

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
SIXTH AMENDMENT TO 11 NYCRR 361
(INSURANCE REGULATION 146)**

**ESTABLISHMENT AND OPERATION OF MARKET STABILIZATION MECHANISMS FOR
CERTAIN HEALTH INSURANCE MARKETS**

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by sections 202 and 302 of the Financial Services Law and sections 301, 1109, and 3233 of the Insurance Law, do hereby promulgate the Sixth Amendment to Part 361 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 146), to take effect upon publication of a Notice of Adoption in the State Register, to read as follows:

(DELETED MATTER IN BRACKETS; NEW MATTER UNDERSCORED)

The title of Part 361 is amended to read as follows:

**ESTABLISHMENT AND OPERATION OF MARKET STABILIZATION MECHANISMS FOR
[INDIVIDUAL AND SMALL GROUP] CERTAIN HEALTH INSURANCE [AND MEDICARE
SUPPLEMENT INSURANCE] MARKETS**

The title of Section 361.6 is amended to read as follows:

**Section 361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 through 2013
for individual and small group policies, other than Medicare supplement and Healthy New York policies.**

Section 361.9 is added to read as follows:

Section 361.9 Market stabilization pools for the small group health insurance market for the 2017 plan year.

(a)(1) The superintendent has been assessing the federal risk adjustment program developed under the federal Affordable Care Act and its impact on the health insurance market in this State. In its simplest terms, the federal risk adjustment program requires that carriers whose insureds or members have relatively better loss experience pay into the risk adjustment pool and those with relatively worse experience receive payment from that pool. The broad purpose of the risk adjustment program is to balance out the experience of all carriers.

(2) In certain respects, however, the calculations for the federal risk adjustment program do not take into account certain factors, resulting in unintended consequences. The department has been working cooperatively with the Department of Health and Human Services and the Centers for Medicare and Medicaid Services (CMS) on risk adjustment. Recently, CMS has announced certain changes to the methodology. CMS has also stated that it will continue to review the methodology in the future.

(3) The federal risk adjustment program has led to a situation in which some carriers in this State are receiving large payments out of the risk adjustment program that are paid by other carriers. For many of these

other carriers, the millions to be paid represent a significant portion of their revenue. The money transfers among carriers in this State under the federal risk adjustment program have been among the largest in the nation.

(4) CMS's changes and planned reviews are much appreciated and anticipated. The superintendent will continue to work with CMS and hopes that over time the federal risk adjustment program will be improved so that it fully meets its intended purposes. The federal risk adjustment methodology as applied in this State does not yet adequately address the impact of administrative costs and profit of the carriers and how this State counts children in certain calculations. These two factors are identifiable, quantifiable and remediable for the 2017 plan year.

(5) This section applies only to risk adjustment experience in the small group health insurance market for the 2017 plan year to be applied to payments and receipts in 2018. The department will continue its review of the federal risk adjustment program and its impact on the individual and small group health insurance markets in this State. Among other issues, the department will continue to examine whether federal risk adjustment adequately accounts for demographic regional diversity in this State, as well as whether federal risk adjustment dissuades carriers from using networks and plan designs that seek to integrate care and deliver value. The superintendent will take all necessary and appropriate action to address the impact on both markets in the future.

(b)(1) The superintendent anticipates that the federal risk adjustment program will adversely impact the small group health insurance market in this State in 2017 to such a degree as to require a remedy. Several factors are expected to cause the adverse impact, including:

(i) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the calculation is based in part upon a medical loss ratio computation that includes administrative expenses, profits and claims rather than only using claims; and

(ii) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the program does not appropriately address this State's rating tier structure. For this State, the federal risk adjustment program alters the definition of billable member months to include a maximum of one child per contract in the billable member month count. This understatement of billable member month counts: (a) lowers the denominator of the calculation used to determine the statewide average premium and plan liability risk scores; (b) results in the artificial inflation of both the statewide average premium and plan liability risk scores; and (c) further results in inflated payments transfers through the federal risk adjustment program.

(2) Accordingly, if, for the 2017 plan year, the superintendent determines that the federal risk adjustment program has adversely impacted the small group health insurance market in the State and that amelioration is necessary, the superintendent shall implement a market stabilization pool for carriers participating in the small group health insurance market, other than for Medicare supplement insurance, pursuant to subdivision (e) of this section to ameliorate the disproportionate impact that the federal risk adjustment program may have on carriers, to address the unique aspects of the small group health insurance market in this State, and to prevent unnecessary instability for carriers participating in the small group health insurance market in this State, other than for Medicare supplement insurance.

(c) As used in this section, *small group health insurance market* means all policies and contracts providing hospital, medical or surgical expense insurance, other than Medicare supplement insurance, covering one to 100 employees.

(d) Following the annual release of the federal risk adjustment results for the 2017 plan year, the superintendent shall review the impact of the federal risk adjustment program established pursuant to 42 U.S.C. section 18063 on the small group health insurance market in this State for that plan year.

(e) If, after reviewing the impact of the federal risk adjustment program on the small group health insurance market in this State for the 2017 plan year, including payment transfers, the statewide average premiums, and the ratio of claims to premiums, the superintendent determines that a market stabilization mechanism is a necessary amelioration, the superintendent shall implement a market stabilization pool in such market as follows:

(1) every carrier in the small group health insurance market that is designated as a receiver of a payment transfer from the federal risk adjustment program shall remit to the superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool. The uniform percentage shall be calculated as the percentage necessary to correct any one or more of the adverse market impact factors specified in subdivision (b)(1) of this section. The uniform percentage shall be determined by the superintendent based on reasonable actuarial assumptions and shall not exceed 30 percent of the amount to be received from the federal risk adjustment program;

(i) the superintendent shall send a billing invoice to each carrier required to make a payment into the market stabilization pool after the federal risk adjustment results are released pursuant to 45 CFR section 153.310(e);

(ii) each carrier shall remit its payment to the superintendent within ten business days of the later of its receipt of the invoice from the superintendent or receipt of its risk adjustment payment from the Secretary of the United States Department of Health and Human Services pursuant to 42 U.S.C. section 18063; and

(iii) payments remitted by a carrier after the due date shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due; and

(2) for the 2017 plan year:

(i) every carrier in the small group health insurance market that is designated as a payor of a payment transfer into the federal risk adjustment program shall receive from the superintendent an amount equal to the uniform percentage of that payment transfer, referenced in paragraph (1) of this subdivision, from the market stabilization pool;

(ii) the superintendent shall send notification to each carrier of the amount the carrier will receive as a distribution from the market stabilization pool after the federal risk adjustment results are released; and

(iii) the superintendent shall make a distribution to each carrier after receiving all payments from payors. However, nothing in this section shall preclude the superintendent from making a distribution prior to receiving all payments from payors.

(f) The superintendent may modify the amounts determined in subdivision (e) of this section to reflect any adjustments resulting from audits required under 45 CFR section 153.630.

(g) In the event the payments received by the superintendent pursuant to subdivision (e)(1) of this section are less than the amounts payable pursuant to subdivision (e)(2) of this section, the amount payable to each carrier pursuant to this section shall be reduced proportionally to match the funds available in the pool.

Section 361.10 is added to read as follows:

Section 361.10 Market stabilization pools for the individual and small group health insurance markets for plan years 2018 and thereafter.

(a)(1) This section applies to risk adjustment experience in the individual and small group health insurance markets for plan years 2018 and thereafter.

(b)(1) The superintendent anticipates that the federal risk adjustment program will adversely impact the individual and small group health insurance markets in this State for plan years 2018 and thereafter to such a degree as to require a remedy. Several factors are expected to cause the adverse impact, including:

(i) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the calculation is based in part upon a medical loss ratio computation that includes administrative expenses, profits and claims rather than only using claims;

(ii) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the program does not appropriately address this State's rating tier structure. For this State, the federal risk adjustment program alters the definition of billable member months to include a maximum of one child per contract in the billable member month count. This understatement of billable member month counts:

(a) lowers the denominator of the calculation used to determine the statewide average premium and plan liability risk scores;

(b) results in the artificial inflation of both the statewide average premium and plan liability risk scores; and

(c) further results in inflated payments transfers through the federal risk adjustment program; and

(iii) other factors, including, without limitation, the disparate impact of the federal risk adjustment program on this State, this State's demographic diversity and geographic rating, carriers' networks and plan designs, carriers' solvency and financial conditions, and market stability.

(2) Accordingly, if, for plan years 2018 and thereafter, the superintendent determines that the federal risk adjustment program has adversely impacted the individual health insurance market in this State and that amelioration is necessary, then the superintendent shall implement a market stabilization pool for carriers participating in the individual health insurance market, other than for Medicare supplement insurance, pursuant to subdivision (g) of this section. The market stabilization pool shall:

(i) ameliorate the disproportionate impact that the federal risk adjustment program may have on carriers;

(ii) address the unique aspects of the individual health insurance market in this State; and

(iii) prevent unnecessary instability for carriers participating in the individual health insurance market in this State, other than for Medicare supplement insurance.

(3) Similarly, if, for plan years 2018 and thereafter, the superintendent determines that the federal risk adjustment program has adversely impacted the small group health insurance market in the State and that amelioration is necessary, then the superintendent shall implement a market stabilization pool for carriers participating in the small group health insurance market, other than for Medicare supplement insurance, pursuant to subdivision (g) of this section. The market stabilization pool shall:

(i) ameliorate the disproportionate impact that the federal risk adjustment program may have on carriers;

(ii) address the unique aspects of the small group health insurance market in this State; and

(iii) prevent unnecessary instability for carriers participating in the small group health insurance market in this State, other than for Medicare supplement insurance.

(c) As used in this section, *individual health insurance market* means all policies and contracts providing hospital, medical or surgical expense insurance, other than Medicare supplement insurance, issued directly to an individual.

(d) As used in this section, *small group health insurance market* means all policies and contracts providing hospital, medical or surgical expense insurance, other than Medicare supplement insurance, covering one to 100 employees.

(e) Following the annual release of the federal risk adjustment results for the applicable plan year, the superintendent shall review the impact of the federal risk adjustment program established pursuant to 42 U.S.C. section 18063 on the individual and small group health insurance markets in this State for that plan year.

(f) If, after reviewing the impact of the federal risk adjustment program on the individual and small group health insurance markets in this State for the applicable plan year, including payment transfers, the statewide average premiums, the ratio of claims to premiums, federal risk adjustment results for previous plan years, and carriers' risk adjustment assumptions included in the premium rates approved by the superintendent for the applicable plan year, the superintendent determines that a market stabilization mechanism is a necessary amelioration in the individual health insurance or small group health insurance market, then the superintendent shall implement a separate market stabilization pool pursuant to the procedures set forth in subdivision (g) of this section.

(g)(1) For each year that the superintendent determines that a market stabilization mechanism is a necessary amelioration in the individual health insurance or small group health insurance market, the superintendent shall determine the uniform percentage adjustment that should be used in administering the market stabilization pool for such market. The uniform percentage adjustment for the applicable market shall be calculated as the percentage necessary to correct any one or more of the adverse market impact factors specified in subdivision (b)(1) of this section. The uniform percentage for the applicable market shall be determined by the superintendent based on reasonable actuarial assumptions.

(i) For plan year 2018, the uniform percentage adjustment for the individual and small group health insurance markets is expected to be, but shall not exceed, 26 percent of the amount to be received from the federal risk adjustment program prior to the 14 percent adjustment described in the following sentence. The uniform percentage shall be in addition to the 14 percent adjustment due to the federal government's removal of non-claims-based administrative expenses from the federal risk adjustment calculation. (The department's market stabilization for the small group market for plan year 2017 (11 NYCRR 361.9) authorizes adjustments to the federal risk adjustment transfers up to 30 percent. The 14 percent adjustment due to the Center for Medicaid and Medicare Services's removal of non-claims based administrative expenses from the federal risk adjustment calculation is not applicable to the 2017 plan year.)

(ii) For plan year 2019 and beyond, the superintendent will provide guidance to carriers, within a reasonable time before the date on which rate applications shall be submitted to the department, as to the assumptions for the federal risk adjustment program they should include in developing premium rates for the applicable plan year. The guidance may also specify the relevant uniform percentage adjustment for the individual health insurance or small group health insurance market.

(2) For each year that the superintendent determines that a market stabilization mechanism is a necessary amelioration in the individual health insurance or small group health insurance market, every carrier that is designated as a receiver of a payment transfer from the federal risk adjustment program for the applicable market shall remit to the superintendent an amount equal to the uniform percentage of that payment transfer for the applicable market stabilization pool as follows:

(i) the superintendent shall send a billing invoice to each carrier required to make a payment into the applicable market stabilization pool after the federal risk adjustment results are released pursuant to 45 CFR section 153.310(e);

(ii) each carrier shall remit its payment to the superintendent within ten business days of the later of its receipt of the invoice from the superintendent or receipt of its risk adjustment payment from the Secretary of the United States Department of Health and Human Services pursuant to 42 U.S.C. section 18063; and

(iii) payments remitted by a carrier after the due date shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due; and

(3)(i) For each year that the superintendent determines that a market stabilization mechanism is a necessary amelioration in the individual health insurance or small group health insurance market, every carrier that is designated as a payor of a payment transfer into the federal risk adjustment program for the applicable market shall receive from the superintendent an amount equal to the uniform percentage of that payment transfer for the applicable market stabilization pool as follows:

(a) the superintendent shall send notification to each carrier of the amount the carrier will receive as a distribution from the applicable market stabilization pool after the federal risk adjustment results are released; and

(b) the superintendent shall make a distribution to each carrier after receiving all payments from payors pursuant to subdivision (g)(2) of this section. However, nothing in this section shall preclude the superintendent from making a distribution prior to receiving all payments from payors.

(ii) In the event the payments received by the superintendent pursuant to subdivision (h)(2) of this section are less than the amounts payable pursuant to this subdivision (g)(3) of this section, the amount payable to each carrier pursuant to this section shall be reduced proportionally to match the funds available in the applicable pool.

(h) The superintendent may modify the amounts determined in subdivision (g) of this section to reflect any adjustment resulting from audits required under 45 CFR section 153.630.



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

I, Maria T. Vullo, Superintendent of Financial Services, do hereby certify that the foregoing is the sixth amendment to Part 361 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 146) signed by me on July 31, 2018 pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301, 1109, and 3233 of the Insurance Law, to take effect upon publication in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed rule was published in the State Register on May 3, 2017 and notice of revised rule making was published in the State Register on May 16, 2018. No other publication or prior notice is required by statute.

A handwritten signature in cursive script, appearing to read "Maria T. Vullo", written over a horizontal line.

Maria T. Vullo
Superintendent of Financial Services

Date: July 31, 2018