


The Role of Insurance Agents and Brokers Under Health Care Reform

The New York Health Benefit Exchange, the **health insurance exchange** established in New York State pursuant to the Affordable Care Act, will open for business on October 1, 2013, and most of the final reforms enacted by the health care reform law — including the individual and employer mandates — will go into effect three months later, on January 1, 2014. In short, full implementation of the Affordable Care Act is coming soon.

This Alert discusses the impact of the Act on **insurance agents and brokers**. Federal and New York State regulators have recently issued important new guidance on the role that agents and brokers will play under health care reform.

Background: **Expansion of the Insured Population** Under Health Care Reform

The Affordable Care Act¹ includes several significant reforms intended to reduce the number of Americans without health insurance, including:

- the expansion of **Medicaid eligibility**  include individuals with income up to **138% of the Federal poverty level**;
- the **“individual mandate”** that requires nearly all Americans to have minimum essential health coverage or pay a penalty;
- the “employer shared responsibility penalty” that will be imposed on covered employers that fail to make **affordable health coverage** available to their full-time employees;
- the establishment of health insurance exchanges (**“Exchanges”**) where individuals and small businesses will be able to purchase health insurance, and the availability of premium **subsidies or tax credits** to help lower income individuals pay for Exchange coverage; and
- new insurance reforms that will prevent health insurers from denying coverage on the basis of an individual's health status or **pre-existing condition**, and from charging higher premiums based on health status or gender.

The projected net result of these changes, which are effective on January 1, 2014 is that approximately **30 million** previously uninsured Americans will receive health insurance coverage by 2022. Of these new enrollees, about 11 million are expected to receive coverage through the Medicaid or CHIP programs, and about 25 million through the Exchanges. The number of

¹ For a summary of the Act's most important provisions for employer health plan sponsors, see our Alert entitled, “Important Dates For Employers Under Health Care Reform - Updated 2012”, available at http://www.jaeckle.com/files/Health_Care/Alerts/Jaeckle_Alert_Important_Dates_For_Employers_Under_Health_Care_Reform.pdf.

persons covered under employer provided health plans is expected to decline by about 1 million.²

The large increase in health insurance enrollment is potentially a significant benefit to agents and brokers; however, this is tempered by the fact that most of the new enrollments will be individual enrollments under Medicaid or CHIP, or will take place on the Exchanges. Large employers will continue to acquire group health insurance outside of the Exchanges (which are limited to individual and small group policies), and many small employers will continue to do so as well. Nevertheless, New York's small business "SHOP" Exchange is potentially important for agents and brokers, and producers will want to stay informed concerning this Exchange.

[CHIP Children's Medicaid]

The Impact of Medical Loss Ratio Requirements

The medical loss ratio (MLR) requirements under the health care reform law may have a significant impact on agent and broker compensation. Briefly, the Affordable Care Act requires health insurers to spend at least 80% of their premium revenues (85% in the large group market) on direct health care expenses and quality improvement rather than administrative expense, overhead and profits. This rule took effect on January 1, 2011. (Note: In New York, the MLR requirement in the small group market is 82% rather than 80%.³)

Fees and commissions paid to agents and brokers are counted as administrative expenses under the MLR rules, with the result that there may be pressure on insurers to reduce producer commissions. A study of nine New York health insurers conducted by the Wakely Consulting Group in June 2012 found that there had been some reduction in producer commissions by New York insurers since the Act was passed, but that upstate New York producers apparently were not affected as significantly as their downstate counterparts:

Commissions have been scaled back by six of the nine carriers over the three year time frame studied [2010-2012]. In general, the commissions have declined deeper and sooner in the downstate region, and national carriers have been more inclined to reduce commissions than regional plans. Three of the nine carriers have moved from commissions based on a percentage of premium sold to a fixed amount per employee per month (PEPM).⁴

The New York Health Benefit Exchange — In General

Background: Health Insurance Exchanges Under the Affordable Care Act

The creation of health insurance exchanges is one of the signature elements of the Affordable Care Act. Exchanges are supposed to begin operating on October 1, 2013, with the first qualified health plans effective as of January 1, 2014. Exchanges will offer individual and small group health insurance policies.

² Congressional Budget Office, *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision* (July 2012).

³ See NY Dept. of Fin. Serv., Circular Letter No. 15 (12-22-2011).

⁴ Wakely Consulting Group, *The Role of Producers and Other Third Party Assistors in New York's Individual and SHOP Exchanges*.

The New York Health Benefit Exchange

Governor Cuomo established the New York Health Benefit Exchange by Executive Order No. 42 on April 12, 2012. Recently, the New York Exchange (sometimes abbreviated "NY-HIX") issued an "Invitation to Participate in the New York Health Benefit Exchange" that summarizes the requirements for applicants to be certified as a qualified health plan ("QHP") that can be offered on the Exchange.

The Navigator Program

As required by the Affordable Care Act, New York will arrange for "navigators" and "in person assistors" (IPAs) to **provide outreach, education and assistance** with enrollment and premium tax credits to individual consumers on the Exchange. IPAs and navigators also will have a role in the small employer SHOP Exchange.

In theory, agents and brokers could act as navigators; however, navigators and IPAs cannot be employed by an insurer or provider entity, and may not receive any commission or other direct or indirect compensation from an insurer for enrolling an individual in an Exchange plan. Navigator and IPA entities will be compensated by grants from the Exchange itself. Although the New York Exchange has not set the grant amounts or rates, compensation levels for navigators in other states have been proposed at modest levels.

Thus, "brokers may have to choose between accepting commissions for sales of coverage and accepting Navigator grants".⁵

New York SHOP Exchange

The New York Health Benefit Exchange will include an individual marketplace and the SHOP Exchange for small employer plans. Under recent Exchange guidance, the following rules will apply to the SHOP Exchange:

Eligible Employers

Only "small employers" can offer health coverage through the SHOP Exchange. For this purpose, an employer is an eligible "small employer" for a calendar year if it employed an average of between **one and 50 employees** on business days during the preceding calendar year. Note that although states can, under the Affordable Care Act, permit employers with up to 100 employees to be treated as eligible small employers on SHOP Exchanges, New York will not increase the employee cap for 2014.

Once an employer is an eligible small employer, the SHOP must treat a qualified employer, that ceases to be a small employer solely by reason of an increase in the number of employees, as continuing to qualify as a small employer until it otherwise fails to meet the eligibility criteria or elects to no longer purchase coverage for qualified employees through the SHOP Exchange.

⁵ New York State Health Foundation, *Connecting Consumers to Coverage: The Role of Navigators and Consumer Assistance Programs in Implementing Health Reform in New York*, p. 21.

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Plans

Under Federal regulations, the SHOP Exchange must allow a qualified employer to select a level of coverage (bronze, silver, gold or platinum) and offer all qualified health plans in the SHOP at that level, or some subset of that group.

The New York SHOP Exchange recently indicated that it is considering a model in which the employer will select a specific plan, and an "employee choice" model, in which the employer would make a defined contribution expressed as either a percentage or dollar contribution and the employees could select among qualified options.

Minimum Participation Requirements

Under recently self-issued Federal regulations, a SHOP may authorize uniform group participation rules for the health insurance plans offered in a SHOP exchange; provided, that if the SHOP authorizes a minimum participation rate, such rate must be based on the rate of employee participation in the SHOP Exchange, not on the rate of employee participation in any particular qualified health plan or QHPs of any particular issuer.

New York State law requires non-HMO products to use a minimum participation rate of at least 50 percent in order to purchase insurance as a group. However, by state regulation, HMOs are not permitted to have a minimum participation rate. The New York Exchange and the Department of Financial Services will continue to review options regarding group participation rules on the SHOP Exchange.

Modified Community Rating

Qualified health plans offered on a SHOP Exchange are subject to the "modified community rating" requirements under the Affordable Care Act. Under these rules — which were finalized very recently — health insurance issuers may vary premiums only based on age (within a 3:1 ratio for adults), tobacco use (within a 1.5:1 ratio for adults and subject to wellness program requirements in the small group market), family size, and geography.

[Wellness]

Health insurance issuers will maintain a single statewide risk pool for each of their individual and small employer markets, unless a state chooses to merge the individual and small group pools into one pool. Premiums and annual rate changes will be based on the health risk of the entire pool.

Under New York Health Benefit Exchange guidance, issuers who intend to sell products on the Exchange in 2014 must submit plan, benefit and premium rate information by April 2013. Presumably, plan and rate information will be publicly available at some point before October 2013.

The Role of Agents and Brokers on the New York SHOP Exchange

The Affordable Care Act requires the U.S. Department of Health and Human Services (HHS) to establish procedures under which State Exchanges can allow agents or brokers to enroll individuals in qualified health plans in the individual and small group markets, and to assist individuals in applying for premium tax credits and cost-sharing reductions for Exchange plans.

According to the Act, such procedures may include the establishment of rate schedules for broker commissions paid by health benefits plans offered through an Exchange.

The New York Health Benefit Exchange has recently issued tentative guidance on the role of insurance producers on the exchange. The recent guidance provides as follows:

Registration With the Exchange

Producers will be invited to enter into agreements with the Exchange to enroll and service eligible small employers. As a condition of participation in the Exchange, producers will be required to have an **active producer's license** and a **certification** that they have completed necessary educational and training requirements relating to the SHOP Exchange. The guidance notes: "Consideration is being given to whether producers will be required to demonstrate that they have appointments with each of the insurers participating in the health insurance exchange. The obligation to secure such appointments would rest with the producers."

Compensation

For 2014 at least, the Exchange will not set producer compensation levels for products sold through the Exchange. The current small group rules for insurers, agents and brokers will apply on the Exchange, with the exception of the community rating rules (see "Modified Community Rating", above). For example, insurers must apply the **same commission level to all small group products, whether offered inside or outside of the Exchange**, and insurers may not apply higher compensation levels to products designed to attract relatively younger, healthier purchasers. Similarly, insurers may not compensate producers at higher levels for enrolling relatively larger small groups.

Licensure and Training

The Exchange will require producers that enroll and service SHOP exchange employers to obtain initial and ongoing SHOP specific education and training. This will be required as part of the SHOP's agreements with producers. New York will rely on its existing licensing infrastructure to provide and certify this training and education.

Web Brokers

Web-brokers will not be used in the SHOP Exchange in 2014; however, the Exchange will continue to study the issue and may allow web brokers in the future.

If you have any questions about health care reform, please contact Robert W. Patterson at 716.843.3910 or rpatterson@jaeckle.com, Michele O. Heffernan at 716.843.3850 or mheffernan@jaeckle.com, or Daniel J. Gocek at 716.843.3814 or dgocek@jaeckle.com.

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