial Services ("Department") received comments from a trade association representing property/casualty mutual insurers ("mutual trade association"), two national trade associations representing property/casualty insurers ("national trade associations"), state trade association representing property/casualty insurers ("state trade association"), and the New York ("NY") excess line stamping office ("stamping office"), in response to the publication of its proposed consolidated amendments in the NYS Register.

Comment: The mutual trade association asked the Department to allow insurers to attach an endorsement to current non-commercial motor vehicle insurance policies mid-term with notice to policyholders to address the changes made by Part AAA of Chapter 59 of the Laws of 2017 (the transportation network company or "TNC" law). A national trade association commented that the TNC law clearly demonstrates the legislative intent that non-commercial motor vehicle insurance policies need not cover any claims arising from TNC activity and that exclusions in existing policies should apply to such activity.

Response: Prior to the enactment of the TNC law, Insurance Regulation 35-A permitted limited exclusions in non-commercial motor vehicle liability policies, such as for using or operating the vehicle as a livery or for-hire vehicle. Regulation 35-A did not permit an exclusion for using or operating the vehicle as a TNC vehicle. In addition, Insurance Law ("IL") Article 51 and § 3420(f), and regulations promulgated

thereunder, did not permit any exclusion at all from personal injury protection ("no-fault"), uninsured motorists and supplementary uninsured/underinsured motorists insurance coverages. The TNC law explicitly states that a TNC vehicle is not a livery or for-hire vehicle. Therefore, any livery or for-hire exclusions in a non-commercial motor vehicle liability policy would not apply to the operation of a TNC vehicle. Moreover, since Regulation 35-A did not permit an exclusion for using or operating the vehicle as a TNC vehicle prior to the enactment in the law, there is no applicable exclusion in policies issued or renewed prior to the TNC law.

The U.S. Constitution prohibits a state from passing a law that impairs the obligation of contracts. Therefore, the changes made by the TNC law may not impair motor vehicle insurance policies issued or renewed before the changes to the law took effect. Allowing an insurer to amend a motor vehicle policy mid-term by attaching an endorsement that addresses TNC vehicles would impair the current motor vehicle policy. In addition, the clear language of both IL §§ 3425 and 3426 preclude any unilateral midterm reduction in coverage by the insurer. There is nothing in the TNC law that supersedes the prohibitions in those sections.

Thus, the Department did not make any changes to address these comments.

Comment: The national trade associations commented that the annual notice requirement set forth in 11 NYCRR § 60-3.9 represents an increased administrative burden on insurers that will add system costs while providing limited benefits to consumers. One of the national trade associations stated that insurers had no advance notice of the requirement before the Department promulgated the consolidated amendments and accordingly had no time to make the systems changes necessary to implement this requirement.

Response: 11 NYCRR § 60-3.9 requires a motor vehicle insurer to provide an annual notice to the named insured advising the named insured whether, and to what extent, the insurer provides coverage under the policy while the vehicle is being used as TNC vehicle and whether the insurer makes such coverage available on an optional basis. It is vital that an insured understand whether his or her policy will provide coverage when he or she is using the vehicle as a TNC vehicle. An insured must be able to make an informed decision about

whether he or she needs to purchase additional coverage before using his or her vehicle as a TNC vehicle especially given the increased liability the insured will have when using the vehicle as a TNC vehicle.

In addition, nothing in 11 NYCRR § 60-3.9 states that the annual notice needs to be on a separate notice or even in a separate mailing. Insurers are free to decide how to implement this annual notice requirement. Therefore, any administrative burdens and costs should be minimal.

The Department understands that insurers may not have had the necessary time to make changes to their systems to implement the notice requirement. Thus, the Department has not taken any action against insurers who did not implement the notice requirement by the effective date of the TNC law and consolidated amendments. However, the Department expects insurers to come into compliance as soon as possible.

The Department did not make any changes to address these comments.

Comment: The state trade association commented that the Department should clarify the phrase "reasonable belief" in IL § 5106(d) because without clarifying this phrase, TNC's could potentially challenge the motor vehicle insurer's policy language to compel the insurer to pay the benefits first and wait to be reimbursed by the TNC after the coverage issue is resolved.

Response: For many decades prior to the enactment of the TNC law, IL § 5106(d) has contained the phrase "reasonable belief" without further elaboration and the language has been interpreted over the years. However, the Legislature amended IL § 5106(d) to add language to require a TNC's group policy to provide first party benefits when there is a dispute, which should practically address the comment. Therefore, the Department did not make any changes to address this comment.

Comment: The state trade association suggested that the Department require a TNC driver to provide a notice to the TNC in all cases where the driver files for no-fault insurance benefits, and that the Department include penalties for non-disclosure under Vehicle and Traffic Law ("VTL") § 1695(6) which, in a claims coverage investigation, requires a TNC and any insurer providing coverage under VTL Article 44-B to facilitate

the exchange of relevant information within 15 days of a claim being filed. The state trade association further commented that the driver background and driving history check requirements set forth in VTL § 1696(1) seem weak and suggested the Department include in the amendments more restrictive language. If that is not possible, then the state trade association questioned whether the Department will allow insurers who offer coverage to stipulate eligibility or driver requirement standards that the insurers deem necessary.

Response: The Department does not regulate TNCs or TNC drivers. VTL § 1695(7) gave the Superintendent of Financial Services ("Superintendent") the authority to promulgate regulations necessary to facilitate the sharing of information between insurers, not TNCs or TNC drivers. These comments are more appropriate for the NYS Department of Motor Vehicles, which regulates TNCs and TNC drivers and has the authority to promulgate regulations pertaining thereto. In addition, an agency generally may not establish penalties by regulation. Any penalties would need to be enacted by the Legislature in legislation.

It is not clear what the state trade association means when it asks whether the Department will allow insurers that offer coverage to stipulate eligibility or driver requirement standards that the insurers deem necessary. The Department would not permit insurers to insert eligibility or driver requirement standards in policy forms or restrict coverage for specific drivers that did not meet those requirements. However, insurers may conduct their usual underwriting to determine whether they wish to write the coverage for certain insureds so long as the underwriting criteria is not contrary to prohibitions in the IL.

Therefore, the Department did not make any changes to address these comments.

Comment: The state trade association suggested that the Department require production of the entire group policy so coverage, exclusions, and restrictions may be reviewed.

Response: 11 NYCRR § 60-3.2(d)(3) requires an insurer to provide to a claimant and any other insurer insuring the vehicle, a clear description of the coverage, exclusions, and limits under a policy issued pursuant to

VTL Article 44-B, including a group policy. Therefore, the Department did not make any changes to address this comment.

Comment: The state trade association suggested that the insurer that issued the owner's policy of liability insurance should be specifically included in the list of persons eligible to receive information from the Commissioner of Motor Vehicles ("Commissioner") under VTL § 1695(8).

Response: VTL § 1695(8) requires the Commissioner to provide, upon request, relevant insurance coverage information to: (1) a person to whom an accident report pertains or who is named in the report, or his or her authorized representative; and (2) any other person, or his or her authorized representative, who has demonstrated to the Commissioner's satisfaction that the person is or may be a party to a civil action arising out of the conduct described in the accident report. Whether the insurer that issued the owner's policy of liability insurance should be specifically included in the list of foregoing persons is for the Commissioner to decide. Therefore, the Department did not make any changes to address this comment.

Comment: The state trade association questioned the coverage implications if a TNC driver crosses state lines and operates his or her vehicle in another state or operates the vehicle completely in another state when the vehicle is registered in NY. The state trade association also expressed concerns about a TNC driver who circumvents the TNC application to pick-up passengers.

Response: A vehicle is a TNC vehicle under VTL Article 44-B if the driver uses a TNC digital application to pick-up a passenger inside NYS other than in New York City ("NYC"). Therefore, if a driver picks up a passenger inside NYS (but outside NYC) using a TNC digital application, then the TNC law applies even if the driver crosses state lines. If the driver picks up the passenger outside NYS, then the TNC law does not apply, even if the driver drops off the passenger in NYS. In that situation, the other state's laws would apply except the driver still must comply with NY's financial responsibility requirements.

As for circumventing the TNC application to pick-up passengers, the TNC law applies only if a driver picks up a passenger using a TNC's digital application. If the driver is picking up passengers in NYS without using a digital application, then the driver is not a TNC driver and the TNC law would not apply. The driver would be acting as a livery or for-hire driver and the insurer that issued the owner's policy of liability insurance could deny a claim if there is an applicable exclusion in the policy pursuant to Insurance Regulation 35-A.

Comment: The stamping office asked that the Department delete the amendment to 11 NYCRR § 27.10(a), which applies Insurance Regulations 107 and 121 to TNC excess line transactions. The stamping office asserts that the amendment makes an exception to a longstanding exemption by applying both regulations to TNC excess line policies, setting a worrisome precedent. A national trade association had a similar comment. The stamping office requested that the Department add a new 11 NYCRR § 60-2.8(c) to state that a policy shall only be written on an occurrence basis with defense costs in addition to state policy limits and that any policy that does not meet the minimum requirements of IL § 3455 must be deemed to step up to meeting the minimum requirements set forth therein.

Response: The TNC law made any policy being used to satisfy the requirements therein, including an excess line policy, financial responsibility coverage when a driver is using or operating his or her vehicle as a TNC vehicle. The Department has always had the authority to apply Regulations 107 and 121 to financial responsibility coverage. It is much cleaner to amend 11 NYCRR § 27.10 than to add new language to 11 NYCRR § 60-2.8. Therefore, the Department did not make any changes to address this comment.

Comment: The stamping office asked the Department to delete the language that applies Insurance Regulation 64, regarding unfair claims practices, to an excess line TNC group policy. The stamping office asserts that IL Article 26 and therefore Insurance Regulation 64 does not apply to excess line insurance policies because IL § 2601(a) applies only to insurers doing business in NYS and IL § 1101(b)(2)(F) expressly exempts

excess line transactions from the definition of doing an insurance business. A national trade association had a similar comment.

Response: The TNC law is a financial responsibility law regulating activity of thousands of motor vehicles registered in NYS. When not operating as TNC vehicles, claims involving these vehicles ae subject to Insurance Regulation 64. It is critical that people in this state are not subject to lower protections for accidents that occur when a vehicle is operated as a TNC vehicle.

Doing business in NYS for purposes of IL § 2601 does not necessarily have the same meaning as doing an insurance business as described in IL § 1101(b)(2)(F). When the IL intends to apply only to an authorized insurer, it usually states such. For example, see IL §§ 2324(a) and 2615. IL § 2601(a) does not state that it is limited to an authorized insurer. Therefore, the Department did not make any changes in response to these comments.

Comment: The stamping office noted that 11 NYCRR § 60-3.8 states that the export list and exempt commercial purchaser exemption do not apply to TNC group insurance policies. The stamping office commented that the federal Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA") and IL § 2118(b)(3)(F) authorize the exempt commercial purchaser exemption and that a regulation may not supersede a law. The stamping office further commented that the TNC group insurance is not currently on the export list and the express mooting of the provision is therefore unnecessary and sets a bad precedent. A national trade association had a similar comment.

Response: The NRRA and IL permit an excess line broker to place insurance with an excess line insurer without obtaining three declinations from authorized insurers under certain conditions. One of those conditions is that the insured be an exempt commercial purchaser. The law defines "exempt commercial purchaser" to be a person purchasing commercial insurance that meets certain requirements, such as retaining a qualified risk manager to negotiate insurance coverage and meeting certain financial requirements. The TNC insurance

policy is a group policy, covering individual drivers, none of whom likely meet the requirements of being an exempt commercial purchaser. The exempt commercial purchaser exemption was not intended to apply to this kind of group insurance. Regarding the export list, the Department is just making clear that it will not put this kind of coverage on the export list.

Therefore, the Department did not make any changes in response to these comments.

Comment: The stamping office commented that the amendments contain several new requirements that place significant burdens on excess line brokers. The stamping office stated that the annual affidavit to TNCs regarding the lack of coverage in the authorized market is redundant since every insured receives a notice of excess line placement. The stamping office also commented that the five written commitments that excess line brokers must obtain from insurers do not appear to have any legally binding authority on insurers and that it is difficult to determine how a broker would enforce these commitments. A national trade association had similar comments.

Response: The Department regulates excess line brokers and wants to ensure that these brokers are doing their due diligence. Since insureds do not deal directly with the excess line insurers but rather deal directly with the brokers, it is imperative that the brokers do their due diligence for the insureds they represent. Regarding the annual affidavit to TNCs, it is not redundant because it contains different information than the notice of excess line placement. Therefore, the Department did not make any changes in response to these comments.