

**Authors**

R. Dean Conlin  
312-443-0454  
[rdconlin@lockelord.com](mailto:rdconlin@lockelord.com)

Timothy S. Farber  
312-443-0532  
[tfarber@lockelord.com](mailto:tfarber@lockelord.com)

[www.lockelord.com](http://www.lockelord.com)

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## High-Risk Pools On Fast Track Under Federal Health Care Reform

On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act (H.R. 3590) (the "Act"), and one of the first provisions to go into effect under the Act is the creation of a temporary high-risk pool program to offer coverage to otherwise uninsurable individuals. This program, which is scheduled to go into effect June 21, 2010, provides a total of \$5 billion for a new temporary national high-risk pool program. The program is designed to be an interim, stop-gap measure until broader health care reforms are implemented in 2014, including prohibiting insurers from denying coverage to those with pre-existing conditions and establishing health insurance exchanges.

### Current State High-Risk Pools

Many individuals with a pre-existing medical condition are currently unable to obtain health insurance. In response to the problem of uninsurable individuals, a number of states have implemented high-risk health insurance pools. According to the National Association of State Comprehensive Health Insurance Plans, there are currently 35 states with high-risk pools. Most of these pools were established by state statutes or regulations, which generally create a non-profit organization to offer comprehensive health insurance to those individuals unable to purchase affordable private health insurance because of pre-existing health conditions. The state high-risk pools offer coverage of last resort for: 1) uninsurable individuals; 2) certain federal individuals specified by the federal Health Insurance Portability and Accountability Act ("HIPAA"); and 3) those eligible for the federal Health Coverage Tax Credit.

Many state insurance high-risk pools were developed in response to HIPAA's requirement

that eligible individuals be guaranteed the right to purchase reasonably affordable individual coverage when such individuals move from their group coverage, provided certain conditions are met. States can adopt different approaches in providing access to non-group coverage for HIPAA eligible individuals. Many states guarantee access to non-group coverage in state high-risk pools instead of in the private health insurance market. There are, however, significant variations among existing state pools regarding costs and levels of coverage.

### High-Risk Pools Under the Act

The Act creates a network of insurance pools for people with pre-existing medical conditions who do not otherwise have health insurance. The pools are intended to be effective June 21, 2010, and are designed as a stop-gap measure to last until the broader health care reforms are effective January 1, 2014. These broader reforms scheduled to take effect in 2014 include the establishment of health insurance exchanges and rules prohibiting insurance companies from denying coverage based on pre-existing conditions. The Act contemplates that the federal insurance pool scheme will no longer be necessary after broader health insurance reforms take effect in 2014. The Act directs Health and Human Services ("HHS") to carry out the insurance program directly or through contracts with states or private, non-profit entities. To be eligible to participate, a state must agree not to reduce the amount it expended for the operation of its high-risk pool in the preceding year.

On April 2, 2010, HHS Secretary Kathleen Sebelius sent letters to governors and state insurance commissioners setting forth the

requirements for these high-risk pools contemplated under the Act and asked states to decide whether they will participate. The letter sets forth certain requirements (outlined below) to participate in the federal high-risk pool program. While the federal program is optional for states, only participating states will be eligible to receive a portion of the \$5 billion in allocated funds for the high-risk pool program. HHS will carry out the high-risk pool coverage program for those states that elect not to participate. There are several options states have in implementing the high-risk pool program, which are outlined below.

#### Eligible Individuals Must

- Be a citizen or national of the United States or lawfully present in the United States;
- Not have been covered under creditable coverage (as defined in Section 2701(c)(1) of the Public Health Service Act) for the previous 6 months before applying for coverage; and
- Have a pre-existing condition, as determined in a manner consistent with guidance issued by HHS Secretary.

#### Benefits/Coverage High-Risk Pools Must Have

- An actuarial value of at least equal to 65 percent of total allowed costs;
- An out-of-pocket limit no greater than the applicable amount for high-deductible health plans linked to health savings accounts, (\$5,950 for an individual); and
- No pre-existing condition exclusions. (This requirement is in stark contrast to many state pools, as 30 state pools do not cover medical care related to an enrollee's pre-existing conditions for up to a year

after enrollment, according to the Kaiser Family Foundation).

#### Premiums Must

- Be established at a standard rate for a standard population (that is, not exceed 100 percent of the standard non-group rate) (Many existing state high-risk pools charge 125 percent to 200 percent of standard rates according to the Kaiser Family Foundation); and
- Not have age rating greater than 4 to 1.

#### A State May Consider the Following Options

- Operate a new high-risk pool alongside a current state high-risk pool;
- Establish a new high-risk pool (in a state that does not currently have a high-risk pool);
- Build upon other existing coverage programs designed to cover high-risk individuals;
- Contract with a current HIPAA carrier of last resort or other carrier, to provide subsidized coverage for the eligible population; or
- Do nothing, in which case HHS would carry out a coverage program in the state.

In order to determine the extent to which HHS will carry out its obligations directly, or under contracts with states or other entities, HHS requested that states' indicate their intent to participate and provide requested preliminary information by April 30, 2010. According to Sandy Praeger, Kansas Insurance Commissioner and chair of the health insurance and managed care committee of the National Association of Insurance Commissioners, because the new pools are required to meet these federal standards for benefits and costs that exist-

ing state pools do not have to meet, many states may elect to keep the new pools separate rather than merge them into their existing ones. One unintended drawback to this approach is that eligibility requirements for the new pools require individuals to be uninsured for at least six months, and therefore those enrolled in the current state pools would likely not qualify for the federal pools. This has the potential to create separate pools with different levels of coverage, costs and benefits, with similarly situated individuals having to pay more for less coverage.

Two states' initial response to the HHS letter are indicative of the divergent viewpoints that have plagued the healthcare debate. In Illinois, Illinois Insurance Director Michael McRaith is enthusiastic about the new high-risk pools under the Act, indicating that Illinois intends to participate in the new federal mandated pools and, eventually, fold existing high-risk pools into the new federal high-risk pool. Currently the Illinois high-risk plans reportedly have premiums that can range up to \$16,000 per covered individual per year according to Illinois Insurance Director Michael McRaith. While Illinois pays for approximately one-third of the total cost to run the plans through an assessment on admitted health insurers, enrollees have to pay for the remainder. Significantly, the high risk provisions of the Act are intended to shift this cost burden so enrollees pay no more than 35 percent of the cost of the high-risk insurance. Illinois is hopeful that its share of the \$5 billion available under the Act will lower the cost for all Illinois enrollees.

The Georgia Insurance Commissioner, on the other hand, has responded quite differently to Secretary Sebelius' April 2

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## High-Risk Pools On Fast Track Under Federal Health Care Reform (cont'd.)

inquiry. In a letter to Secretary Sebelius, Georgia Insurance Commissioner John Oxendine stated that Georgia will not participate in the federal program to establish high-risk pools for the uninsured. Commissioner Oxendine stated he has “no confidence [the] so-called temporary program will not burden the taxpayers of Georgia.” He continued to state that he “cannot commit the State of Georgia to implement a federal high-risk pool program that is part of a broader insurance scheme which [the Georgia Commissioner] believe[s] the Supreme Court will hold to be unconstitutional.” Georgia is one of 19 states challenging the constitutionality of the Act.

States have very little time to indicate whether they intend to participate in the federal high-risk pool program. Some states may seek to change their existing pool programs to comply with the Act while others may decide to offer the federal high-risk pool program alongside an existing state program. HHS will likely issue further guidance, regulations and an implementation strategy for the high-risk pools sometime after HHS receives responses to Secretary Sebelius’s April 2 letter. All parties, from insurers to companies to individuals, need to understand the significant changes to our health care system that will result from the landmark legislation in the health care area. Locke Lord Bissell & Liddell will continue to follow developments in the health care area at both the state and federal levels.

### About the Authors

R. Dean Conlin is a partner at Locke Lord. He has more than 30 years of experience in a wide range of health care, insurance regulatory and corporate matters. Mr. Conlin has focused on managed health care since the early stages of preferred provider networks. His clients include regulated insurers and alternative risk vehicles that provide managed health care coverage. His work for these clients, including preferred provider organizations, has ranged from product development to regulatory counseling, including counseling on the impact of ERISA on managed health care. In addition, Mr. Conlin has organized insurers and reinsurers and counseled them on a full range of regulatory and corporate issues. In this connection, he leads our firm’s longstanding representation of Old Republic International Corporation and American Fuji Fire and Marine Insurance Company. He also counsels Lloyd’s Illinois, Inc., which is the corporate Illinois Attorney-in-Fact for Underwriters at Lloyd’s, London.

Timothy S. Farber is an associate at Locke Lord. He practices in the area of corporate law, where his focus is on general corporate law, mergers and acquisitions, securities and insurance regulatory matters. Mr. Farber has experience representing issuers and underwriters in debt and equity financing matters for both public and private companies.