



Brokers and Agents and Health Insurance Exchanges

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As the Affordable Care Act is implemented, reaching and enrolling the millions of newly eligible people, helping people switch plans, and educating consumers on the new protections of the law will be a major task that will require all hands on deck. The Congressional Budget Office anticipates that 30 million uninsured people will gain coverage under the Affordable Care Act by 2022. Nearly half of them will gain coverage in 2014.¹ People will need help enrolling in plans, figuring out their eligibility for premium tax credits, and in some cases, switching to another plan that offers better benefits or help with premiums. In addition, consumers will want help understanding the new rights and protections offered by the Affordable Care Act.

Much of this new enrollment will take place through health insurance exchanges, which will begin accepting applications in October 2013. These exchanges will be regulated marketplaces where consumers and/or small businesses can shop for insurance and readily compare standardized plans. Additionally, low- and middle-income consumers will be able to apply for premium tax credits and for Medicaid and CHIP through the exchanges. Exchange rules recognize the importance of getting lots of different helpers in the enrollment process: traditional health insurance brokers and agents will continue their work and, appropriately, other entities and agencies will also help with outreach and enrollment. Yet, besides making sure that everyone who has the potential to reach consumers does so, states will have the major responsibility of making sure that consumers get accurate and complete information about their health insurance choices. In this uncharted territory, it will be important that states think about how brokers and agents, particularly, interact with the exchange.

With regard to brokers and agents (which are referred to generally as “producers”), states will need to:

- actively monitor and regulate marketing practices and step in to promptly stop any misleading or deceptive marketing;
- ensure that incentives brokers and agents receive are appropriate to guide consumers to good enrollment choices;
- ensure that consumers know if agents and brokers receive payment for enrolling them in certain plans and could be providing biased information;
- develop training programs and update competency exams to make sure that brokers and agents can properly explain exchange plans, tax credits, and public program options; and
- ensure that consumers who use brokers or agents will also be informed about how to contact their state’s exchange and get further information from the exchange’s website.

This paper is intended to give advocates some background information about brokers and agents. This information will help you determine whether changes are needed in your state’s training, regulation, or oversight of agents and brokers to ensure that your state has adequate consumer protections. It defines terms, explains what the final exchange rules say about agents and brokers, and then discusses some of the issues that advocates and states may want to consider.

The Roles of Brokers, Agents, and Producers

Although the terms “broker,” “agent,” and “producer” are often used interchangeably, the National Association of Insurance Commissioners distinguishes their roles as follows:

- **Brokers** act on behalf of the consumer. They can be compensated by the consumer or receive compensation from an insurance company.
- **Agents** are loyal to an insurance company and sell, solicit, or negotiate insurance on behalf of the insurer. They are compensated by the company (or companies) only. An “independent agent” is affiliated with more than one company. A “captive agent” works for or on behalf of one insurance company. (When you buy a policy directly from an insurance company, you are probably going through an in-house agent.)
- **Producer** is a broader term that encompasses both agents and brokers. A producer is defined as someone who sells, solicits, or negotiates insurance.

Other Enrollment Assistance Resources

In addition to brokers and agents, other entities commonly play a role in health insurance plan outreach and enrollment. For example, State Health Insurance Assistance Programs (often called SHIPs) help Medicare beneficiaries understand their Medicare plan options and enroll. Government agencies, such as those that administer the Medicaid and Children’s Health Insurance Programs, help people sign up for those benefits, and community-based organizations also assist with Medicaid and CHIP enrollment. Under the Affordable Care Act, these entities will also help applicants who don’t qualify for Medicaid or CHIP get coverage and premium assistance through the exchange. Some consumers may select their plans as they apply for coverage, and others may do it in a separate step. Under the Affordable Care Act, navigators, consumer assistance programs, and other consumer-help entities will each have a role in helping consumers enroll in exchange plans and resolve any questions or problems they encounter.

This paper does not delve into issues concerning navigators—a forthcoming Families USA publication will discuss navigator program design—but it is useful to keep in mind how navigators are distinct from agents and brokers. The Affordable Care Act requires exchanges to establish a navigator program, using entities that have, or could readily form, relationships with people likely to be qualified to enroll in plans through an exchange. The navigator program will conduct public education, distribute “fair and impartial information”

concerning enrollment, premium credits, and cost-sharing reductions; facilitate enrollment; provide referrals to consumer assistance resources if problems arise; and provide information in a manner that is culturally and linguistically appropriate. As noted in the next section, exchanges can use various types of entities to deliver navigator services. They may elect to use agents and brokers who agree to forego commissions for health insurance sales as one type of navigator, but exchanges must always designate at least one community- or consumer-focused nonprofit as a type of navigator.

The Final Exchange Rule and Brokers and Agents

The Department of Health and Human Services (HHS) published its final rule for the establishment of health insurance exchanges in the March 27, 2012, Federal Register. Consumers who meet income requirements and do not qualify for Medicaid or do not have other affordable coverage options may be eligible for premium tax credits that help them pay for qualified health plans sold in the exchange. HHS's final rule addresses both the governance of an exchange and how brokers and agents can assist with enrollment.

- **Exchange boards:** The majority of voting members on the governing board of an exchange can't have a conflict of interest. Members with a conflict include "representatives of health insurance issuers or agents or brokers." This provision will limit the number of brokers and agents on exchange boards. (45 CFR §155.110)
- **Exchange consultation:** The exchange must regularly consult with a number of types of stakeholders, including agents and brokers. (45 CFR §155.130)
- **Enrollment by agents and brokers:** Agents and brokers can assist with qualified health plan enrollments without being navigators, if states permit this. An agent or broker that enrolls individuals in qualified health plans through an exchange must first enter into a formal agreement with an exchange. At a minimum, the agreement must require the producer to register with the exchange, receive training about qualified health plans and about insurance affordability programs, and comply with privacy and security standards. When an agent or broker enrolls someone in a qualified health plan through the exchange, the agent or broker must ensure that the applicant completes the application on the exchange website and completes the eligibility verification process. Ultimately, the exchange—not the agent or broker—transmits enrollment information to the selected plan. If a producer's website is used to display the choices of qualified health plans, that website must meet certain standards, including that it display all of the qualified health plans offered by the exchange. (45 CFR §155.220) The interim final federal rule says that agents and brokers that meet certain standards (including having an agreement with the exchange) can also assist individuals in applying for advance premium credits and cost-sharing reductions.

- **When brokers and agents can act as navigators:** “Navigator entities” receive grants from the exchange to carry out a number of duties: (1) they are experts in eligibility and enrollment through the exchange, and they provide public education about the exchange; (2) they provide fair, accurate, and impartial information and services that must “acknowledge other health programs” (We understand that to include Medicaid and CHIP, for example, in addition to plans sold in the exchange.); (3) they facilitate selection of a qualified health plan (see “Qualified Health Plans and the Exchange” for more information on qualified health plans); (4) they refer to consumer assistance programs and appropriate agencies when enrollees have a complaint, grievance, or question about their health plan, covered benefits, or a determination made by their plan; and (5) they provide culturally and linguistically appropriate information to consumers. Navigators must receive training that is specific to their duties.

Exchanges must award navigator grants to at least two types of entities. One must be a community- or consumer-focused nonprofit group. The other entity may be any of seven other types specified in the rules, one of which is “licensed agents and brokers.” However, agents and brokers who serve as navigators cannot receive any compensation from health insurers, either directly or indirectly, for enrolling individuals or employees in health plans in or out of the exchange. (45 CFR §155.210) The preamble of this rule clarifies that exchanges cannot require all navigators to be licensed as agents or brokers, or to hold errors and omissions insurance (a type of liability insurance that may pay an agent or broker’s losses and legal fees if their erroneous advice caused a client financial harm).

Qualified Health Plans and the Exchange

Qualified health plans offer a certain standardized package of benefits and meet other requirements so that they can be sold in an exchange, the regulated marketplace in each state where people can compare plans and shop for coverage. Qualified health plans must meet exchange standards for provider networks, marketing, accreditation, and other health plan factors. In order to shop in an exchange, people must: be residents of the area served by the exchange; be citizens, nationals, or lawfully present; and not be incarcerated. Federal law does not prohibit insurers from offering plans, including qualified health plans, outside

of an exchange. However, it is possible that some states will require individual and/or small group health insurance be sold through an exchange as the only marketplace.

If people enroll in a plan through the exchange and verify their incomes, low- and moderate-income individuals and families who meet income requirements and do not have other affordable coverage options may receive premium tax credits and cost-sharing assistance for use with a qualified health plan. They will not receive that assistance if they enroll in plans outside of the exchange.

Broker and Agent Issues that Advocates and States Should Think About

Brokers and agents can be an important resource for outreach and enrollment. However, as the health insurance market changes, states and advocates should think about whether the state's existing regulation, oversight, and training requirements for agents and brokers are still sufficient, or whether they should be updated to better protect consumers.



Revisiting Regulation and Oversight of Marketing Practices

All states already have laws permitting only licensed agents or brokers to sell health insurance. (Other entities can give impartial information about insurance options, but only agents and brokers can promote one company over another and make sales.) Licensure ensures that agents and brokers have some basic training and have passed an exam demonstrating their knowledge of insurance regulation, health insurance concepts, and policy terms. Licensure gives states a way to intervene—by revoking a license, and thereby the legal authority to sell insurance, for example—if producers mislead or deceive consumers. Further, it gives states the power to stop an unlicensed, unqualified person from fraudulently selling products, including those products that may not even really be health insurance.² A national database (<http://nipr.com/>) helps states determine whether a producer is licensed in another state and is in good standing. States and community groups should educate consumers to ask whether an agent or broker that is attempting to sell them insurance is licensed.

States and exchange boards may want to set further parameters on marketing. For example, they may wish to ban door-to-door marketing and unsolicited marketing of qualified health plans (“cold calls”). It is difficult for states or insurance companies to monitor what an agent says in a door-to-door presentation, and in other contexts, this marketing has proven ripe for abuse: Persuaded by a door-to-door salesperson that they had to take action, consumers have signed up for plans that they did not need or did not understand.³ Similarly, when consumers receive unsolicited phone calls, they cannot easily identify whether the caller legitimately sells health insurance. Since consumers should not be giving personal or financial information to a caller who may or may not be legitimate, it is best to ban unsolicited marketing and educate consumers not to talk to plan salespeople unless they have initiated the call. Exchanges may also want to require that all plan marketing materials, including those created by agents or brokers, are subject to advance review by a regulator. States should require that any marketing gifts be of nominal value and that any marketing materials that list an agent's or broker's phone number also provide the phone number for the exchange (and the plan, if applicable). Federal rules for Medicare and Medicaid plans include these sorts of marketing protections and could thus serve as an example for exchange marketing protections.⁴

It is not enough just to set marketing rules; it is also important that the state and plans vigilantly oversee marketing practices of agents and brokers. Plans are responsible for the work of contracted agents and brokers and should ensure that they are properly trained and understand the products they are marketing. States and plans should both monitor marketing practices and take action if complaints arise. They should watch for complaints that consumers misunderstood their plan, its provider network, or its premiums and cost-sharing obligations since these can be signs of improper or misleading marketing.⁵



Ensuring that Agents and Brokers Give Consumers Information about All Available Exchange Plans

It is important for consumers to understand all of their options for coverage in an exchange, especially because premium assistance will cover more of their costs in some plans than in others. States could use various methods to ensure that consumers know about and understand all of their options. One way would be to require brokers and agents to sell all exchange plans.⁶ (The exchange rules already require this of brokers who use their own websites to market qualified health plans, but states could extend the requirement to brokers and agents that sell products in person.) For example, if an exchange is paying brokers directly, the exchange's contracts and agreements with brokers could require them to sell all exchange plans. Alternatively, states could require that qualified health plans that participate in the exchange all use a common set of brokers. Even if agents and brokers do not have to sell all plans, a state might require agents and brokers that sell exchange plans to explain which plans they are selling, disclose that these are not the only plans available through the exchange, and describe where consumers can get information about the remaining exchange plans. In this case, advocates might want to work with states to draft a prominent, easy-to-understand notice and script that brokers and agents must use to provide this information to consumers and small businesses.



Broker and Agent Compensation

Most states do not have rules about how brokers or agents are compensated, although they may have rules that require that certain brokers disclose that they are being compensated by an insurer. Compensation structures vary among insurers. Often, insurers pay agents and brokers a percentage of the annual premiums that they bring in. They may pay a higher amount for first year sales, and they may pay bonuses for bringing in a high volume of business or particularly profitable business, such as larger groups of relatively healthy enrollees. Agent trade associations report that compensation methods are changing in some markets and that, instead of paying a percentage of premiums, insurers are increasingly paying producers flat fees per member or per employee per month.⁷

A study of states' insurance market reforms over a decade ago found that agents played a critical role in the success of those reforms. If agents were not paid to sell guaranteed issue products but were paid to sell other health insurance, enrollment in the guaranteed issue products suffered; and when agents were compensated at a lower percentage of premiums for selling insurance to a very small business than for a larger business (despite the fact that servicing small groups requires the most work for brokers for the amount of premium earned) enrollments by these very small businesses suffered.⁸

In the context of exchanges,⁹ states will want to work toward several goals and strategies related to compensation can help. They will want to do the following:

1. Maximize enrollment.
2. Make sure that agents and brokers do not undermine the exchange by directing consumers that could benefit from exchange coverage to policies outside the exchange.
3. Make sure that a mix of people with various health needs enroll in each exchange plan and that compensation structures don't drive enrollments to particular plans for reasons other than what is in consumers' best interests.
4. When it is open enrollment season, producers can help consumers change plans if their plan is no longer meeting their needs, but states may wish to discourage many plan changes, known as churning, unless changing plans is in the consumer's best interest.

States could use a range of methods pertaining to compensation to accomplish the above goals. For example, a state exchange could elect to pay agents and brokers a flat fee for selling exchange policies rather than having each insurer pay the agents and producers themselves. This is a strategy that is used by many state high-risk pools, by the federally run Pre-Existing Condition Insurance Plan (PCIP), and by the Massachusetts Connector and the Utah Health Exchange (state exchanges that predated the Affordable Care Act). However, advocates and states should be aware of the potential pitfalls to this approach: If the fee for selling exchange policies is less than typical compensation for selling policies outside of the exchange, exchange plan enrollment could suffer. Another method states could use is to have each insurer pay producers but to set some parameters: States could require that compensation for selling exchange plans be equal to compensation for plans outside the exchange, that compensation structures not lead to discriminatory sales practices and not be based on the health of the enrollee, or they could set some ranges on permissible compensation. Regulating compensation is likely to be a politically charged issue; agents and brokers are already concerned that the health care law will cause insurers to reduce the commissions they pay them. As a result, states and consumer advocates should think carefully about the best way to accomplish their goals. They should point out that prohibiting discriminatory practices need not reduce compensation.

Before weighing in on how or whether your state might regulate or set compensation for agents and brokers enrolling people in exchange plans, you may want to ask your state to gather some information on the volume of individual and small group health insurance business now handled by producers, and on how producers are typically compensated in your state. Some of this information may be proprietary, but your state should be able to get some information through meetings and surveys.¹⁰

If, for example, you find that most small businesses now purchase health coverage through brokers and agents, you might want to make sure that those producers will receive appropriate compensation to sell health plans through the SHOP (Small Business Health Options Program) exchange. Otherwise, your state's SHOP exchange may find itself with few enrollees and an adverse selection problem. If, on the other hand, producers are not selling much individual health insurance, you may want to consider whether producers or other community entities will be most important in reaching and enrolling individuals in the exchange. If you are in a state where a high-risk pool or the Pre-Existing Conditions Insurance Plan paid agents and brokers a flat fee for enrollments, you can ask how significant producer-initiated enrollments have been in these markets and whether the use of flat fees made a difference to enrollment.

Other compensation policies that states and advocates may want to consider are as follows:

- **Setting rules about compensation for first-year sales versus future sales:** Often, brokers are paid a higher rate for initial enrollments than for renewals, because initial enrollments require more work. If initial enrollment fees are much more lucrative, it may incentivize agents and brokers to help people change plans each open enrollment period, even when it is not in their best interest to do so. Prior to 2008, consumer advocates and states complained that agents and brokers encouraged seniors to switch Medicare Part D plans or switch to Medicare Advantage or private Medicare fee-for-service plans each open enrollment season, even when it was not in their best interest. They said that this churning was encouraged by the fact that agents and brokers were paid a much higher rate for new sales than for renewals. The federal government eventually capped the amount that initial sales compensation could vary from renewal compensation for Medicare plans and required that plans take back any commissions paid if beneficiaries rapidly disenrolled from a plan.¹¹

- **Creating payment structures that encourage marketing to very small groups:** When agents and brokers are paid a percentage of premiums or fees per employee enrolled, they obviously get more money by selling to a large employer than to a small employer. On top of that, in the past, some insurers have actually paid a higher percentage of premiums for sales to larger groups.¹² However, very small businesses are especially likely to lack health insurance, and so to incentivize sales to these businesses, broker and agent compensation should not vary in small group markets unless it is reciprocally related to the group size. States such as Maryland,¹³ Texas,¹⁴ and Utah¹⁵ required this even before federal health reform was enacted. Likewise, exchanges should target very small groups for outreach and enrollment assistance. States, exchange boards, and health plans should consider agent and broker payment structures that will encourage outreach to very small groups.
- **Making sure compensation for selling within the exchange and outside of the exchange is similar:** If producers are typically paid more to sell plans outside the exchange than they are to sell exchange plans, they may steer customers to the outside market, undermining the viability of the exchange. To combat this problem, as discussed earlier, exchanges setting their own compensation structure for producers should be mindful of the compensation producers receive on the outside market. California and the Pacific Business Group on Health learned this lesson when they operated small group purchasing pools from 1993 to 2006.¹⁶ Similarly, if exchanges allow qualified health plans to set agent and broker compensation structures, they may want to require that those plans pay the same amounts to agents and brokers for selling products in and outside of the exchange.
- **Reviewing a plan's producer compensation schedule to ensure that incentives are appropriate:** States that do not require a particular compensation structure for agents and brokers might still want to require that plans' compensation structures results in appropriate, informed enrollments. Thus, states may want to review the compensation structure as well as each plan's overall marketing strategy to ensure that they are not designed to inappropriately steer enrollees into certain plans or inappropriately reward producers for enrolling certain individuals or groups instead of others. (Analogously, the federal Centers for Medicare and Medicaid Services now has the authority to review Medicare plans' producer compensation structures.¹⁷) States should consider reviewing compensation structures and marketing strategies before plan marketing begins and also reviewing them post-enrollment if actual enrollment patterns appear to indicate steering.



Informing Consumers about Possible Biased Guidance

The fees that an agent or broker receives from one insurer as compared to another or for selling one type of policy as compared to another may influence the producer to sell certain policies more vigorously. But consumers may not be aware when brokers and agents have financial incentives that may bias their advice. They may assume that if they are presented with multiple options, the agent or broker is guiding them to the policy that is in their best interest. Current state laws vary as to whether they require some or all licensed agents and brokers to disclose to consumers that they are compensated by insurers and the amount or method of compensation.¹⁸ Some states require agents and brokers to have consumers sign a form that explains that the agent or broker has received compensation from an insurance company. Other states instead require the agent or broker to sign a form attesting that they disclosed this information to a consumer. In some cases, if the agent or broker will receive a bonus for bringing in a large volume of business or profitable business, that must be disclosed too. Still, other states have no rules requiring health insurance agents and brokers to disclose how they are compensated.

State disclosure requirements predated the Affordable Care Act, so the disclosures likely do not include all the information that a consumer might need before deciding whether to buy an exchange plan through a producer. If the state allows the agent or broker to receive varying commissions from different exchange plans, the consumer should know that they might have financial incentives to steer him or her to particular plans. Additionally, as mentioned above, a consumer should know if there are plans available in the exchanges that are not being sold by a particular agent or broker. Further, consumers should know the following:

1. Which exchange plans offer cost-sharing assistance;
2. That an online calculator is available to help them determine their premium share and cost-sharing obligations in various plans after the tax credit and cost-sharing assistance;
3. That they can enroll directly through the exchange if they don't want to use an agent or broker; and
4. That in addition to or instead of using an agent or broker, they can get help from a navigator who is not paid by plans and who is impartial.

Moreover, states should think about when the consumer needs the information and how to make any disclosure notices easily understandable. Signing a disclosure form at the time the consumer enrolls in a plan is too late in the process to give the consumer timely notice. Perhaps agents and brokers should present some standardized disclosure information both orally and in writing as they begin their

presentations. If an agent or broker uses the exchange's web portal with consumers, the portal will help to provide the necessary information. However, if the agent or broker is on the phone with the consumer or in another setting where the consumer cannot actually view the web portal, they may not get the same information. States should think about any additional notice these consumers might need and how the state can be sure that the consumer has received notice.



Additional Training for Brokers and Agents

All states require brokers and agents that sell life and/or health insurance to be trained and pass an exam before they are licensed. Most states have “reciprocity agreements” whereby they agree to license non-resident producers who are licensed and in good standing in another state without further restrictions or qualifications. However, state training and continuing education requirements for resident producer licensure vary.¹⁹ States should enhance the training requirements for agents and brokers who sell exchange plans. The federal rule requires that a broker participating in the exchange “receives training in the range of QHP [qualified health plan] options and insurance affordability Programs (45 CFR §155.220(d)).” Thus, states should require some training on premium tax credits, advance premium tax credits, cost-sharing help, online exchange enrollment tools, enrollment through the exchange in public programs (and some basic information about public coverage programs that are not handled by the exchange, such as Medicare, veteran's benefits, and Medicaid for seniors and people with disabilities), how small businesses purchase insurance plans through the SHOP exchange, and small business tax credits.



Information on Exchange Websites about Brokers and Agents

Some exchange websites may list licensed brokers and agents who can help consumers with enrollment. This could be a useful function as it helps consumers identify legitimate brokers and agents and helps consumers understand what products they are selling. However, exchange websites should make it clear that brokers and agents are not the only source of help with exchange plan enrollments. They can do this by also including lists of navigators, making it clear wherever agents and brokers are listed that they are not the only source of help nor are they necessarily impartial (unless the state requires them to sell all exchange plans and be paid the same amount for enrollment in each), and by including contact information for the exchange and for health plans.



Information on Agent and Broker Websites

Although CMS is still weighing public comments on some parts of this rule, the interim final rule says that someone wishing to receive cost-sharing reductions and/or premium assistance in a qualified health plan must use the exchange's website to verify eligibility and apply for enrollment through the exchange, but can use producer's website to select a qualified health plan. In that case, the producer's website must provide the consumer the opportunity to view all qualified health plans, display all required data, and allow the consumer who is using the website to withdraw and use the exchange website instead at any time. Also, the website should not provide financial incentives, such as gifts or rewards for picking particular plans. However, the federal rule is not explicit about details such as how or in what order the required plan data must be displayed.

A recent study of some existing health plan comparison websites showed that the display of information matters to consumers' choices. Plan comparison websites often give consumers options of how they want to see plans sorted (e.g., by premium price, by bestselling plans, or by other variables.) However, producer and government websites differ in how they first display plan information before the consumer selects a sorting option. The study found that websites' default sorting options strongly influenced consumers' choices.²⁰ This is true even when the website provides alternate options for how to sort comparative information. Thus, states may want to consider how broker's and agent's websites may display information to ensure that sorting options do not influence consumers to select plans based on factors other than what is in their best interests. For example, states may wish to guide consumers to think about cost and quality first, rather than a plan's popularity or a more arbitrary sorting method. Similarly, the website shouldn't hide some of the exchange plan choices or make it hard to navigate the full list.

It is also important that consumers know when they are on an official government-sponsored website and when they are on the website of a private entity. Thus, exchanges may wish to establish and trademark an easily recognizable logo or take other steps to stop and prevent impostor exchange web portals.

Conclusion

Many entities will need to work together to achieve successful enrollment in health coverage under health reform. Agents and brokers will play an important role in this process: They already have experience with enrollment and know how to reach some segments of the population, and states already have some mechanisms in place to license and certify them. Some agents and brokers already have websites that compare health plans. But while these things provide some building blocks toward successful enrollment, they are not enough. Insurance options and enrollment systems will be different in 2014, so agents and brokers (as well as other entities) will need more training. Though agents and brokers reach some segments of the population, many people and businesses do not have insurance. Other segments of the population, such as people whose primary language is not English, or individuals in some neighborhoods or economic strata, may not be reached by agents and brokers at all. People who are reached by agents and brokers (or by their websites) may not know if they are getting complete information about their insurance choices or if information is biased due to the producer's financial arrangements with insurers. Health insurance producer licensing and certification programs pre-dated the Affordable Care Act, so certification does not yet show that a producer has the requisite knowledge to assist consumers with a reformed health insurance market.

In this new world of health insurance exchanges, states may take a variety of approaches to the use of agents and brokers. Some state exchanges may want to pay agents and brokers themselves so that they can require them to provide impartial information about all health plans sold through the exchange. Other state exchanges may decide to leave agent and broker payment arrangements to insurers, but they may still take additional steps to regulate and oversee agents' and brokers' behavior in a health insurance exchange. All states should plan for full-scale enrollment efforts over the next few years, and should develop concerted efforts, involving many different players, to reach the uninsured and underinsured.

Resources

California's Exchange Board

Individual Market: Agent Payment Options

http://www.healthexchange.ca.gov/BoardMeetings/Documents/July_19_2012/VIII-C-CHBE-BRB_AgentCompensation_07192012.pdf

Small Employer Health Options Program (SHOP agent strategy starts on page 29)

http://www.healthexchange.ca.gov/BoardMeetings/Documents/June12_2012/CHBE-SHOPExchange-BoardOptions-05-18-12FINAL.pdf

The Maryland Health Benefit Exchange Navigator Advisory Committee

Navigator Certification and Insurance Producers Authorization Regulations Recommendations

http://dhmh.maryland.gov/exchange/pdf/Navigator%20Certification%20and%20Insurance%20Producer%20Authorization%20Regulations%20Recommendations_73012.pdf

July 30, 2012 Meeting (discussing navigator certification and producer authorization regulations)

<http://dhmh.maryland.gov/exchange/SitePages/Navigator%20July%2030%20Meeting.aspx>

The National Association of Insurance Commissioners

Draft Marketing and Consumer Information White Paper: Navigators, Agents and Brokers, Marketing and Summary of Benefits and Coverage (adopted by the Exchanges Subgroup on July 26, 2012)

http://www.naic.org/documents/committees_b_exchanges_120626_marketing_consumer_information_white_paper.pdf

Nevada's Silver State Health Insurance Exchange Consumer Assistance Advisory Committee

July 25, 2012, meeting and background materials (discussing training, certification, and compensation for producers and navigators in the exchange)

http://exchange.nv.gov/Meetings/July_25_2012_Meeting_Attachments_CA/

Oregon Health Insurance Exchange Corporation

April 2012 meeting (discussing recommendations for an Agent Management Program, beginning on page 18)

https://orhix.org/pdfs/board/4_12_12_board_packet.pdf

State Reform

Discussions and papers from various states' health reform implementation activities
statereform.org

Endnotes

¹ Congressional Budget Office, *Estimates for the Insurance Coverage Provisions of the Affordable Care Act, Updated for the Recent Supreme Court Decision* (Washington: CBO, July 24, 2012), available online at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf>.

² The federal Gramm-Leach-Bliley Act requires states to either have uniform laws or reciprocal arrangements for licensing. Many states have thus adopted a model licensure act promulgated by the National Association of Insurance Commissioners. For a brief history, see the presentation by Sarah Heidenreich, National Association of Insurance Commissioners Legal Counsel, "Maintaining Tradition: History/Framework of Producer Licensing," (Kansas City, 2012), available online at http://www.naic.org/ereg/presentations/PL_200.pdf.

³ Families USA Foundation, *A Guide to Marketing and Enrollment in Medicaid Managed Care* (Washington: Families USA, June 1997).

⁴ Centers for Medicare and Medicaid Services, *Final 2013 Medicare Marketing Guidelines* (Baltimore: CMS, 2012), available online at <http://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/Downloads/2013-Medicare-Marketing-Guidelines.zip>; 42 CFR § 438.104 and 42 CFR §422.2268.

⁵ Experience with Medicare marketing problems in 2005-2007 is instructive. See: National Association of Insurance Commissioners, Senior Issues Task Force, *State Survey on Medicare Marketing Issues Preliminary Results* (Kansas City, MO: NAIC, June 2007), available online at http://www.naic.org/documents/committees_b_senior_issues_medpp_070911_survey_summary.pdf; David Lipshutz, Paul Precht, and Bonnie Burns, *After the Goldrush: The Marketing of Medicare Advantage and Part D Plans* (Sacramento: California Health Advocates and the Medicare Rights Center, January 2007), available online at http://www.cahealthadvocates.org/_pdf/advocacy/2007/AfterTheGoldrush.pdf.

⁶ States could decide if different requirements would apply to captive agents that work for just one insurer and who don't make unsolicited sales.

⁷ Letter from the Council of Insurance Agents and Brokers, Independent Insurance Agents and Brokers of America, The National Association of Health Underwriters, and National Association of Insurance and Financial Advisers to Kevin McCarty, Chair, National Association of Insurance Commissioners Professional Health Insurers Advisers Task Force, March 21, 2011.

⁸ Mark A. Hall, "The Role of Independent Agents in the Success of Health Insurance Market Reforms," *78 Milbank Quarterly* 23, no. 1 (2000), available online at <http://www.rwjf.org/files/research/Hall.%2078-1.pdf>.

⁹ States may want to look at producer compensation rules for other products too, including for stop-loss policies that may adversely affect their small group markets.

¹⁰ The National Association of Insurance Commissioners, for example, worked with the National Association of Health Underwriters to gather national information about producer compensation in 2011 that blinded specific companies' practices. National Association of Insurance Commissioners Health Care Reform Actuarial (B) Working Group, Report Regarding Producer Compensation in the PPACA Medical Loss Ratio Calculation (Kansas City, MO: NAIC, May 26, 2011), available online at http://www.naic.org/documents/committees_b_110607_hcragw_report.pdf.

¹¹ 42 Code of Federal Regulations §422.2274, published in the *Federal Register*, Vol. 73, No. 182, Thursday, September 18, 2008, pp. 53226-54254, available online at <http://www.gpo.gov/fdsys/pkg/FR-2008-09-18/pdf/E8-21686.pdf>.

¹² Mark A. Hall, op. cit.

¹³ Maryland's law, amending 15-1206 of its Insurance Statute, available online at <http://mlis.state.md.us/2002rs/billfile/hb0085.htm>.

¹⁴ Texas House Bill 471, enacted in 2001, available online at <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=HB471>.

¹⁵ Utah Administrative Code Rule R590-270, available online at <http://www.rules.utah.gov/publicat/code/r590/r590-207.htm#T5>.

¹⁶ Micah Weinberg and Bill Kramer, *Building Successful SHOP Exchanges: Lessons from the California Experience* (San Francisco: Pacific Business Group on Health, 2011), available online at http://www.pbgh.org/storage/documents/PBGH_SHOP_05.pdf. The report also discusses other differences between California's purchasing pool and the outside market that contributed to the pool's demise.

¹⁷ 42 Code of Federal Regulations §422.2274.

¹⁸ Kevin McCarthy, *Insurers Producers and Agents* (Hartford: Connecticut Office of Legislative Research, December 2007). This includes a table comparing state insurance producer laws, originally written by National Association of Insurance Commissioners. For examples of state variation see Arkansas Department of Insurance webpage, "Producer Disclosure Frequently Asked Questions," <http://www.insurance.arkansas.gov/Legal%20Dataseservices/ProdCompFAQ.html>, and Idaho's sample life and health producer form, http://www.doi.idaho.gov/Producer/lh_disclosure.pdf, accessed July 26, 2012.

¹⁹ National Association of Health Underwriters, *Rebating and Producer CE laws by State* (Arlington, VA: NAHU, May 2009), available online at http://www.naic.org/documents/committees_ex_pltf_plwg_PLC_assessment_aggregate_report.pdf

²⁰ Barbra Kingsley and Lynn Quincy, *Choice Architecture: Design Decisions that Affect Consumers' Health Plan Choices* (Rockville: Kleimann Communication Group; DC: Consumers Union, July 2012), available online at http://www.consumersunion.org/pdf/Choice_Architecture_Report.pdf.

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