

Assessment of Public Comments for the Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

The Department of Financial Services (“Department”) received comment letters from the following individuals and entities in response to its publication of the proposed rule in the New York State Register:

- a trade association comprised of New York State automobile insurers (“trade association”);
- a property/casualty insurer (“insurer”);
- a health service provider;
- durable medical equipment (“DME”) providers; and
- a law firm that provides legal services to various health service providers (“law firm”).

Comments from the trade association

Comment: Although the trade association generally supported the rule, the association recommended that the total accumulated rental charge should be limited to the acquisition cost and not include an additional 50% markup, because the markup will encourage DME providers to rent items unnecessarily to the maximum reimbursed amount. The trade association also commented that because the DME item may be rented multiple times, DME providers will be able to recover their costs and therefore the 50% markup is excessive.

Response: The Department believes that the total accumulated rental charge and maximum purchase charge should be consistent to allow reimbursement for renting DME up to what would have been paid had the DME been purchased at the outset. Moreover, although under the proposed rule a DME provider may rent DME up to the maximum purchase charge, ultimately the rental period for DME is subject to medical necessity. Therefore, the Department did not make any changes to the rule.

Comments from the insurer

Comment: The insurer requested that the fee schedule rental rates be based on a weekly rather than a monthly basis to ensure accuracy and manage costs, and because fee schedule rental rates are calculated weekly

rather than monthly. The insurer also suggested adding the actual purchase price listed in the Workers' Compensation DME Fee Schedule as a "lesser of" option for the total accumulated rental charge.

Response: The proposed rule makes clear that rental charges for less than one month shall be prorated using a 30-day month. Therefore, no change is necessary to address this comment. However, the Department agrees that the purchase price listed in the Workers' Compensation DME Fee Schedule should be included as a "lessor of" option and made changes accordingly. This is a clarifying change, not a substantive change, because the total accumulated rental charge was always meant to be limited to the purchase price regardless of whether a fee is listed in the Workers' Compensation DME Fee Schedule.

Comment: The insurer requested that the Department clarify that the rule applies when either the purchase or rental or both fees are not listed in the Workers' Compensation DME Fee Schedule.

Response: The Department agrees and made the necessary change to the rule, which is not a substantive change.

Comment: The insurer requested that the Department amend the definition of "acquisition cost" to require DME providers to submit invoice documentation at the time the claim is submitted to facilitate payment and the handling of claims.

Response: An insurer has the right to request any documentation it deems necessary to verify a no-fault claim. Therefore, the Department did not make any changes to the rule because it does not believe that any change is necessary.

Comment: The insurer requested that the Department amend the rule to include the price available to the public through "large volume online retailers or suppliers" when determining the maximum purchase charge.

Response: The Department did not make this change because it would require the rule to define "large volume online retailers or suppliers," which ultimately is a question of fact. In addition, adding the price available through "large volume online retailers or suppliers" would mean that the price could be based on what

a provider overseas is able to charge, which could result in cheaper, poorly made DME and a price that would be so low that DME providers in New York could not compete and that could put them out of business.

Comments from DME providers, a law firm representing DME providers, and a health service provider

Comment: A DME provider requested that the rule take effect 180 days after final adoption to give stakeholders time to update invoice, intake, and billing processes.

Response: There has been an emergency regulation in place since last year regarding the maximum permissible purchase charge or total accumulated rental charge. However, the Department acknowledges that the monthly rental charge was not in the emergency rule and was new in the proposed rule. Therefore, the Department amended the rule so that the maximum permissible rental charge takes effect on and after June 1, 2023 to give DME providers time to update their invoices, intake, and billing processes. The Department does not consider this a substantive change.

Comment: A DME provider commented that the rule hinders the ability of DME providers to make a living because since the pandemic, the costs of several items has skyrocketed due to a shortage in raw materials.

Response: The maximum permissible monthly rental of DME is tied to acquisition cost and the maximum purchase charge, and total accumulated rental charge is tied to acquisition cost and the usual and customary price DME providers charge. The rule defines “acquisition cost” in relevant part as to the line-item cost to the provider from the manufacturer or wholesaler. Therefore, if the cost of DME has increased because of a shortage in raw materials, DME providers are paying more to purchase the DME from the manufacturer or wholesaler and the usual and customary price DME providers charge increases, then the amount the individual DME provider can charge increases too. Therefore, the Department did not make any changes in response to this comment.

Comment: Several DME providers suggested various methodologies for establishing the maximum purchase charge and total accumulated rental charge, including recommending that a neutral third-party vendor

be used to determine those charges, eliminating acquisition cost to determine the maximum permissible rental charge, and calculating rental charges at 1/3 or 1/4 of acquisition cost.

Response: The Department believes that the methodology in the rule is rational since it is largely based on the Medicaid DME Fee Schedule, which DME providers authorized under Medicaid already are using for reimbursement, and which is similar to fee schedules that the Department previously established that also were based on the Medicaid DME Fee Schedule. Therefore, the Department did not make any changes to the rule to address this comment.

Comment: Many of the DME providers commented that the maximum permissible monthly rental charge established in the rule is too low and does not take into account denied claims, policy exhaustion, or the DME provider's business expenses (such as delivery and set-up expenses, repairs, and lost or stolen DME items), which could lead providers to lay off employees or go out of business. Some DME providers asserted that the amendment would impose new costs on DME providers because it costs more to provide services to patients than the DME provider can make. They also asserted that the amendment would require them to need extra employees, new software, and labeling systems. DME providers and a health service provider commented that the medical device industry is improving every day, that new products will eventually be presented, and that if this rule is adopted, it will prevent health service providers from adopting new technology and using new medical devices that may substantially help patients.

Response: The Department does not agree that the maximum permissible rental charge is too low because as stated above, the maximum charge mirrors the Medicaid DME Fee Schedule, which DME providers authorized under Medicaid already are using for reimbursement. In addition, many of the items DME providers rent out would have an established fee under the Workers' Compensation DME Fee Schedule and this rule would be limited only to DME not captured by the Workers' Compensation DME Fee Schedule. Finally,

Insurance Regulation 83 already permits an insurer, arbitrator, or court to pay a fee exceeding the scheduled fee if the insurer, arbitrator, or court finds that an unusual procedure or unique circumstance justifies the charge.

The Department disagrees that the maximum monthly rental charge should consider denied claims. The purpose of the fee schedule is to set reasonable reimbursement rates for DME that is medically necessary, and not for claims that have been denied as not reimbursable under no-fault. Additionally, the monthly rental charge already takes into account expenses such as delivery and repair costs.

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

Comment: Certain DME providers commented that the Department should provide a clearer definition of “acquisition cost” or provide for a review or appeal process for disputes regarding acquisition cost, while other DME providers commented that something other than acquisition cost should be used. DME providers also commented that the usual and customary price charged to the general public methodology should be limited to at least New York State or local geographic areas or otherwise clarified. A DME provider explained that various providers within the system have individual proprietary pricing arrangements, which they are unwilling to share as a matter of business competition. Additionally, the payer will have no way of determining either acquisition cost or usual and customary charge, outside of considering the bill being submitted as fair and honest by the provider. A DME provider stated that the relative interpretations of the “lesser of” language in the rule will cause confusion in the marketplace.

Response: The Department disagrees that acquisition cost should not be used or that it needs to be further defined. Acquisition cost is currently being used in Medicaid to calculate the maximum permissible charge and until recently, was used in the Workers’ Compensation DME Fee Schedule. As to an appeal or review process, there is already a no-fault arbitration system in place to deal with disputes and DME providers also can file a complaint with the Department.

Regarding the usual and customary price methodology, this is a standard that is used already in Insurance Regulation 83 and has been in place for decades. The usual and customary price charged to the general public generally means the fee charged by the majority of DME providers within the same geographical area. While the methods for arriving at that fee vary by insurer and geographic area, an insurer typically would derive the usual and customary price based on claim data collected by the insurer. The usual and customary price is not meant to be compared with what an individual DME provider considers a “fair and honest” price. In addition, the rule does not require providers to divulge proprietary pricing arrangements. Therefore, the Department did not make any changes in response to these comments.

Comment: DME providers and a law firm commented that the total accumulated rental charge should not be subject to a lifetime cap on the DME.

Response: The Department amended the rule to clarify that the total accumulated rental charge is not subject to a lifetime cap, and that DME providers may rent a particular item many times over the life of that item. As this was always the Department’s intent, these amendments are clarifications and are not substantive changes.

Comment: A DME provider commented that adopting a formula-based reimbursement model would lead to increased fraud and collusion, explaining that fraud has been focused on devices sold to patients since acquisition cost can be manipulated and that by tying acquisition cost to the total accumulated rental charge, the fraud would be expanded to rentals. The DME provider also commented that the rule would result in increased litigation by applying acquisition cost to rentals.

Response: The Department disagrees that there will be increased fraud and litigation because acquisition cost is a factor used in the Medicaid DME Fee Schedule already for rentals and has been for many years. In addition, an insurer can verify acquisition cost through the verification process and therefore reduce fraud. Thus, the Department did not make any changes in response to this comment.