



Up Next: HHS Tackles Health Insurance Exchanges

By: Denise Hanna

Health insurance exchanges — state-based marketplaces where individuals and small employers may shop for health coverage — are the centerpiece of the commercial health insurance reforms starting in 2014 under the Affordable Care Act (“ACA”). At the end of June, six states, including California, had enacted legislation creating exchanges under the ACA (“Exchanges”). On July 11, 2011, the U.S. Department of Health and Human Services (“HHS”) released a much-anticipated **proposed rule** that would establish a framework to assist states in setting up their Exchanges (the “Exchange Rule”). As a companion to the Exchange Rule, HHS released a **second proposed rule** that would establish three new programs, each beginning in 2014, to provide premium stability in these new individual and small group health insurance markets that could be jeopardized by the disproportionate impact of adverse risk experience (the “Premium Stabilization Rule”). Both the Exchange Rule and Premium Stabilization Rule will be published in the Federal Register on July 15, 2011, and remain open for public comment for 75 days.

The Exchange Rule, which we are addressing here, provides details and guidance on how the state Exchanges should function and the certification of “qualified health plans” (“QHPs”) being offered on the Exchanges beyond that given in the ACA and HHS’ **November 18, 2010 guidance**. However, the Exchange Rule provides only minimum federal standards, and the Exchange Rule’s flexibility confers much deference and latitude to states in organizing their own Exchanges. This discretion also extends to a state’s decision to develop its Exchange in partnership with the federal government, relying on certain federal systems, or to design all Exchange systems themselves.

Exchange Models

The Exchange Rule declines to dictate one or more models of Exchange operation. Each state would be able to offer on its Exchange any QHP that meets the Exchange Rule’s minimum standards, or to impose additional requirements or implement competitive bidding in selecting QHPs and their carriers for participation on its Exchange. Consistent with the ACA, states may choose to organize a single Exchange for individuals and small employers or to operate separate Exchanges for these markets.

Organization and Governance

An Exchange may be organized as a government agency or a non-profit entity. Health insurers may not serve as an Exchange or subcontract to perform Exchange functions. However, representatives of health insurers and producers may serve on the governing body as long as such individuals, presumed to have a conflict of interest, constitute only a minority of the governing



body. A majority of the Exchange's governing body must be free of conflicts of interest and have relevant health industry experience.

Approval and Operation

To offer QHP coverage to qualified individuals and small businesses effective January 1, 2014, HHS must approve a state's Exchange no later than January 1, 2013. The Exchange's initial open enrollment period would begin on October 1, 2013, and extend until February 28, 2014. Under the Exchange Rule, HHS would have the ability to issue a conditional approval on January 1, 2013, giving states more time to complete their Exchange planning. Still, the federal government would operate an Exchange in 2014 for any state that has not been approved or conditionally approved by January 1, 2013. The requirements for a federal-run Exchange will be addressed in subsequent HHS rulemaking. However, pursuant to the Exchange Rule, after 2014, a state operating under a federal Exchange may choose to later develop its own state Exchange, provided that HHS approves or conditionally approves the Exchange at least 12 months prior to the Exchange beginning operations. Also, an approved Exchange may later cease operations and transition to a federally-run Exchange upon prior notice to HHS.

Geographic Reach of Exchanges

States may organize their Exchanges consistent with natural market dynamics. States may choose a single statewide Exchange or may develop two or more subsidiary Exchanges operating in separate, non-overlapping areas within the state. Multiple states may choose to participate in a regional Exchange, even if the states are not contiguous (e.g., Alaska and Washington). Also, a state Exchange could carve out a metropolitan area or other locale for participation in a regional Exchange so long as there is no overlap.

Producers and Navigators

The Exchange Rule confers on each state the ability to determine the role of agents and brokers in its Exchange and does not impose any federal standards on their conduct. The Exchange Rule also better defines the role of "navigators" who will perform educational and outreach functions about Exchange offerings. Producers may serve as navigators too, provided they are not paid by health insurers and satisfy the other navigator requirements.

To fully implement the Exchanges, additional rulemaking is forthcoming to address the essential health benefits package, the processing of premium tax credits and cost-sharing subsidies, Exchange program integrity requirements and more.

Locke Lord is following the development of the Exchange rulemaking. Please contact your Locke Lord professional if you have specific questions about any of the Exchange rules or would like assistance in submitting formal comments to HHS.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

Denise Hanna | T: 202-220-6992 | dhanna@lockelord.com