

in New York. This rulemaking adds a new section 2.19 to 23 NYCRR Part 2, specifying that the Department may conduct administrative hearings by videoconference at the Department's discretion so that parties and hearing officers do not have to be physically present at the same location during hearings, subject to a determination by the hearing officer upon a timely objection filed by the respondent or applicant that a hearing held by videoconference would either impinge upon the respondent's or applicant's due process rights, or would be fundamentally unfair or impractical, as expressed in section 2.19(d) of the regulation.

The Department has no reason to believe that the rulemaking will result in any adverse impact on job or employment, including self-employment, opportunities in New York.

## EMERGENCY RULE MAKING

### Minimum Standards for Form, Content, and Sale of Health Insurance, Including Standards of Full and Fair Disclosure

**I.D. No.** DFS-29-21-00011-E

**Filing No.** 808

**Filing Date:** 2021-07-06

**Effective Date:** 2021-07-06

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of sections 52.17(d) and 52.18(h) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 302; Insurance Law, sections 301, 3216, 3217, 3217-h, 3221, 4303 and 4306-g

**Finding of necessity for emergency rule:** Preservation of public health and public safety.

**Specific reasons underlying the finding of necessity:** Telehealth played an indispensable role in providing quality care to those persons who needed health care services during the COVID-19 pandemic but could not visit their providers in person. As made evident by the COVID-19 pandemic, access to these services should not be limited to in-person or visual requirements. When clinically appropriate, an audio-only visit, such as by telephone, provides an essential form of access for New Yorkers. The availability of audio-only visits allows for more widespread access, particularly for mental health and substance use disorder services, because no visual component is required. Additionally, encouraging people who do not need emergency care to use audio-only telehealth services may alleviate the stress that in-person visits put on our health care system. Failure to continue to enable the use of telehealth services through audio-only visits could result in New Yorkers losing access to care they have come to rely on throughout the COVID-19 pandemic, potentially disrupting the health and safety of the people of New York. Further, coverage of audio-only telehealth services is important because some New Yorkers, such as senior citizens, are not able to use video-enabled technology, like Zoom.

This amendment clarifies that an audio-only visit falls within the meaning of telehealth. Additionally, this amendment clarifies that for the purposes of telehealth, an insurer may engage in reasonable fraud, waste, and abuse detection efforts, including efforts to prevent payments for services that do not warrant a separate billable encounter. This amendment is not intended to require coverage of services for which no charge is normally made consistent with 11 NYCRR section 52.16(c)(8). The Department of Financial Services expects every health care plan to reimburse a provider offering telehealth services for audio-only visits when medically necessary.

Given the continuing public health implications related to COVID-19, it is essential that New Yorkers continue to be able to access health care services in a way that limits the spread of COVID-19. It is thus imperative that this amendment be promulgated on an emergency basis for the preservation of public health.

**Subject:** Minimum Standards for Form, Content, and Sale of Health Insurance, Including Standards of Full and Fair Disclosure.

**Purpose:** To clarify application of Insurance Law sections 3217-h and 4306-g.

**Text of emergency rule:** Section 52.17(d) is added as follows:

(d) Telehealth.

(1) Telehealth has the meaning set forth in Insurance Law sections 3217-h and 4306-g and includes audio-only visits.

(2) For the purposes of Insurance Law sections 3217-h and 4306-g, an insurer may engage in reasonable fraud, waste and abuse detection efforts, including to prevent payments for services that do not warrant a separate billable encounter.

Section 52.18(h) is added as follows:

(h) Telehealth.

(1) Telehealth has the meaning set forth in Insurance Law sections 3217-h and 4306-g and includes audio-only visits.

(2) For the purposes of Insurance Law sections 3217-h and 4306-g, an insurer may engage in reasonable fraud, waste and abuse detection efforts, including to prevent payments for services that do not warrant a separate billable encounter.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 3, 2021.

**Text of rule and any required statements and analyses may be obtained from:** Tobias Len, Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 474-8975, email: Tobias.Len@dfs.ny.gov

#### Regulatory Impact Statement

1. Statutory authority: Financial Services Law sections 202 and 302 and Insurance Law sections 301, 3216, 3217, 3217-h, 3221, 4303, and 4306-g.

Financial Services Law section 202 establishes the office of the Superintendent of Financial Services ("Superintendent").

Financial Services Law section 302 and Insurance Law section 301, in pertinent part, authorize the Superintendent to prescribe regulations interpreting the Insurance Law and to effectuate any power granted to the Superintendent in the Insurance Law, Financial Services Law, or any other law.

Insurance Law section 3216 sets forth the standard provisions in individual accident and health insurance policies.

Insurance Law section 3217 authorizes the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance policies and subscriber contracts of corporations organized under Insurance Law Articles 32 and 43 and Public Health Law Article 44.

Insurance Law sections 3217-h and 4306-g provide that an insurer or corporation may not exclude from coverage a service that is otherwise covered under a policy or contract that provides comprehensive coverage for hospital, medical or surgical care because the service is delivered via telehealth.

Insurance Law section 3221 sets forth the standard provisions in group and blanket accident and health insurance policies.

Insurance Law section 4303 sets forth mandatory benefits in subscriber contracts issued by corporations organized under Insurance Law Article 43.

2. Legislative objectives: The statutory sections cited above establish the minimum standards for the form, content, and sale of health insurance, including standards of full and fair disclosure and standards for telehealth services. This proposed amendment accords with the public policy objectives that the Legislature sought to advance in the foregoing sections of the Insurance Law by clarifying that telehealth services includes audio-only visits.

3. Needs and benefits: Telehealth played an indispensable role in providing quality care to those persons who needed health care services during the COVID-19 pandemic but could not visit their providers in person. As made evident by the COVID-19 pandemic, access to these services should not be limited to in-person or visual requirements. When clinically appropriate, an audio-only visit, such as by telephone, provides an essential form of access for New Yorkers. The availability of audio-only visits allows for more widespread access, particularly for mental health and substance use disorder services, because no visual component is required. Additionally, encouraging people who do not need emergency care to use audio-only telehealth services may alleviate the stress that in-person visits put on our health care system. Failure to continue to enable the use of telehealth services through audio-only visits could result in New Yorkers losing access to care they have come to rely on throughout the COVID-19 pandemic, potentially disrupting the health and safety of the people of New York. Further, coverage of audio-only telehealth services is important because some New Yorkers, such as senior citizens, are not able to use video-enabled technology, like Zoom. Given the public health experience throughout the COVID-19 pandemic, it is essential that insureds continue to have access to health care services through audio-only telehealth visits. Thus, this amendment clarifies that an audio-only visit falls within the meaning of telehealth.

This amendment also clarifies that for the purposes of telehealth, an insurer may engage in reasonable fraud, waste, and abuse detection efforts, including efforts to prevent payments for services that do not warrant a separate billable encounter. This amendment is not intended to require coverage of services for which no charge is normally made consistent with 11 NYCRR section 52.16(c)(8).

The Department of Financial Services ("Department") expects every health care plan to reimburse a provider offering telehealth services for audio-only visits when medically necessary.

4. Costs: Health care plans may incur additional costs to comply with the amendment if they need to file new policy and contract forms and rates with the Department to clarify that audio-only visits fall within the meaning of telehealth. However, any costs should be minimal because health care plans submit policy and contract form and rate filings as a part of the normal course of business. In addition, the Department had previously issued an emergency regulation clarifying that telehealth includes services rendered by telephone; thus, health care plans already should have updated their forms and rates, accordingly.

Health care providers (“providers”) should not incur any additional costs as a result of this amendment.

This amendment may impose compliance costs on the Department because the Department may need to review amended policy and contract forms and rates. However, any additional costs incurred by the Department should be minimal, and the Department should be able to absorb the costs in its ordinary budget.

The amendment will not impose compliance costs on any local governments.

5. Local government mandates: The amendment does not impose any program, service, duty or responsibility on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Health care plans may need to file new policy and contract forms and rates with the Department.

Providers and local governments should not incur additional paperwork to comply with this amendment.

7. Duplication: This amendment does not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: The Department considered referencing telephone visits in the definition of telehealth. However, the Department decided to use broader language by referencing audio-only visits for consistency with the federal Centers for Medicare & Medicaid Services and in the event technology changes.

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

10. Compliance schedule: The rule will take effect immediately upon filing of the Notice of Emergency Adoption with the Secretary of State.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This rule affects health maintenance organizations and authorized insurers (collectively, “health care plans”) and health care providers (“providers”). This amendment clarifies that telehealth includes audio-only visits (e.g., telephone calls) and that, for the purpose of telehealth, an insurer may engage in reasonable fraud, waste, and abuse detection efforts, including efforts to prevent payments for services that do not warrant a separate billable encounter. This amendment is not intended to cover services for which no charge is normally made consistent with 11 NYCRR section 52.16(c)(8).

Industry asserts that certain health care plans subject to the amendment are small businesses. Providers also may be small businesses. As a result, certain health care plans and providers that are small businesses will be affected by this amendment.

This amendment does not affect local governments.

2. Compliance requirements: No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with this amendment because the amendment does not apply to any local government.

A health care plan that is a small business affected by this amendment, if any, may be subject to reporting, recordkeeping, or other compliance requirements as the health care plan may need to file new policy and contract forms and rates with the Superintendent of Financial Services.

A provider that is a small business should not be subject to additional reporting, recordkeeping, or other compliance requirements.

3. Professional services: No local government will need professional services to comply with this amendment because the amendment does not apply to any local government. No health care plan or provider that is a small business affected by this amendment should need to retain professional services, such as lawyers or auditors, to comply with this amendment.

4. Compliance costs: No local government will incur any costs to comply with this amendment because the amendment does not apply to any local government. A health care plan that is a small business affected by this amendment, if any, may incur costs because it may need to file new policy or contract forms and rates. However, any costs should be minimal because health care plans submit policy or contract form and rate filings as a part of the normal course of business. In addition, the Department had previously issued an emergency regulation clarifying that telehealth includes services rendered by telephone; thus, health care plans already should have updated their forms and rates, accordingly.

A provider that is a small business should not incur additional costs as a result of the amendment.

5. Economic and technological feasibility: This amendment does not

apply to any local government; therefore, no local government should experience any economic or technological impact as a result of the amendment. A health care plan and a provider that is a small business should not incur any economic or technological impact as a result of the amendment.

6. Minimizing adverse impact: There will not be an adverse impact on any local government because the amendment does not apply to any local government. This amendment should not have an adverse impact on a health care plan or provider that is a small business because the amendment uniformly affects all health care plans and providers. The Department of Financial Services (“Department”) considered the approaches suggested in State Administrative Procedure Act (“SAPA”) section 202-b(1) for minimizing adverse impacts but did not find them applicable.

7. Small business and local government participation: The Department complied with SAPA section 202-b(6) by notifying representatives of health care plans that are small businesses that it intended to promulgate this amendment. Health care plans and providers that are small businesses also will have an opportunity to participate in the rulemaking process when the amendment is published in the State Register and posted on the Department’s website.

#### **Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: Authorized insurers and health maintenance organizations (collectively, “health care plans”) and health care providers (“providers”) affected by this amendment operate in every county in this state, including rural areas as defined by State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping, and other compliance requirements; and professional services: A health care plan, including a health care plan in a rural area, may be subject to additional reporting, recordkeeping, or other compliance requirements because the health care plan may need to file new policy and contract forms and rates with the Department of Financial Services (“Department”).

A provider, including a provider in a rural area, should not be subject to any additional reporting, recordkeeping, or other compliance requirements.

A health care plan and a provider, including those in a rural area, should not need to retain professional services, such as lawyers or auditors, to comply with this amendment.

3. Costs: Health care plans, including those in rural areas, may incur additional costs to comply with the amendment because they may need to file new policy and contract forms and rates with the Department. However, any costs should be minimal because health care plans submit policy and contract form and rate filings as a part of the normal course of business. In addition, the Department had previously issued an emergency regulation clarifying that telehealth includes services rendered by telephone; thus, health care plans already should have updated their forms and rates, accordingly.

Providers, including those in rural areas, should not incur additional costs to comply with the amendment.

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

5. Rural area participation: The Department notified representatives of health care plans in rural areas that it intended to promulgate this amendment. Health care plans and providers in rural areas will also have an opportunity to participate in the rulemaking process when the amendment is published in the State Register and posted on the Department’s website.

#### **Job Impact Statement**

This amendment should not adversely impact jobs or employment opportunities in New York State because the amendment simply clarifies that the meaning of “telehealth” includes audio-only visits (e.g., telephone calls) and that, for the purpose of telehealth, an insurer may engage in reasonable fraud, waste, and abuse detection efforts, including efforts to prevent payments for services that do not warrant a separate billable encounter. This amendment is not intended to require coverage for services for which no charge is normally made, consistent with 11 NYCRR section 52.16(c)(8). As a result, there should be no impact on jobs or employment opportunities.