

Assessment of Public Comments for the Adoption of the Sixth Amendment to 11 NYCRR 361 (Insurance Regulation 146).

The Department of Financial Services (“Department”) received three public comments in response to the Revised Proposed Sixth Amendment to 11 NYCRR 361 (Insurance Regulation 146). After considering these comments, the Department has determined that no additional changes are necessary to the amended regulation.

In general, the comments set forth the commenters’ opinions as to the prudence of promulgating the amendment, rather than provide significant alternatives.

Comment: Two commenters raised issues of a purely legal nature as to perceived legal deficiencies, including perceived deficiencies of a procedural, jurisdictional, or constitutional nature.

Response: The Department has reviewed the issues raised in these comments and does not agree with the conclusions reached by the commenters. There are no legal defects that would prevent the adoption and enforceability of the amendment.

While the State Administrative Procedure Act (“SAPA”) does not require the Department to respond to the commenters’ legal arguments, the Department calls to the attention of the one commenter that raised issues as to the perceived impermissibility of the regulation under the federal Affordable Care Act (“ACA”), that the U.S. Department of Health and Human Services (“HHS”) has regularly and repeatedly opined that states may – and indeed has encouraged states to – use state authority to mitigate the effects of the magnitude of ACA-risk adjustment transfers. That is precisely what this amendment does.

Comment: One commenter, an insurer, expressed support for the Department’s actions in this area, characterizing them as “improving the stability of the individual and small group markets.” This commenter suggested that the Department go a step further than the revised proposed amendment by deciding now that a Market Stabilization mechanism will be utilized for the 2018 plan year.

Response: Given that the Market Stabilization mechanism is implemented only after the release of federal risk adjustment results for the applicable plan year, it is not possible for the Department to make the decision urged upon it at this time. Recent news reports from the Trump Administration concerning Risk Adjustment, and the destructive uncertainty that the Trump Administration's actions in the health insurance field have created, are additional reasons why flexibility and adaptability are necessary here.

Comment: The insurer-commenter also suggested that the Department consider submitting a state adjustment under new federal ACA-risk adjustment rules for plan year 2020 and consider various anomalies that may affect ACA-risk adjustment in 2019 before approving 2019 rates.

Response: Both of the suggested actions fall outside of the promulgation of this amendment. Both the rate approval process and the new federal rules have their own comment periods associated with them, and the commenter is encouraged to provide its position during those periods.

Comment: One commenter, an insurer trade group, re-submitted its prior comments on the proposed amendment, while indicating that it was reiterating the positions it had taken in its previous comments with respect to the revised proposal. Those comments were addressed in the previous Assessment of Public Comments and the Department's analysis of the issues raised then has not changed since that assessment; some comments are no longer relevant given the passage of time; and some comments relate to perceived procedural defects that are addressed above. Ultimately, this commenter noted that some of its members support the proposed action, while others oppose it.

Response: The Department notes that the trade group's assessment that some members support, while others oppose, the amendment is borne out in two other comments received by the Department. Both of those comments were submitted by members of the insurer trade group: one that supported and one that opposed the amendment. Further, as noted above, the Department considered the legal claim of procedural defects and determined that there are no legal defects that would prevent the adoption of the amendment. To the extent that

the commenter suggested the Department should contain its efforts in stabilizing New York markets to working with HHS on changes to the ACA-risk adjustment formula and program because “[t]he benefit of working at the federal level for such changes is that . . . there is more of a consensus in support of the changes”, this is simply not the case. Unfortunately, since this comment was originally drafted there have been multiple legal challenges throughout the country to the federal ACA-risk adjustment rules and it has been reported that the Trump Administration may suspend ACA-risk adjustment payments altogether. The amendment is necessary to ensure the stability of New York markets.

Comment: The trade group-commenter also reiterated its position that any action by the Department should be made on a prospective basis and based on neutral principals. It appears from its previous comments that this comment particularly relates to providing insurers with “advance notice” of the ultimate size of uniform percentage and the size of the actual payment it will make, or receivable it will receive from the Market Stabilization mechanism. Further, the comments express questions about the level of discretion the Department will exercise in determining whether and to what extent a Market Stabilization mechanism should be implemented for a given plan year.

Response: The process to be followed and the factors to be considered are provided in the amendment. As this amendment addresses the disparate impact of the magnitude of ACA-risk adjustment transfers, as invited and encouraged by HHS, this requires that the Department determine that there was indeed an impact, and what level of mitigation is necessary in each year. Thus, per the amendment, the Department must wait until the ACA-risk adjustment has run its course for a plan year and the final results are released. The amendment also requires the uniform percentage to be determined based on “reasonable actuarial assumptions”. After review, the Department has determined that no changes are necessary based upon this comment.