Assessment of Public Comments on the Proposed Sixty-Seventh Amendment to 11 NYCRR 52 (Insurance Regulation 62)

The New York State Department of Financial Services ("Department") received comments from insurers; associations that represent insurers and health maintenance organizations ("HMOs") (collectively, "plans"); an association that represents the life insurance industry, the department of health for a major city, and advocates for consumers. Some comments expressed support for the regulation, while others requested changes and expressed concerns about the proposed regulation's requirements.

Comment: One commenter stated that enhanced data collection is not necessary. The commenter stated that in their experience, insureds feel uncomfortable participating in such data collection. Collecting more information than is necessary to administer plans and serve insureds goes against principles of data minimization, which is the idea that to protect the data rights of customers, an entity should not collect information it does not need.

Response: No revisions were made in response to this comment. The regulation protects consumers who are uncomfortable or unwilling to share their demographic information by making clear that they are not required to respond to any of the demographic questions. Furthermore, plans may not use an applicant's or insured's refusal to respond to any demographic question as a basis for any underwriting, rating, or eligibility decision. At the same time, there is consensus among experts in academia, government, and the insurance industry that self-reporting is the gold standard for demographic data collection. Also, similar demographic data is already collected by the Centers for Medicare and Medicaid Services ("CMS")-regulated Medicare providers and also by insurance plans sold on the New York State of Health ("NYSOH") insurance exchange to serve a similar goal—identifying health disparities. In addition, providers of other financial services must collect similar data, like mortgage lenders pursuant to the Home Mortgage Disclosure Act. Requiring the systematic collection of such demographic data will help enable the Department and plans to identify disparities that exist in the quality and utilization of care experienced by underrepresented populations and inform data-driven public policymaking.

Comment: One commenter suggested that the number of regulations in New York State is difficult to manage due to the complexity and sheer volume of regulations. The commenter noted that as a startup business, costs associated with understanding the degree of regulation in New York are great. The commenter expressed their appreciation for the Department to make a serious effort to reduce regulation as other states have done and as the federal government has indicated an intent to do.

Response: No revisions were made in response to this comment because the comment is outside the scope of the subject matter of this regulation.

Comment: One commenter stated that they were seeking clarity on how the regulation impacts self-funded plans.

Response: The regulation does not apply to self-funded plans. The regulation applies to an "insurer", which section 52.52(g) defines as an insurer licensed to write accident and health insurance in this State, a corporation organized pursuant to Insurance Law Article 43, an HMO certified pursuant to Public Health Law Article 44, and a student health plan certified pursuant to Insurance Law section 1124. Therefore, no revisions were made in response to this comment.

Comment: A commenter expressed general dissatisfaction with the Department's enforcement of existing regulations and expressed concerns that collecting more data will allow "black box" artificial intelligence ("AI") underwriting tools to better associate profiles between silos and thus engage in shadow discrimination against protected classes. The commenter further expressed that the commenter does not trust that the Department has the technical expertise or courage to defend the public from these AI underwriting tools.

Response: The regulation expressly prohibits plans from using the data for unfair or unlawful discriminatory purposes, including eligibility, rate setting and underwriting determinations, and requires plans to collect the data in a separate and supplemental questionnaire at the time of application for new insureds or at renewal for current insureds. The regulation also requires plans to file an annual attestation with the Department that the information collected is not used in underwriting, including eligibility determinations, for rating, or otherwise used in a manner that would constitute unfair or unlawful discrimination under the New York Insurance Law. Separately, the Department has adopted expanded guidance on the use of AI in the insurance industry in underwriting and pricing to ensure that the insurance industry understands the Department's expectations on the responsible use of AI, including that plans perform appropriate due diligence and oversight of AI usage and are ultimately responsible for the outcomes of that AI usage, including by third-party vendors. No changes were made in response to this comment.

Comment: One commenter requested that the Department amend the regulation to provide a procedure to make de-identified data available to county and city public health authorities and to researchers, consistent with applicable law.

Response: The Department did not revise the regulation in response to this comment because the Department already may share information, including confidential information with local regulatory authorities pursuant to Insurance Law section 110, if the Department wishes to do so.

Comment: One commenter asked the Department to confirm whether the regulation applies to the Essential Plan, Child Health Plus, and Medicaid Managed Care plans.

Response: The regulation does not apply to the Essential Plan, Child Health Plus, or Medicaid Managed Care plans. It only applies to comprehensive health insurance plans issued by insurers as defined in section 52.52(g) of the regulation. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter recommended that the Department specifically identify comprehensive health insurance coverage as the target of the regulation or amend every subsection to make clear that the regulation applies solely to comprehensive health insurance policies.

Response: The Department did not make any changes to the regulation because section 52.52(a) of the regulation already explicitly provides that the requirements established under 11 NYCRR 52.52 apply to comprehensive health insurance policies.

Comment: One commenter requested that the Department clarify the phrase "efforts to eliminate health disparities" as used in section 52.52(b)(2) because it is unclear whether a plan may use member zip code data for marketing purposes under the proposed regulation. The commenter stated that geographic location drives health disparities, and the commenter believes geographic location is not included in the definitions of "health disparities" and "health equity" set forth in Public Health Law section 240(6) and (7) as referenced in the regulation.

Response: A member's zip code is not one of the items that a plan is required to collect under this regulation. Therefore, it is not demographic information under section 52.52(b)(2), and nothing prohibits a plan from using a member's zip code for marketing purposes. Therefore, the Department did not make any changes in response to this comment.

Comment: One commenter requested that the Department provide additional clarity on what is meant by "preferred language," since plans collect information on both preferred spoken language and preferred written language, which may be different for individuals completing a demographic questionnaire. The commenter also asked that the Department revise the proposed regulation to include "language spoken" to align with demographic data collection standards established by New York Department of Health's ("DOH's") Quality Assurance and Reporting Requirements ("QARR").

Response: Preferred language includes both spoken and written language. The Department anticipates issuing a questionnaire template for plans to use to ensure compliance with the regulation. The template will show how the questionnaire should be worded. Therefore, the Department did not make any changes in response to these comments.

Comment: Several commenters requested clarity with respect to the frequency with which plans must deliver to members and applicants the required questionnaire. One commenter recommended that the Department clarify whether plans should solicit and send members a request for demographic information each time a member renews a health insurance policy. Another commenter requested that the Department confirm that requests for demographic information be made at an individual's first policy renewal after the regulation's effective date for only those insureds and dependents for whom the plan does not have such information to avoid repeat requests to individuals who declined to respond. Another commenter asked whether plans must survey individuals annually upon renewal if such individual initially declines to answer a plan's demographic questions.

Response: The Department amended the proposed regulation to clarify that a plan must request and collect the information from insureds and dependents already covered under a policy as of the effective date of section 52.52 at the time of the next policy renewal that is at least 90 days after the effective date of the section and at any later time upon the direction of the Superintendent of Financial Services ("Superintendent"), provided that the Superintendent cannot direct an insurer to request and collect the demographic information from insured and dependents more than once every two years. . Nothing in the regulation requires a plan to follow-up if an insured, dependent, or applicant does not respond. A plan may, but is not required, to re-ask for demographic information beyond what is required in the regulation.

Comment: Commenters requested clarification on how the data requests required under the proposed regulation should be worded, and the level of specificity required for the collection of race, ethnicity, language, sexual orientation, and gender identity and expression data. Specifically, one commenter requested that the Department amend the regulation to clarify operational protocols to prevent unintentional errors or misunderstandings in gathering required information. One commenter asked the Department to clarify the format through which information should be obtained. Another commenter requested that the Department amend the proposed regulation to require that plans use a predefined range of response options for demographic data collection, while another commenter suggested that the Department consider creating a questionnaire template.

Response: The Department anticipates issuing a questionnaire template for plans to use to ensure compliance with the regulation. The template will show how the questionnaire should be worded. Therefore, the Department did not make any changes in response to these comments.

Comment: One commenter asked that demographic information collected by plans and reported to the Department occur no more than every two years to align with the frequency of mental health parity reporting required under Insurance Law section 343. Another commenter requested that the Department amend the proposed regulation to include additional details on both the format and timing for reporting required by the regulation to allow plans to provide feedback to improve the data collection and reporting process and meet obligations established by the regulation.

Response: Section 52.52(d) states that a plan must provide to the Superintendent, upon her request, and in a format specified by her, all demographic information received. The Department has not determined the frequency with which plans must provide to the Superintendent the demographic information. The Department anticipates issuing guidance on the reporting requirement at a later date. Therefore, the Department did not make any changes in response to these comments.

Comment: One commenter stated that the proposed regulation will require plans to build significant and costly infrastructure to collect and store demographic data.

Response: In response to the Department's request for information under Insurance Law section 308 on November 30, 2022, plans indicated to the Department that they not only seek standardized demographic information from insureds, but that some have also supplemented their data through third parties. Also, similar demographic data is already collected by CMS-regulated Medicare providers and plans that sell on NYSOH's insurance exchange to serve a similar goal—identifying health disparities. Therefore, the Department does not believe that plans will need to build significant and costly infrastructure to collect and store demographic data and did not make any changes in response to this comment.

Comment: Several commenters recommended that the Department align its demographic data standard with existing national standards. One commenter requested that the Department align its demographic data to standards set by the National Committee on Quality Assurance ("NCQA") and CMS. Specifically, this commenter stated that the demographic information standard in the regulation does not align with NCQA health equity accreditation and differs from – and in some places exceeds – CMS's demographic standards. Another commenter recommended that the Department amend the proposed regulation to be consistent with data standard measures established nationally and with the DOH. Specifically, the commenter expressed concern over variation in the collection and storage of demographic information, noting that inconsistency in standards for data collection may yield unreliable data that the Department will not be able to use to compare plans against national and DOH data on health measurement and performance. The commenter also expressed concern that the proposed regulation does not indicate whether the requirements under the proposed regulation align with demographic data collection standards established by QARR. This commenter recommends that the Department collaborate with DOH and stakeholders to amend DOH's data collection, instead of establishing another duplicative reporting process, and also recommends that the Department align with the United States Core Data for Interoperability for patient demographics and the Demographic Data Element Modernization Initiative.

Response: The Department did not revise the regulation in response to these comments. The proposal was adopted to provide a complete data set needed to study potential health equity issues. As discussed above, the Department anticipates issuing a questionnaire template for plans to use to ensure compliance with the regulation. The Department has reviewed and considered existing data standards to develop a questionnaire template.

Comment: Some commenters expressed privacy concerns with collecting sexual orientation and gender identity information from minors. One commenter requested that the Department establish a minimum age requirement of 18 years for completion of any sexual orientation or gender identity and expression-related demographic questions to preserve the privacy of children under the age of 18 who may not feel ready to reveal their sexual orientation or gender identity to their parents, and to request such information directly from a dependent, and not a parent or legal guardian.

Response: The Department did not make changes to the regulation in response to this comment because it does not think it is necessary. Completion of any request for demographic information is completely voluntary for all individuals, including for parents or guardians who may be reporting information for individuals under the age of 18.

Comment: One commenter asked what steps are required of health plans and the Department to ensure the privacy of the information collected under the proposed regulation, stating that maintenance of privacy for collected demographic information is likely to be paramount to health plan members, and such members should know the privacy measures that the Department will take.

Response: All plans must follow federal and state laws relating to the privacy of information collected under the proposed regulation. Further restrictions have also been included in the regulation to prohibit the use of de-identified data beyond the parameters established under the regulation. Additionally, the Department regularly collects and maintains confidential information and has protocols in place to ensure the confidentiality of the information. The Department declines to publicly share these protocols. No changes were made as a result of this comment.

Comment: One commenter recommended changing the reference in section 52.52(a)(1) from “request and collect” demographic data to “request and solicit” such data, since members are not required to provide the data requested.

Response: The Department did not make this change because the terms “request” and “solicit” are synonymous and therefore to use both is duplicative.

Comment: A commenter urged the Department to clarify whether a failure to respond to a request for demographic information should be treated as a declination to provide such information and requested that the Department reconsider its requirement for plans to both track and maintain records for each individual declination or failure to respond. Another commenter asked whether the plans must store declination responses for each individual question or wholly, that is, for declinations to the survey entirely, and also asked if a recorded declination should be considered equivalent to a nonresponse.

Response: A failure to respond to a request for demographic information should be treated as a person declining to provide the information under section 52.52(f). The Department believes that it is necessary for a plan to maintain a record of individuals who have declined to provide the information, and that insurers should record declination responses for each individual question. Additionally, plans should treat declinations as distinct and different from a nonresponse. The Department did not make any changes in response to this comment.

Comment: Several commenters recommended that the Department allow plans to post, and insureds and covered dependents to complete and submit responses to, requests for demographic information electronically. One commenter requested that the regulation allow plans to post and receive responses electronically and allow health plans to send enrollees confirmation emails to ensure receipt of the questionnaire. Another commenter requested that the Department allow insureds and dependents to voluntarily disclose demographic information through a plan’s online portal or app, rather than through a separate collection method, to streamline and simplify the data collection process for plans. This comment states that, through an online portal, a plan should not be required to record specific declinations, but only should be required to record whether an insured or dependent was notified of such portal or app. One commenter asked whether plans are expected to request data for an enrollee only, or also for others covered by a policy, and another commenter also requested that the regulation permit a plan to send questionnaires to insureds on behalf of their dependents, since independent mailing to dependents will be costly.

Response: The regulation does not require that a plan send an insured or applicant a paper questionnaire. Therefore, a plan may request and collect the demographic information electronically, such as via email or an online portal or app, so long as the insured or applicant consents to receiving the questionnaire electronically. See Insurance Circular Letter No. 33 (1999). While the regulation requires plans to request and collect demographic information from insureds and covered dependents, nothing in the regulation requires plans to send demographic questionnaires directly to dependents. A plan may send a demographic questionnaire to insureds on behalf of their dependents. Therefore, the Department did not make any changes in response to these comments.

Comment: A commenter asked if plans may ask plan-specific questions along with the demographic questionnaire and if a plan may provide additional information with targeted population health messaging with a questionnaire.

Response: Nothing in the regulation prohibits a plan from including plan-specific documents and questions in its outreach to members, and it does not prohibit a plan from providing targeted population health messaging to insureds and dependents. Still, the separate and supplemental questionnaire is intended to collect only those data points established by the regulation. Plans may ask plan-specific questions via additional materials or clearly indicate that the plan-specific questions are separate from the questionnaire required under the regulation. No changes were made to the regulation in response to this comment.

Comment: One commenter recommends removing the requirement that plans maintain a record of the demographic information received and instead proposes that the Department store the information in a secure location to ensure that the information is not used for purposes beyond the intent of the regulation.

Response: Since the plan is receiving the demographic information and must provide reports to the Superintendent on the information, the plan is in the best position to maintain the information, and not the Department. Therefore, the Department did not make any revisions in response to this comment.

Comment: One commenter suggested amending the regulation to clarify whether a plan may use demographic information for its own health equity data and related purposes, or for targeted promotion of existing products beneficial to certain populations.

Response: No changes were made in response to this comment because section 52.52(b)(2) already permits a plan to use demographic information to communicate with insureds or a covered dependent using preferred language and for efforts to eliminate health disparities and to promote health equity, as those terms are defined in Public Health Law section 240(6) and (7). Therefore, a plan may use the demographic information for its own health equity purposes and for targeted promotion of existing products beneficial to certain populations, if the targeted promotion pertains to efforts to eliminate health disparities and to promote health equity.

Comment: One commenter urged the Department to work with DOH and NYSOH to require entities that already collect demographic information from applicants or enrollees to send such information to the relevant plan through an enrollment file and notify the plan when a member declines to answer questions on the demographic questionnaire. The commenter notes that plans can gather demographic information through indirect data sources, such as from providers and qualified entities, as defined under 10 NYCRR 300. Additionally, the commenter stated that because managed long-term care and Medicaid Advantage Plus plans already collect demographic information, DOH could report the required information to the Department. The commenter also emphasized that requiring plans to ask demographic questions again via an additional supplement is overly burdensome to both members and the plans.

Response: While the Department works collaboratively with other agencies, the regulation requires insurers to collect information directly from members to limit variation in data collection by the plans the

Department regulates. No change was made to the regulation as a result of this comment because the regulation aims to standardize the collection of demographic data and minimize variation from multiple and incomplete data sources so that demographic information is both accurate and interoperable.

Comment: One commenter suggested that NYSOH post a standard template questionnaire on its online portal and share the collected data with an individual's plan.

Response: The Department does not oversee NYSOH and cannot tell it what to do. As discussed above, the Department plans to create a questionnaire template. Therefore, the Department did not make changes in response to this comment.

Comment: A commenter recommended that the Department amend the regulation to require plans to provide written, and where feasible, verbal communication explaining that the demographic information will be used to identify inequities, develop targeted interventions and ultimately improve health outcomes, and explain how the collected demographic information cannot be used. Additionally, the commenter recommends that the Department amend the regulation to require plans to provide notice about protections for discrimination based on race, color, creed, national origin, disability, sex, and marital status pursuant to New York Insurance Laws, and discrimination based on pregnancy or pregnancy outcomes.

Response: Section 52.52(c) also already requires that plans disclose how a plan may use the demographic information collected under the regulation. Additionally, the Department did not amend regulation to require plans to provide notice about protections for discrimination under the Insurance Law, because it does not believe it is necessary. No changes were made in response to this comment.

Comment: One commenter asks whether plans must notify members that information collected pursuant to the proposed regulation could be sent to the Department and other government agencies.

<u>Response</u>: The regulation does not require insurers to notify members that information collected under the proposed regulation may be sent to the Department and other state agencies. Therefore, no changes were made in response to this comment.

<u>Comment</u>: One commenter requested that the Department amend the regulation to align requirements for the use of de-identified demographic information with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The commenter stated that the limitations on the use of the demographic information established under the proposed regulation go beyond the requirements in HIPAA, because under HIPAA, de-identified information is no longer considered "protected health information" and is thus not subject to the requirements of HIPAA.

<u>Response</u>: The protections under HIPAA are a floor and not a ceiling. The Department believes that it is important to ensure the protection of demographic information a plan receives, including de-identified information. These protections should also help to make insureds and applicants feel more comfortable sharing their demographic information. Thus, the Department did not revise the regulation in response to this comment.

<u>Comment</u>: One commenter recommends that there be no required completion rate imposed on plans for completion of the demographic information questionnaires, since historical response rates to similar types of surveys have been low.

<u>Response</u>: The regulation does not impose a completion rate on plans. Therefore, the Department did not make any changes in response to this comment.

<u>Comment</u>: A commenter proposed that the demographic data request be sent once to consumers – post-effectuation of enrollment – via email and annually via email for renewals post-effectuation for non-responders. Specifically, the comment recommends that the demographic data questionnaire be sent to applicants, insureds and their covered dependents within 90 days of enrollment effectuation, and further recommends annual submission of collected data by June 30 via a flat file data feed. The commenter also proposed that those members

without an email address on file do not receive the survey, and that there should be no repeat survey for those members who have declined to respond.

Response: The Department amended the proposed regulation to clarify that a plan must request and collect the information from insureds and dependents already covered under a policy as of the effective date of section 52.52 at the time of the next policy renewal that is at least 90 days after the effective date of the section and at any later time upon the direction of the Superintendent, provided that the Superintendent cannot direct an insurer to request and collect the demographic information from insured and dependents more than once every two years. . A plan may, but is not required, to re-ask for demographic information beyond what is required in the regulation. The regulation does not specify the number of days after which an applicant has completed an application that an insurer must send the questionnaire. As also explained above, a plan may send the questionnaire electronically, but only if the insured, dependent, or applicant consents to receiving it electronically. See Insurance Circular Letter No. 33 (1999). A plan may not refuse to send out a questionnaire if the plan does not have an email address on file for an insured, dependent, or applicant or the insured, dependent, or applicant does not consent to receiving the questionnaire electronically. With regard to the comment that there should be an annual submission of collected data by June 30 via a flat file data feed, section 52.52(d) requires the information to be submitted upon the Superintendent's request and does not require submission annually or by a specific date. However, the Department will take the annual June 30 date under advisement.

Comment: One commenter recommended that the regulation require that a plan send the questionnaire after a member completes certain tasks, such as submitting a binder payment, creating an account, or selecting a primary care physician selection, to ensure critical tasks required for access to care are prioritized. Another commenter asked if the Department intends for information to be collected at enrollment or at some later date, citing significant issues related to surveys at any point in time given some members' potential reaction to even a voluntary survey.

Response: A plan may, but is not required, to re-ask for demographic information beyond what is required in the regulation. The regulation does not prescribe a time or date by which the plan must send the applicant the questionnaire. Plans have latitude to determine when they will send the questionnaire after an application is completed, which may include after the applicant has submitted a binder payment, created an account, or selected a primary care physician. Therefore, the Department did not make any changes to the proposed regulation as a result of this comment.

Comment: A commenter stated that there is rate banding occurring in New York based on health status from professional employer organizations ("PEOs"). The commenter states that although the regulation explicitly states that collected demographic data should not be used for any rating decisions, the commenter does not trust the Department to adequately enforce rating regulations given that PEOs operate in New York State and contribute to rate banding.

Response: The Department can and does enforce rating regulations. Therefore, the Department did not make any revisions in response to this comment.

Comment: A commenter requested that the regulation take effect one year from the publication of the notice of adoption in the State Register citing that insurers would need to update their systems, a process that requires a significant amount of time.

Response: The proposed regulation will take effect 120 days after the publication of the notice of adoption in the State Register. Because many plans already collect demographic information, there should be minimal system changes to implement this regulation. No revisions were made in response to this comment.

Comment: A commenter recommends that the Department take additional steps to promote health equity by requiring plans to report certain information that is broken down by certain demographic categories, specifically, the number of prior authorization requests and claim denials by reason type, as well as grievances, internal appeals, and external appeals filed by an insured's race, ethnicity, preferred language, sexual orientation, and gender identity or expression. The commenter also requested that the outcomes of all grievances, internal appeals, and external appeals be reported and be broken down by certain demographic categories.

Response: This comment goes beyond the scope and purpose of this regulation. Insurance Law section 345 sets forth the information that plans must include in health care claims reports that are submitted to the Department. Therefore, no changes were made in response to this comment.