

KATHY HOCHUL
Governor



ADRIENNE A. HARRIS
Superintendent

March 8, 2023

By Electronic Mail Delivery
New York State Legislature
Albany, New York

Dear State Legislators:

In connection with the testimony of Superintendent Adrienne A. Harris on behalf of the New York State Department of Financial Services (“DFS”) during the joint legislative Health budget hearing held on Tuesday, February 28, 2023, please see the following written responses to questions posed by the Senate and Assembly members present:

Insurance Committee Chair Assembly Member David Weprin asked Superintendent Harris as whether the Department of Financial Services anticipates challenges to its Executive Budget Proposal on advance notification of drug pricing, similar to what is being experienced related to Oregon legislation.

The Department’s Response:

DFS does not anticipate a successful challenge to the proposed language. DFS has been monitoring legal challenges to similar bills. The pharmaceutical industry previously lost its challenge in California court to the state’s drug price disclosure requirement, which like both Oregon’s statute and New York’s Executive Budget Proposal, requires advance disclosure of price changes. The challenge in California was based upon the dormant commerce clause and defeated at the District Court level, and again at the 9th Circuit Court of Appeals. Subsequently, the industry voluntarily dismissed the action in September 2022 with prejudice, effectively conceding that California’s drug price disclosure law was not unconstitutional. Inasmuch as the pharmaceutical industry has also asserted the dormant commerce clause as the basis of its argument in Oregon, and Oregon is similarly within the jurisdiction of the 9th Circuit, the Department believes that there is minimal likelihood of success to the Oregon challenge.

Health Committee Ranking Assembly Member Josh Jensen, in connection with the Executive Budget Proposal concerning the Health Guaranty Fund, asked Superintendent Harris who would be responsible for paying the alleged two new taxes imposed to health plans to satisfy administrative costs and duties.

The Department’s Response:

The Health Guaranty Fund does not impose a tax on health plans. The proposed Health Guaranty Fund expands the current life insurance guaranty fund to include health insurance and uses a post-insolvency model, meaning that assessments are only collected as needed after a court has issued an order of liquidation. The current administrator of the fund, the Life Insurance Company Guaranty Corporation of New York (“LICGC”), which is managed and controlled by the industry, determines the projected claims liabilities and administrative costs needed to make sure claims are paid. The industry-run corporation (not the state) then collects these funds. This is how the guaranty fund currently works for life insurer insolvencies in New York.

In the case of a health insurer insolvency, the corporation will assess member insurers proportionally based on the health insurance premiums written by the members in the previous three years. To that end, if a company did not write any health insurance, they would not be directed to make any contributions to the guaranty fund.

Similarly, for long term care insolvency, the assessment amount would be determined by LICGC and would also be proportional, but with a 50/50 split between life and health insurers. Property insurers who write health insurance would be considered health insurers for this purpose.

It has been alleged that assessments would be 2% of premiums written. This is false. The law caps assessments in any year at 2% of premiums written by the respective insurer in New York State during the preceding calendar year, but the long-term care liquidation pending in New York court would not require there to be an assessment at the ceiling of 2% in order to fully support impacted consumers. Further, if an insurance company is financially troubled, the Superintendent may exempt that company from paying assessments under current law.

Insurance Committee Ranking State Senator Pamela Helming asked Superintendent Harris as to whether the Pay and Pursue/Resolve Executive Budget Proposal would replace cooperative agreements made between upstate hospitals and insurers to advance/expedite payments.

The Department’s Response:

The Pay and Pursue/Resolve Executive Budget proposal is limited to emergency services. It is intended to expedite payments. Insurers will be required to pay claims within 30 days of receipt, without delaying payment for a medical necessity review (which will only be permitted after payment). DFS does not anticipate an impact on hospital arrangements for advance payments. However, DFS and the Department of Health (“DOH”), who oversees hospitals and would have greater insight on their processes, would need more information on any specific hospital arrangement to provide further insight.

State Senator Lea Webb asked Superintendent Harris why New York was the only state prohibiting risk retention groups from being licensed in the state.

The Department’s Response:

New York does not prohibit a risk retention group (“RRG”) from being “licensed” in New York. An RRG, generally, is a corporation or other limited liability association whose primary activity consists of assuming and spreading all or any portion of the liability exposure of its group members who are engaged in a common business. Under the federal Liability Risk Retention Act (“LRRRA”), an RRG is generally exempt from any state law, rule, regulation, or order that would make unlawful or regulate the operation of an RRG or discriminate against an RRG or any of its members. However, the LRRRA provides that it does not preempt a state’s authority to specify acceptable means of demonstrating financial responsibility where the state has required a demonstration of financial responsibility as a condition for obtaining a license. Under the LRRRA, the state in which the RRG is chartered may regulate the formation and operation of an RRG, and RRGs must register in the states in which they do business, including in New York.

The Department is aware that there are certain groups advocating for an amendment to the Vehicle and Traffic Law to permit RRGs with a minimum of \$15 million in surplus to write motor vehicle financial responsibility coverage for non-profit carsharing companies because the Vehicle and Traffic Law currently requires this coverage to be written by a licensed insurer. There are significant consumer protection concerns raised by such an amendment that could result in accident victims being unable to have their claims fully paid. Motor vehicle financial responsibility coverage is designed to protect innocent third parties who may be injured or killed as a result of a motor vehicle accident. As a result of the LRRRA, DFS is not able to regulate RRGs that are chartered in another state and registered in New York, and therefore, cannot protect consumers who may need to make claims under policies issued by RRGs. In that RRGs are not subject to the consumer protections in New York’s laws and regulations, DFS is unable to review and prior approve policy forms and rates, and there is no guaranty fund protection for RRGs in the event an RRG becomes insolvent, goes out of business, and cannot pay claims to innocent third parties.

Assembly Member Marjorie Byrnes asked Superintendent Harris how many of the distressed provider funds have been distributed to nursing homes.

The Department's Response:

This is not a DFS program, and we believe that this is a program administered by the Department of Health. To that end, please contact the Governmental Affairs Division of the Department of Health for further guidance.

We continue to welcome engagement with the Elected to respond to any inquiries had concerning the Executive Budget Proposal, along with any DFS related matters.

Sincerely,

Joyce Elie
Director of Legislative Affairs