

IDEAS IN ACTION

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KEEPING THE FOX OUT OF THE HENHOUSE

Protecting New Health Insurance Markets from Insurance Company Conflict of Interest

Introduction

In March 2010, Congress passed historic health reform legislation. It is now up to New York lawmakers to implement reform in our state, including passing legislation to establish new health insurance exchanges through which individuals and small businesses can buy health insurance. These new exchanges are intended to provide an alternative to largely unregulated private insurance markets, where insurers faced little or no restraints on who they could turn down for coverage or what they could charge.

In order for the exchanges to provide an affordable, quality alternative, they need to be protected from health insurance industry influence. Each exchange will be governed by a board that will make key decisions about what kind of coverage will be offered and how much it will cost. It is essential that the legislation creating the exchanges protect the integrity of the exchange boards and keep them free of insurance company conflict of interest.

Based on six anti-conflict of interest measures, this report card grades S 5849/A 8514, which passed the New York Assembly earlier this year, and finds that the bill fails on all counts. This grade falls far short of what is needed to protect New Yorkers from health insurance company dominance of the new health insurance exchange.

Health Insurance Companies Are Trying to Influence Health Reform Implementation

Health insurance companies do more than just sell health coverage. They also engage in politics, using premium dollars to make campaign contributions to office-seekers, lobby lawmakers, and otherwise influence the public debate on key public policy issues. Although health insurance companies can't occupy elected positions, they can – and do – use their financial muscle to influence decisions that affect the way they do business and the way patients receive health care.

The methods of influence used by the health insurance industry are often far from transparent. Prior to the passage of health reform, the health insurance industry funneled more than \$86.2 million into an undeclared anti-health reform media and lobbying campaign, while publicly claiming that it supported the idea of reform.¹

Now, insurance companies are making campaign contributions and lobbying state lawmakers across the country to influence the legislation to create exchanges. Health insurance companies have contributed generously to statewide campaigns in New York, with WellPoint, Empire Blue Cross Blue Shield's parent company, giving out \$173,000 since 2003. During the same period, UnitedHealth (parent of Oxford) made contributions of \$145,200, while Aetna lavished \$303,050 on statewide campaigns.²

These dollars are dwarfed by some of the lobbying contracts reported to New York's Commission on Public Integrity. Hinman Straub Advisors, LLC is one of the state's top lobbying firms, reporting \$4.4 million in compensation and reimbursements for 2010,³ and represents insurance companies such as WellPoint and CIGNA.⁴ In both 2009 and 2010, Hinman reported the third largest lobbying contract in the state,

receiving \$425,026 from Excellus Health Plan in 2009 and \$491,555 in 2010. For both years, Hinman Straub also reported the state's seventh largest lobbying contract: \$330,808 from WellPoint in 2009 and \$364,195 in 2010.⁵

Top Health Insurance Lobbying Contracts Reported by Hinman Straub Advisors, LLC

	2009	2010
Excellus	\$425,026	\$491,555
WellPoint	\$330,808	\$364,195

Undoubtedly, the health insurance industry is seeking the ear of lawmakers on key issues related to denial of benefits, quality of coverage, cost of health services, premium rates, and other matters of concern to consumers.

Governing the health insurance exchange

Under the Affordable Care Act (ACA), by 2014 every state is required to put into place a health insurance exchange through which individuals and small businesses can purchase health insurance. (As an alternate, states may join a federal exchange.) The exchange is intended to provide an alternative to the largely unregulated private health insurance marketplace, which has left many people uninsured or inadequately insured.

Through the exchange, private health insurance companies will offer health insurance plans, and consumers will choose which plan they want to purchase. The exchange will set standards and common rules for insurers wishing to sell their insurance products through the exchange. These rules and standards will address issues such as quality and affordability of coverage – in other words, what kind of coverage insurers can offer and at what cost. In particular, the exchange “must certify plans based on a determination of what ‘is in the interests of qualified individuals and qualified employers’ in the state.”⁶

Accordingly, health insurance companies have a strong financial interest in the decisions made by the exchange's governing board. Health insurance companies' interest in maximizing profit often stands in conflict with patients' interest in getting high quality health care they can afford.

However, health insurance companies are not the only ones with a financial stake in exchange board decisions. Insurance brokers, physicians and other providers, clinics and hospitals, and others also stand to gain financially from exchange board decisions. Likewise, “navigator” agencies – which will receive funding through the exchange to help ensure that patients get the health insurance and health care they need – have a stake.

Finally, potential conflicts arise not only in exchange board decisions but in the day-to-day operation of the exchange. It would present a conflict, for example, if the state hired an insurance company to administer the exchange, since the insurance company has a financial interest in customers' choice of insurance products and in other issues related to exchange administration. Likewise, insurance brokers may have financial incentives to steer clients toward particular health policies. These and other incentives run counter to individuals' and small businesses' interest in the best possible health care at the best price.

The financial interests of health insurers and these other health care market participants may often stand in conflict with the interests of patients, who need health care they can afford. Consequently, it is essential that the exchanges be insulated from industry influence.

Six Ways to Protect Exchanges from Health Insurance Industry Conflict of Interest

Fortunately, there are provisions that New York can adopt in its health insurance exchange legislation to protect the governing board from insurance company and other conflict of interest. These include the following:

- *No board seats for representatives of insurance companies* or other entities with a direct financial interest in exchange board decisions (such as hospitals or pharmaceutical companies). Representatives include those who are employed by or receive compensation from an entity with a financial stake in exchange board decisions.

- **Disclosure of financial interests and recusal in case of potential conflicts.** To ensure sunlight on potential conflicts of interest, board members should be required to disclose financial interests, such as stock ownership, in companies with a stake in board decisions. Exchange board members should also be barred from participating in any board discussions or decisions in which they or a family member has a financial interest.
- **No-revolving-door policy** that bars, for a determined period: exchange board members from later being employed by an entity with a direct financial interest in exchange board decisions; or, assumption of exchange board positions by former employees of an entity with a direct financial interest in exchange board decisions.
- **Conflict of interest requirements apply to senior exchange staff**, in addition to exchange board members.
- **Conflict of interest requirements apply to entities participating in the navigator program** established by the exchange.
- **Anti-steering provisions** to prevent insurance agents and brokers from steering business away from the exchanges. The exchanges should monitor agents' enrollment rates inside and outside the exchange and exclude brokers that have a pattern of steering clients away from the exchange. The exchange legislation should also prohibit commission structures that encourage agents to steer enrollees to products outside the exchange.

New York's Health Insurance Exchange Bill Gets an F on Conflict of Interest for:

- Letting insurance company representatives sit on the exchange board
- Allowing a revolving door between insurance companies and the exchange board
- Failing to require disclosure and recusal for exchange board members with a financial interest in board decisions
- Failing to apply conflict of interest provisions to exchange staff
- Going only partway toward preventing conflict of interest with regard to health insurance navigators and brokers

New York's health insurance exchange proposal doesn't make the grade: F

During the legislative session, New York lawmakers considered a bill to establish a health insurance exchange in New York. (The bill was S 5849 in the Senate and A 8514 in the Assembly.) Although this bill has not been signed into law, it did pass the Assembly and represents lawmakers' most significant step toward creating New York's health insurance exchange.

The bill would establish an exchange governed by a board of nine voting directors. The bill sets out the terms for these positions and the process of appointment. However, it does not include any provisions specifically addressing conflict of interest and the board, establishing only the duty of board members to "serve the public interest of the individuals and small businesses seeking health care coverage through the exchange."⁷ The bill does not, for example, bar participation on the board by representatives of insurance companies or require disclosure and recusal when a board member's financial interests are at stake.

The bill does specify that members of the exchange board and exchange board officers and employees will be covered by New York's public officers law.⁸ This law provides that public employees and officers should not "have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction...which is in substantial conflict with the proper discharge of his duties in the public interest."⁹

This provision, however, will not prevent insurer representatives and other parties with a potential conflict from serving on the board. A New York State Ethics Commission opinion¹⁰ and an Attorney General opinion¹¹ have held, in two instances, that appointment of industry representatives to public entities was not barred by the public officers law, even though in both cases the entities were making decisions or recommendations affecting the financial interests of those industries. These interpretations underscore the importance of explicitly excluding industry representatives from participation in the health insurance exchange.

The exchange would also be subject to the conflict of interest provisions of New York's public authorities law. This provision requires only that a majority of the appointed board members be "independent members."¹² An independent member is defined as someone who is not currently employed, and has not been employed in the past two years, by an entity that has received at least \$15,000 in payment from the public authority.¹³ A lobbyist who is, or has been in the past two years, employed to influence the public authority is also considered not independent.¹⁴ This provision would still allow providers, insurance industry executives, and lobbyists representing providers or insurance carriers to serve on the exchange board, as long as they did not make up a majority of the appointed members.

In addition, the bill does not include any specific provisions with regard to selection of navigator entities. It also does not address the role that insurance brokers will play in enrolling clients in insurance products through the exchange. However, the bill calls for the exchange to study both these issues and make recommendations based on the findings.¹⁵ Therefore, the bill provides an opportunity for conflict of interest provisions on these issues to be incorporated into the exchange law in the future.

Percentage points earned	Grade
0-60	F
60-70	D
70-80	C
80-90	B
90-100	A

This report grades S 5849/A 8514 on the six standards included above. The most important thing states can do to insulate the exchanges from conflict of interest is bar participation of people with a direct conflict – representatives of health insurance companies or other entities with a direct financial stake in board decisions. For this reason, this standard accounts for 75 percentage points out of 100. For each remaining provision the state adopts, it receives five percentage points.

No insurance company board seats	Fail	0
Disclosure & recusal	Fail	0
No revolving door	Fail	0
Applies to exchange seniors staff	Fail	0
Applies to navigators	Incomplete	2
Anti-steering provisions	Incomplete	2
GRADE	Fail	4

S 5849/A 8514 performs as indicated in the accompanying table. It receives no points for most conflict of interest provisions, as it lacks a revolving door provision, disclosure and recusal provision, and a provision to bar industry representatives from serving on the board. Because it allows for conflict of interest provisions to be incorporated in treatment of navigators and insurance brokers, pending study and recommendations, it receives partial credit in those areas. Overall, however, the legislation receives only four points and earns an “F.”

Conclusion

Health reform represents a response to private health insurance companies’ failure to deliver good, affordable coverage to a sufficient number of people in New York and across the country. This failure arises from private health insurance companies’ putting their financial interests above the public interest in health care.

Under health reform, consumers will now have the opportunity to purchase coverage through an exchange that sets rules and standards for health insurance. This is an important step forward. However, New York is still not doing everything it needs to do to protect the exchange from health insurance company influence. New York policymakers should incorporate strong conflict-of-interest provisions into S 5849/A 8514 to ensure that the health insurance exchange represents the people of New York and not its health insurance companies.

- 1 Dave Eggens, “Health insurers’ group gave U.S. Chamber \$86.2 million in 2009 for lobbying,” Washington Post, November 17, 2010, viewed at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR2010111706325.html>.
- 2 Figures from the National Institute on Money in State Politics database, followthemoney.org.
- 3 New York State Commission on Public Integrity, Annual Report 2010, p. 55, viewed at: http://www.nyintegrity.org/pubs/annual_report_2010/2010%20Annual%20Report.pdf. Figure is rounded.
- 4 New York State Commission on Public Integrity, Lobbying List Reports, https://apps.nyintegrity.org/lrr/menu_reports_public2.aspx.
- 5 New York State Commission on Public Integrity, Annual Report 2010, p. 58, viewed at: http://www.nyintegrity.org/pubs/annual_report_2010/2010%20Annual%20Report.pdf.
- 6 “Designing an Exchange: A Toolkit for State Policymakers,” National Academy of Social Insurance, January 2011, p. 6, viewed at: <http://www.nasi.org/research/2011/designing-exchange-toolkit-state-policymakers>.
- 7 A 8514 § 2, Proposed 10-E § 3982(7)(a).
- 8 A 8514 § 3.
- 9 Public Officers Law § 74(2).
- 10 See, Application of Public Officers Law § 74 to directors of the New York State Thoroughbred Breeding and Development Fund Corporation (Advisory Opinion No. 95-13).
- 11 Opinion No. 83-F20.
- 12 New York State Public Authorities Law § 2825(2); Authority Budget Office Policy Guidance 07-01, March 1, 2007.
- 13 New York State Public Authorities Law § 2825(2)(b).
- 14 New York State Public Authorities Law § 2825(2)(d).
- 15 A 8514 §2 Proposed 10-E § 3988(8) & (9).