COMMUNITY CATALYST

The New Health Law and Private Insurance: What are Opportunities and Challenges for States?

The Affordable Care Act makes significant changes to private insurance practices that have created major barriers to necessary health care services for thousands of people in states across the country. The health care debate exposed many unfair private market practices common in most states, including pre-existing condition exclusions, gender rating, and steep premium increases once a person uses his or her coverage. But the national law will not automatically end these practices — state-level implementation and oversight will be necessary to ensure these protections benefit people.

A number of private insurance reforms have taken effect or will take effect earlier than other provisions of the law. There are many opportunities for state advocates and policymakers to use the new rules in the law to improve access to the private insurance market now.

To take advantage of these opportunities, advocates need to be familiar with the key private insurance changes, where and when to weigh-in on critical decisions, and how to develop public education campaigns focused on these issues. Campaigns on early provisions can increase public awareness of the effects of the new law, and in some places, provide states with opportunities to go beyond federal standards. Building off the work of advocating to strengthen and pass the health care reform law, state health care advocates need to effectively engage and educate both policymakers and the public to implement strong private insurance rules.

Who has a role in shaping the private insurance rules?

There are many opportunities for advocates and consumers to participate in strengthening private insurance rules and oversight at the federal and state levels. To choose the best points of intervention, it is important first to understand the different policymaker roles in implementing private health insurance provisions in the states.

> **The federal role**: The federal government has new authority under the ACA to develop private insurance market rules. If states do not adopt these federal rules, the federal government has the power to step in and enforce them. Nearly all of the rulemaking and federal oversight will be done by the newly created federal Office of Consumer Information and Insurance Oversight. ***Advocates should be aware that, for most federal guidance and regulations, there are comment periods in which people can weigh in through written letters or testimony.***

The new law also identifies several areas where the National Association of Insurance Commissioners (NAIC) will advise or develop rules in collaboration with the federal policymaking agencies (see http://www.naic.org/index_health_reform_section.htm). And NAIC is a resource being looked to for advice on nearly all private market issues under the new law. The NAIC voting membership includes health insurance commissioners, or other top regulators, from all states. In addition, NAIC has 17 consumer representatives focused on health care from a number of states. These representatives provide insight from the consumer perspective about the debate and issues NAIC discusses, and offer suggestions about consumer-friendly policies (see XX for a listing of consumer representatives). ***NAIC consumer representatives can help advocates find information and understand rules as provisions are implemented.***

Insurance commissioners and consumer representatives are organized in work groups to address different issue areas related to the new law. ***To weigh in with NAIC members, advocates can approach their state insurance commissioner directly, or his/her staff, who are often very involved with NAIC workgroups***.

The state role: While the federal government is deciding most of the private insurance changes in the new national law, most states have to enacting their own laws to enforce these provisions — including laws that exceed the federal minimum standards. Much of the oversight of premium increases and insurer market activity is the responsibility of the state department of insurance, which in most states is likely to need expanded capacity for adequate oversight and enforcement of private insurance rules. The new law makes federal grants available to state insurance departments (between one and five million dollars each year between 2010 and 2014) to help support this capacity. ***Advocates should strengthen relationships with staff and leadership in the Department of Insurance, and develop a plan for working together on implementation, including on increasing capacity for oversight.***

What are the major private insurance changes?

To help state advocates concentrate implementation efforts in the most critical areas, it is necessary to have an understanding of both the major changes to private insurance, and of who has the greatest decision-making authority.

For most of the new rules below, the HHS Secretary, through the Office of Consumer Information and Insurance Oversight, has or will develop regulations or guidance (in some cases, HHS also works with the Departments of Labor and Treasury to cover self-insured plans). The specifics of each provision will become clearer as federal regulations are developed. ***Advocates have the opportunity to weigh in at the federal level as regulations are created.***

Listed below are the major private insurance provisions in the law. Each provision affects different portions of the private insurance market. Different types of plans are explained below the chart.*

2010
Creation of temporary high risk pools
States must set up high risk pools, or coverage for people who cannot find insurance because of a pre-existing medical condition. If a state decides not to create (or modify) its high risk pool, the federal government will provide an option for the uninsured in that state.
Ban on lifetime benefit caps & limits on annual caps
No health plans can have a maximum health benefit limit for a person's lifetime. Limits on annual health benefits must be held to a reasonable standard, defined in regulation.
Applies to: all health plans. It also limits annual benefit caps in all plans, including grandfathered group plans (but *not* grandfathered individual plans).
No cost-sharing on preventive care
Health plans must cover preventive services, screenings and immunizations without cost-sharing, including co-payment and co-insurance.
Applies to: all health plans, except grandfathered plans
Ban on rescissions
Prohibits insurers from dropping coverage after patients use medical care
Applies to: all health plans
Young adults can stay on parent's plan until age 26
Extension of coverage to allow adult children to remain on their parent's health plan up to age 26
Applies to: all health plans (for grandfathered group plans before January 2014, the young adult cannot be eligible for an employer-based plan)
All children covered
Health plans must offer all children coverage, regardless of pre-existing health conditions.
Applies to: all health plans, including grandfathered group plans (but *not* grandfathered plans in the individual market)
States review insurers' premium rates
Gives state insurance departments greater authority to review premium increases and to request insurers provide justification for premium increases. The federal government will work with states to develop a process and oversight and provide grants to help states develop this capacity.
Applies to: all health plans, except self-insured and grandfathered plans

2011
Health plans must meet medical loss ratios (MLRs)
MLRs — or the proportion of dollars spent on health services (versus spending on administration) — must be at least 85 percent in the large group market or 80 percent in the small group and individual market, otherwise health plans must provide rebates to policyholders. NAIC developed the definition of MLRs, which must be certified by the HHS Secretary.
Applies to: all health plans, except self-insured plans

2014
No pre-existing condition exclusions
Health plans may not exclude anyone with pre-existing health conditions from insurance coverage.
Applies to: all health plans
Health plans must limit the amount premium prices vary
Premiums may not be based on a person's health status, health history, or gender. Premiums may only vary up to 3:1 times based on age (which means a health plan for an older person may not cost more than three times as much as the same health plan for a young person), 1.5:1 times based on tobacco use, and based on geography, at a rate that the state can determine. NAIC will provide federal government guidance on this issue.
Applies to: all plans in small group and individual market (and to the large group market, if a state decides to offer those through the Exchange). It does *not* apply to grandfathered or self-insured plans.
All applicants receive coverage
Health plans must guarantee that all people who apply for coverage are able to apply for it, regardless of their health conditions, history, or any other factors.
Applies to: all health plans, except grandfathered and self-insured plans
Essential benefits standards with limited cost-sharing
Health plans must meet essential benefits package and have limitations on cost-sharing, including deductibles, co-payments and coinsurance.
Applies to: health plans in the individual and small group market, as well as large group, if a state decides to include the large group market in its Exchange. It does *not* apply to grandfathered or self-insured plans.
Creation of a Health Insurance Exchange
States must set up Exchanges, or a marketplace of health insurance options and information, by January 2014. Individuals, families, and small business with 50 to 100 employees (based on state's preference) can purchase health plans through the Exchange. The state has an option of creating separate Exchanges for individuals and small businesses. If a state is decides not to set up an Exchange, HHS will operate an Exchange for that state. Insurance subsidies, starting in 2014, will only be available through the Exchange. Funding to establish Exchanges will soon be available to states.

***** *Individual (non-group) market:* Health insurance bought directly from an insurer, rather than through a group (such as an employer).

Small group market: The market that sells plans to employers with fewer than 50 employees (in most states).
Large group market: The market that sells plans to employers with more than 50 employees.
Grandfathered policies: Health plans in existence prior to the date of enactment of the new health law, March 23, 2010. The HHS Secretary has developed regulations to more strictly define "grandfathered" and "new plans."
Self-insured health plans: Health plans offered by employers who directly assume much or all of the risk of providing health care for their employees, rather than depending on an external insurer. Some self-insured employers purchase additional insurance to cover some part of health care costs, while others bear all of the risk of health costs for their employees. A self-insured employer may have a health insurer coordinate medical benefits, although the employer covers the costs directly. Self-insured plans exist in both the small group and large group market.

How can advocates take advantage of these new private insurance changes?

State advocates have a critical role to play throughout the process of implementing private insurance changes. ***Advocates can build support for the new law by ensuring the public is aware of the changes and informed of new benefits and consumer protections.*** State advocates can strengthen the law by ensuring consumer interests are included in decisions on these new rules and regulations.

Using private insurance changes to develop campaigns

There are a number of ways to structure campaigns to improve health insurance in your state based on the opportunities presented in the new law. These include public education campaigns about the law, or campaigns that implement provisions sooner or go beyond the minimum federal private insurance changes.

State advocates' first consideration is the political environment. ***Advocates should assess what is possible in your state***— going beyond the new national law may not be an option in a difficult political climate. In that case, it will likely make the most sense to 1) organize policy advocacy by targeting constituencies affected by private insurance rules in the federal and NAIC rule-making process, 2) provide good public education about benefits of federal changes, and 3) work on a campaign to promote best practices on state-level oversight and enforcement.

The policies being implemented this year and next can provide opportunities for public education campaigns about the law to foster support for the new law and to make significant improvements to your state's insurance market. Highlighting these issues and mobilizing consumer support can improve the public's understanding of how health insurance regulations affect their physical and financial well-being. It can also influence policymakers, who will be lobbied intensely by competing interests from the insurance industry.

Longer-term goals, such as reducing premium increases or prohibiting premium variation based on health status, can rest on the foundation of these early private insurance changes. For instance, advocates may be able to harness momentum from the efforts to pass the new law to implement policies like banning gender rating earlier than 2014. And a stronger understanding of what drives premium increases can help consumers weigh in on rate review hearings. By understanding key intervention points for consumers to

engage policymakers, advocates can build campaigns to strengthen your state's health care system.

Building a public education campaign: Expanding coverage of young adults

Public education provides a way to counter negative messaging about the new law and to promote its early benefits. A publicly popular provision that lets parents keep their children on their health plans up to age 26 can help mobilize greater support for the national health law. Because young adults have one of the highest concentrations of uninsurance, this change will help many families keep peace of mind through young adults' school and job transitions (see http://www.rwjf.org/files/research/61008.pdf for further information on expanding young adult coverage).

Many advocates already have experience with expanding young adult coverage, and understand the importance of helping young people keep coverage. The new federal health law also extends this benefit to people enrolled in self-insured health plans, which creates a new opportunity to promote this benefit to families across the state.

- ***Public education opportunities.*** State consumer advocates have great opportunities for public education — using colleges and parent organizations — to highlight the young adult coverage provision to create support for the new law. By educating and enrolling as many young adults as possible, people will see a real benefit to the law. The federal law is stronger than many states' in coverage of young adults — specifically, self-insured plans must also provide coverage to people up to age 26.
- ***Gather stories and provide feedback.*** Consumer advocates also have an important role to play in oversight of this policy. By tracking success stories about enrolling young adults in coverage, advocates can increase support and oversight of the private insurance changes. As state and federal agencies develop their capacity to enforce these provisions, feedback from advocates may make these policies stronger.

Going beyond the national law: Tightening state oversight and increasing transparency over insurance company rate setting, rules and practices

Advocates have the opportunity to leverage certain provisions in the national health law to exceed federal minimum standards. Holding insurers to medical loss ratios (MLRs), or the proportion of premium dollars spent on medical services (compared to the spending on administration, marketing and profit) presents an opportunity for your state to move rate review beyond federal reforms. The new law requires health plans to report MLRs and provide rebates to consumers if the amount is higher than allowed: 85 percent in the large group market and 80 percent in the small group or individual markets. This information can be helpful in advocating for expanded state premium rate review and can help to curtail significant premium increases.

State advocates can use the new law to increase capacity of the Department of Insurance. Advocates should determine what current capacity the Insurance Commissioner has to review premiums, and if needed, pursue legislation to increase this authority.

- ***Public education opportunities***. Once health plans begin reporting their MLRs in 2011, consumer advocates can work to make this information public. It is currently unclear if the MLRs will be reported at the state or federal level. But posting these on a public website or holding oversight hearings will increase transparency of health plan data and premiums.
- ***Gather stories and provide feedback.*** As the national law is implemented, some insurers are likely to find ways to game the new system. We have already seen skyrocketing premiums and insurer backlash to greater regulations. Information gathered through MLRs can provide a valuable tool for advocates to demand transparency and oversight of insurance company practices in your state. Advocates can use this information to strengthen premium rate review, and to educate the public about insurer practices and to involve more constituencies in demanding accountability from insurers.
- ***Work for stronger state rules on premium review.*** Your state could go beyond the federal rules by advocating to 1) increase the MLR to 85 percent or higher for all plans, 2) require additional data collected by state Department of Insurance, beyond MLRs, 3) increase the Insurance Commissioner's authority and capacity for rate review.

Weighing in on Exchange Design

Advocates can play an important role in developing the state health insurance Exchange. As the state begins plans for creating an Exchange, there are many decisions that will be critical for consumers. But the first issue is ensuring basic consumer representation and protections in the Exchange.

For advocates, the most important task will be getting a seat at the table in designing the Exchange. First, does your state have a body working on design of the Exchange, either as part of a broader implementation workgroup, or independently? Second, are consumer interests adequately represented in that workgroup? While there are many issues to consider in designing an Exchange with adequate consumer protections, ensuring a formal, direct way for consumers to be heard is critical at this time.

- ***Advocate for consumer input in the creation of the Exchange***. If you determine that advocates and consumers do not have strong representation and support in the design of the health insurance Exchange in your state, a campaign could organize grassroots support to ensure consumer voices are well-represented. Since the Exchange will make decisions on health coverage for individuals and employees of small businesses, it is important these interests are at the Exchange planning table.
- ***Ensure basic consumer protections.*** Two important lessons from the Exchange in Massachusetts (called the Connector) have significant impact on consumer

protections. The Connector Board, which oversees decisions on available health plans, determining subsidy levels and governance issues, has three consumer or labor representatives out of 10 members. This provides a strong voice and meaningful representation for consumers. In addition, all meetings of the Connector Board are subject to the state's open meeting law, so advocates and other stakeholders can monitor the discussion and decisions of the Board.

- ***Start to consider the upcoming Exchange decisions.*** Once consumer advocates are involved in key decisions of the Exchange, it will be important to consider how the many decisions in creating the Exchange will impact consumers. Issues include: whether the state should operate an Exchange, or operate more than one; where and how the Exchange will be governed; which populations will get coverage through the Exchange; which carriers and health plans will be available; methods to protect the Exchange against adverse selection; ways to create a seamless link between the Exchange and Medicaid; and how the Exchange will rate the available heath plans. Going forward, advocates will need a process for deciding and weighing in on the decisions that are most critical to consumers.

Implementing provisions early: Prohibiting premiums based on gender

Advocating for the state to implement provisions of the national law early can help to engage state-level policymakers. The national health care debate exposed many unfair practices in the private insurance industry, like basing premiums on gender. Using momentum from the law's passage may enable your state to implement certain provisions faster than the federal rules.

There is strong public support for eliminating gender as a factor to determine premium prices. While the new law prohibits this practice, this provision does not go into effect at the federal level until 2014 (and does not apply to grandfathered plans — another possible area for advocacy). State advocates have an opportunity to move the state's health agenda forward by working with state policymakers to ban the practice of basing premiums on gender at the state level now.

- ***Organize affected constituencies***. Public education about the current practice of basing health plan premiums on gender can be useful to help organize consumers to take action on this issue at the state-level.
- ***Use effective messaging with policymakers.*** The National Women's Law Center (www.nwlc.org/reformmatters/) and Raising Women's Voices (http://www.raisingwomensvoices.net/) have developed numerous materials to help states with messaging and organizing on campaigns to prohibit basing premiums on gender. Colorado and California have recently passed laws that ban gender rating and go into effect this year.
- ***Provide a "hero opportunity."***[1] Implementing a provision early at the state level is also a good way to engage the state legislature in the new law and offer a "win" against an issue most people perceive to be unfair.

[1] See Judy Meredith and Lori Fresina. The Power Prism: a tool for advocacy planning, execution & evaluation. http://www.realclout.org/files/toolbox/training/toolboxPowerPrismTool_Planning.pdf

There may be other private insurance provisions that could be implemented early in your state, such as phasing out premiums based on health conditions and other factors. Advocates should consider what is most possible given their political environment.

Looking ahead: longer-term goals

The critical task for advocates right now is to ensure the best implementation of early provisions and use this success to secure public support for the law. However, it is also important to think ahead, because implementation will roll out over several years, and the work of advocates will remain critical.

The private insurance changes that will be implemented in 2014 — guaranteed issue, the ban on pre-existing condition exclusions and limits on premium variation — will continue to bring significant changes to your state insurance market.

By focusing now on educating the public about how private insurance rules affect and expand consumers' access to health care services, developing relationships with state insurance commissioners and NAIC representatives, and organizing consumers, it will be easier to prepare people for the rule changes in 2014. Insurers are likely to try to use the changes in 2014 to increase premiums in across the country — tools like MLRs and greater transparency and information for consumers can help counter this.

Going forward, it will be critical for advocates to monitor policy implementation in these private insurance areas. There is an opportunity to provide feedback about on-the-ground experiences to state and federal policymakers and to continue to strengthen and improve the new law. Advocates can use the national law to build support and momentum to influence the health care system at the state level, and private insurance rules provide a strong basis for this work.