

Regulatory Impact Statement for the Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62).

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301, 2606, 2607, 2608, 3201, 3217, 3221(h), 3231(a), 3232(g) and (h), 3240(b) and (d), 4303(II), 4317(a), 4318(g) and (h), and 4328(b)(1).

Financial Services Law § 202 establishes the office of the Superintendent of Financial Services (“Superintendent”). Financial Services Law § 302 and Insurance Law § 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 § 2606 prohibits discrimination because of race, color, creed, national origin, or disability, Insurance Law § 2607 prohibits discrimination because of sex or marital status, and Insurance Law § 2608 prohibits discrimination because of treatment for a mental disability.

Insurance Law § 3201 requires a policy form delivered or issued for delivery in New York to be filed with and approved by the Superintendent.

Insurance Law § 3217 requires the Superintendent to issue such regulations as the Superintendent deems necessary or desirable to establish minimum standards for the form, content and sale of accident and health insurance policies and subscriber contracts offered by a corporation authorized under Insurance Law Article 43 and entities licensed pursuant to Public Health Law article 43.

Insurance Law §§ 3221(h), 3240(d), 4303(II), and 4328(b)(1) require an individual or small group health insurance policy or contract delivered or issued for delivery in New York, including a health maintenance organization (“HMO”) contract (other than a grandfathered health plan), that provides hospital, medical or surgical expense coverage, and a student accident and health policy or contract delivered or issued for delivery in New York, to provide coverage for essential health benefits (“EHB”) as defined in 42 U.S.C. § 18022(b).

Insurance Law §§ 3231(a) and 4317(a) require an individual and small group health insurance policy or contract, including an HMO contract, to be community rated.

Insurance Law §§ 3232(g) and (h), 3240(b), and 4318(g) and (h) prohibit an issuer (i.e., insurer or HMO) from imposing any preexisting condition exclusion in any individual, group or blanket health insurance policy or contract, including an HMO contract, that provides hospital, medical or surgical expense coverage and is not an individual grandfathered health plan and any student accident and health insurance policy or contract.

2. Legislative objectives: Insurance Law §§ 3221(h), 3240(d), 4303(II), and 4328(b)(1) require an individual or small group policy or contract delivered or issued for delivery in New York (other than a grandfathered health plan) that provides coverage for hospital, medical or surgical expense, and a student accident and health insurance policy or contract delivered or issued for delivery in New York, to provide coverage for EHB defined in 42 U.S.C. § 18022(b). In addition, Insurance Law §§ 3232(g) and (h), 3240(b), and 4318(g) and (h) prohibit an issuer from imposing any preexisting condition exclusion in any individual, group or blanket health insurance policy or contract that provides hospital, medical or surgical expense coverage and is not a grandfathered health plan and in any student accident and health insurance policy or contract. Insurance Law Article 26 prohibits discrimination because of race, color, creed, national origin, disability, sex, or marital status.

This rule accords with the public policy objectives that the Legislature sought to advance in Insurance Law §§ 3221(h), 3240(d), 4303(II), 4328(b)(1) by requiring every individual and small group accident and health insurance policy or contract delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage (other than a grandfathered health plan), and every student accident and health insurance policy or contract delivered or issued for delivery in New York, to provide coverage of at least the enumerated ten categories of EHB if the EHB provision in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 *et seq.* are no longer in effect or are modified as determined by the Superintendent.

This rule also accords with the public policy objectives that the Legislature sought to advance in Insurance Law Article 26, which prohibits an issuer from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition with respect to a small or large group or individual accident and health insurance policy or contract that provides hospital, surgical, or medical expense coverage or a student accident and health insurance policy or contract.

3. Needs and benefits: There is movement underway in Congress to repeal and replace the federal Affordable Care Act (“ACA”), including the requirement that issuers cover EHB, such as benefits for maternity and newborn care and mental health and substance use disorder services, and the prohibition against discrimination in the issuance and rating of accident and health insurance because of factors such as race, color, national origin, sex, age, and disability. This rule would require every individual and small group accident and health insurance policy or contract (other than a grandfathered health plan) delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York to provide coverage of at least the enumerated ten categories of EHB if the EHB provisions in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 *et seq.* are no longer in effect or are modified as determined by the Superintendent. This will ensure that people covered under individual, small group, and student accident and health insurance policies and contracts will continue to have coverage for these important benefits.

In addition, the rule would, with regard to a small or large group or individual accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy or contract delivered or issued for delivery in New York State, reaffirm that an issuer is prohibited from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition and to clarify the scope of such prohibitions.

4. Costs: This rule will not impose compliance costs on issuers because it only continues the existing

protections provided under the ACA.

The Department will not incur costs for the implementation and continuation of this rule.

This rule does not impose compliance costs on state or local governments.

5. Local government mandates: This rule 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 rule does not impose any reporting requirements, including forms and other paperwork.

7. Duplication: With regard to the section in the rule that pertains to EHB, it does not duplicate or conflict with any existing state or federal rules or other legal requirements because it only applies if Congress repeals the ACA. With regard to the section in the rule that pertains to nondiscrimination, there is some duplication and overlap with Insurance Law Article 26.

8. Alternatives: The Department considered not promulgating the rule. However, the Department is concerned about the negative impact on consumers if the protections under the ACA are repealed. As a result, the Department determined that it is necessary to promulgate this rule requiring coverage of EHB for the individual and small group health insurance markets and for student accident and health insurance and to reaffirm the continued prohibition against certain types of discrimination for the small and large group and individual health insurance markets and for student accident and health insurance, while clarifying the scope of such prohibition.

Another alternative considered by the Department was to implement the amendment immediately. However, if the ACA remains in effect in its current form, then there is no need to implement mandating the EHB benefits in the regulation.

In the original proposed rule and earlier iterations of the emergency rule, the prohibitions against certain types of discrimination only specified individual and small group accident and health insurance policies or contracts delivered or issued for delivery in New York that provide hospital, surgical, or medical expense

coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York, consistent with the prohibitions on discrimination in the ACA. However, the prohibitions regarding certain discrimination in Insurance Law Article 26 apply regardless of group size. Therefore, to prevent any implication that the scope and nature of the prohibitions against discrimination specified in this regulation do not apply also to large group policies, the regulation now makes clear that the prohibitions and scope apply to small and large group and individual accident and health insurance policies or contracts delivered or issued for delivery in New York that provide hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York, consistent with New York law.

In the original proposed rule and earlier iterations of the emergency, the Superintendent could select from five options in choosing the New York Benchmark Plan. The rule was amended to add three additional EHB benchmark plan selection options. On April 17, 2018, the Department of Health and Human Services amended 45 C.F.R. Part 156 to add a new section 45 C.F.R. 156.111, which added three new EHB benchmark plan selection options for plan years beginning on or after January 1, 2020. These options include: an EHB benchmark plan that another State used for the 2017 plan year; replacing one or more categories of EHB in the New York Benchmark Plan used for the 2017 plan year with the same category or categories of EHB from a benchmark plan that another State used for the 2017 plan year; or any other set of benefits that the superintendent selects that would become the New York Benchmark Plan. Consistent with the federal rule, this rule is being amended to add these new EHB benchmark plan selection options. The Department considered not amending the EHB benchmark plan selection options in this rule to include the new EHB benchmark plan selection options but decided to add them because they provide greater flexibility when selecting an EHB benchmark plan selection options.

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

10. Compliance schedule: The Department is promulgating this rule on an emergency basis in the event that Congress repeals the ACA.

Statement setting forth the basis that for the finding that the Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62) will not have a substantial adverse impact on small businesses and local governments.

1. Effect of the rule: Small businesses: This amendment to Part 52 applies to insurers and health maintenance organizations (“HMOs”) (collectively, “issuers”) in New York State that provide comprehensive hospital, surgical, and medical care coverage. Although most issuers are not small businesses, industry has asserted previously that certain issuers subject to the regulation are small businesses but has not provided the Department of Financial Services (“Department”) with the names of specific issuers or the number of such entities.

Local governments: The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at insurers and HMOs.

2. Compliance requirements: The rule applies across the board to all issuers. However, this rule will not impose new compliance requirements on issuers because it only continues the existing protections provided under the ACA and reaffirms existing requirements under the Insurance Law.

No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with the amendment.

3. Professional services: It is not anticipated that any issuer that is a small business affected by this amendment will need to retain professional services, such as lawyers or auditors, to comply with this amendment.

4. Compliance costs: This rule will not impose compliance costs on issuers because it only continues the existing protections provided under the ACA and reaffirms existing requirements under the Insurance Law.

5. Economic and technological feasibility: No issuer that is a small business affected by this amendment should experience any economic or technological impact as a result of the amendment.

6. Minimizing adverse impact: The Department considered the criteria in State Administrative Procedures Act (“SAPA”) Section 202-b(1) but the Department could not design the amendment to minimize any adverse impact on issuers that are small businesses. The requirements must apply equally to all issuers.

7. Small business and local government participation: Issuers will have an opportunity to comment on the revised proposed rule.

Rural Area Flexibility Analysis for the Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62).

1. Types and estimated numbers of rural areas: Insurers and health maintenance organizations (“HMOs”) (collectively, “issuers”) affected by this rule operate in every county in this state, including rural areas as defined by State Administrative Procedure Act § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule does not impose additional reporting, recordkeeping, and other compliance requirements on issuers located in rural areas. An issuer in a rural area should not need to retain professional services to comply with this rule.

3. Costs: This rule will not impose compliance costs on issuers, including issuers in rural areas.

4. Minimizing adverse impact: This rule uniformly affects issuers that are located in both rural and non-rural areas of New York State. The rule should not have an adverse impact on rural areas.

5. Rural area participation: The Department of Financial Services (“Department”) is promulgating this rule on an emergency basis in the event that Congress repeals the ACA. Issuers in rural areas will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department’s website.

Statement setting forth the basis for the finding that the Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62) will not have a substantial adverse impact on jobs and employment opportunities.

This rule should not adversely impact jobs or employment opportunities in New York State. This rule would require every individual and small group accident and health insurance policy or contract (other than a grandfathered health plan) delivered or issued for delivery in New York that provides hospital, surgical, or medical expense coverage and every student accident and health insurance policy or contract delivered or issued for delivery in New York to continue providing coverage of at least the enumerated ten categories of essential health benefits (“EHB”) if the EHB provisions in 42 U.S.C. § 18022 and 45 C.F.R. 156.100 *et seq.* are no longer in effect or are modified as determined by the Superintendent of Financial Services. This will ensure that people covered under individual, small group, and student accident and health insurance policies and contracts will continue to have coverage for these important benefits.

In addition, the rule would, with regard to a small or large group or individual accident and health insurance policy that provides hospital, surgical, or medical expense coverage and a student accident and health insurance policy or contract delivered or issued for delivery in New York State, reaffirm that an issuer (i.e., insurer or health maintenance organization (“HMO”)) is prohibited from discriminating because of race, color, creed, national origin, sex, age, marital status, disability, or a preexisting condition and to clarify the scope of such prohibitions.