

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

The Department of Financial Services (the “Department”) has received several comments in response to the Proposed Sixth Amendment to 11 NYCRR 361 (Insurance Regulation 146). After consideration of these comments and in response thereto, the Department has revised the proposed amendment to incorporate matters previously promulgated on an emergency basis.

In general, the comments set forth the commenters’ opinions as to the prudence of issuing the proposed amendment, rather than provide significant alternatives. Some commenters raised issues of a purely legal nature as to perceived legal deficiencies, including perceived deficiencies of a procedural, jurisdictional, or constitutional nature. 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 entry into force of the proposed amendment.

While the State Administrative Procedure Act (“SAPA”) does not require the Department to respond to the legal arguments of commenters, 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”), which has the regulatory – and sole enforcement – authority over the ACA, has regularly 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 the Proposed Amendment does.

Comment: One industry commenter suggested that the Department explain in more detail the issues with ACA-risk adjustment that the Department seeks to address.

Response: After review, the impacts that the proposed amendment seeks to remedy are amply addressed both in the text of the proposed amendment and in HHS’s own rulemaking, including as recently as the 2019

Final Notice of Benefit and Payment Parameters, where HHS notes the disparate impact and again encourages states to take action under state authority to address the magnitude of risk adjustment transfers. This is also true of section 361.9, as added in the revised rulemaking. No changes were made in response to this comment.

Comment: One commenter noted that the proposed amendment provides significant discretion in implementing the market stabilization pool and the uniform percentage that will be applied if the pool is implemented and further suggested that the Department add criterion limiting that discretion and clarify that the uniform percentage selected under the proposed rule be based on reasonable actuarial assumptions.

Response: The proposed amendment contemplates only the discretion necessary to adapt to the new circumstance of any particular plan year. The proposed amendment would only allow for the implementation of a market stabilization pool based on a determination that the ACA-risk adjustment adversely impacted the particular market and only if it is determined necessary. These criteria are sufficient guides of discretion in this area, particularly given the difficulty in anticipating all the ways in which the market may in the future be impacted. Further, the proposed amendment and section 361.9 as added in the revised rulemaking, already require that the determination of the uniform percentage must be determined “based on reasonable actuarial assumptions”. As such, no changes were made in response to this comment.

Comment: One commenter suggested that the proposed amendment should be changed to account for regional differences and to correct geographic biases.

Response: Because the proposed amendment and section 361.9 added in the revised rulemaking seek to remedy the disparate impact of the ACA-risk adjustment program that applies uniformly statewide, the Department has determined that this is not the appropriate place to deal with regional differences. As such, no changes were made in response to this comment.

Comment: One commenter suggested that the proposed amendment failed to account for notice to the carriers about what the uniform percentage will be for a particular year, so that insurers may use that information in setting rates.

Response: The proposed amendment contains a provision requiring the Department to provide guidance before the date on which rate applications are required. Additionally, that guidance may include the anticipated uniform percentage adjustment. Given that the decision whether to implement a market stabilization pool and the final determination of the uniform percentage adjustment must come after ACA-risk adjustment has been finalized and only after the implementation is determined necessary, it would not be possible to give any further guidance than contemplated in the proposed amendment. As such, no changes were made in response to this comment.