Assessment of Public Comments on the Revised Proposed First Amendment to 23 NYCRR 400

The New York State Department of Financial Services (the "Department") received comments from an association that represents insurers and health maintenance organizations ("health care plans"). The comments supported some provisions of the revised proposed regulation while requesting changes or expressing concern with other provisions.

Comment: The revised proposed regulation provides that an independent dispute resolution ("IDR") entity ("IDRE") must use the conditions and factors set forth in Financial Services Law § 604 when determining the reasonable fee and must consider any other information submitted by the parties. The commentor expressed concern that using one of the factors set forth in Financial Services Law § 604 – the usual and customary cost of the service ("UCR") – allows out-of-network ("OON") providers to maximize billing levels. The commentor argued that UCR has risen well above health care plans' fee schedules and that OON charges are easily manipulated by OON providers who have refused to contract with health care plans. The commentor further argued that IDREs focus on the comparison between the payment made, the charges assessed, and UCR, rendering the remaining criteria in Financial Services Law § 604 largely irrelevant and resulting in the inflation of some OON providers' bills. The commentor also expressed concern that reliance on UCR, when determining the reasonable fee, does not take into consideration the rates of Medicaid Managed Care and Medicare Advantage plans, causing these plans to pay fees that are not built into their premiums and that are unsustainable. The commentor recommended revising the regulation to equalize the emphasis on all criteria an IDRE should follow to determine the reasonable fee, which the commentor stated is especially important for cases involving Medicaid Managed Care and Medicare Advantage reviews.

Response: As the commentor points out, the conditions and factors that an IDRE must use when determining the reasonable fee in an IDR dispute are set forth in statute. Financial Services Law § 604 provides that, in determining the appropriate amount to pay for a health care service, an IDRE must consider all relevant factors,

including, with respect to physician services, UCR. This means that an IDRE must consider UCR, but it is not bound by UCR. An IDRE must also consider all other relevant factors, including the other factors set forth in Financial Services Law § 604 and any other information submitted by the parties. The revised proposed regulation clarifies that an IDRE must consider any other information submitted by the parties when determining the reasonable fee. Therefore, it is already clear that an IDRE must consider all relevant factors, including UCR, the other factors set forth in Financial Services Law § 604, and any other information submitted by the parties when determining the reasonable fee. If a party wishes to submit for consideration the amount that is payable under a reimbursement methodology other than UCR, e.g., Medicare, the party may do so. Under Financial Services Law § 602, however, IDR is not applicable to Medicare Advantage plans or Medicaid Managed Care plans when physician fees are subject to schedules or other monetary limitations. Therefore, the Department did not make any changes in response to this comment.

Comment: The revised proposed regulation requires a health care plan that is a party to an IDR dispute to provide the patient's coverage type to the IDRE. The commentor requested that the revised proposed regulation be revised further to reference the patient's coverage type in the provision that specifies the conditions and factors that an IDRE must use when determining the reasonable fee and requested clarification that an IDRE should take the patient's coverage type into consideration as an individual patient characteristic when analyzing the factors set forth in Financial Services Law § 604.

Response: As stated above, the conditions and factors that an IDRE must consider when determining the reasonable fee in an IDR dispute are set forth in statute. The patient's coverage type is not one of the conditions or factors set forth in Financial Services Law § 604. However, the revised proposed regulation clarifies that an IDRE must consider any other information submitted by the parties when determining the reasonable fee, meaning that it can consider the patient's coverage type if the coverage type is submitted by the health care plan. Therefore, the Department did not make any changes in response to this comment.

Comment: The revised proposed regulation requires that, with respect to disputes involving a health care plan, in determining a reasonable fee for the services rendered, an IDRE must select either the health care plan's payment or best and final offer, if applicable, or the OON provider's fee or best and final offer, if applicable. For disputes that do not involve a health care plan, the IDRE must determine a reasonable fee. The commentor encouraged the Department to adopt changes to make the regulation consistent with the federal No Surprises Act, which the commentor stated does not require the IDRE to choose between the health care plan's payment or the provider's fee.

Response: The federal No Surprises Act requires an IDRE to select either the offer submitted by the health care plan or the offer submitted by the OON provider. The revised proposed regulation, which is summarized in relevant part above, is consistent with the federal law. Therefore, the Department did not make any changes in response to this comment.