FLORIDA CENTER FOR FISCAL AND ECONOMIC POLICY

Issue Brief **June 2012**

Uncertain Prospects:
Florida Insurers Complying with Early ACA Provisions, But Future Benefit Threatened by State Inaction

Introduction and Summary:

More than two years have passed since Congress passed and the President signed into law the comprehensive federal health care reform legislation known as the Patient Protection and Affordable Care Act (ACA).[1] Although implementation of the ACA is to occur over the course of a decade, with the most substantial components coming online in 2014, a number of ACA-created consumer protections are in fact already in effect. Although a decision by the U.S. Supreme Court regarding the constitutionality of the ACA is imminent, few of the provisions discussed in this report would be directly affected unless the court invalidates the entire ACA.

The ACA is a federal law, but the political compromise struck by Congress preserved the role of states as the primary regulators of the business of health insurance, giving them significant power and flexibility to make ACA-related implementation decisions. Contrary to the portrayal of the ACA by opponents as federally directed, state leaders and state agencies play the central role in configuring access to ACA benefits and protections.

Nevertheless, the law has been met with fierce and persistent opposition from Florida's elected and appointed leadership, and state-level efforts to implement the ACA have remained at a virtual standstill for more than a year and a half. This inaction and outright resistance raises a question of whether Floridians might face delayed or denied access to the intended benefits of the ACA's key reforms as they take effect during the next few years. On the more immediate front, it gives rise to questions about the extent to which Floridians have access to the limited but important ACA benefits that should already be available to them.

In an effort to answer these questions, the Florida Public Interest Research Group (FPIRG) and this writer sought to assess the level of compliance with the ACA provisions already in effect by Florida insurers, first by inquiring of insurers directly and subsequently by reviewing insurers' administrative filings with the Florida Office of Insurance Regulation (OIR).

The reviewers found that, despite the fact that Florida remains mired at "square one" with respect to progress in implementing the ACA, Florida insurers nevertheless appear to be generally compliant with the effective provisions of the ACA, and millions of Floridians are benefitting as a result. For its part, however, OIR may be monitoring but is not enforcing or reporting on compliance with these provisions.

These findings are cause for both confidence and concern among Florida consumers. While indications are that insurers have taken and will make some effort to comply with the law, the extent and level of compliance will be considerably lower and less continuous without strong transparency requirements and enforcement mechanisms. Furthermore, unlike the initial set of ACA protections, the reforms that follow require far more complex and labor-intensive implementation efforts, including the establishment of a Health Insurance Exchange and the implementation of major insurance market reforms in Florida. For the most part, implementation and compliance of these components will be dependent on receipt of legislative authority and allocation of resources, though the need for state action may be diminished to an extent by the availability of federally implemented alternatives.

In most cases, health insurers now must spend at least a minimum percentage of premiums collected on patient care and quality improvement activities (or issue rebates), must allow young adults to remain covered under their parents' plans until age 26, and are prohibited from retroactively canceling coverage when a covered individual gets sick, to cite just a few examples.

ACA Consumer Protections Already in Effect:

The ACA includes a wide array of interrelated provisions that are to be implemented over the course of a decade. An initial wave of ACA consumer protections have already been implemented, however, with many becoming effective as of September 23, 2010.[2,3]

Specifically, insurers were required to comply with a number of new provisions intended to benefit and protect consumers by increasing the likelihood that they will be able to get and/or keep coverage, by increasing access to covered services, and increasing the value and quality of the coverage provided. In most cases, health insurers now must spend at least a minimum percentage of premiums collected on patient care and quality improvement activities (or issue rebates), must allow young adults to remain covered under their parents' plans until age 26, and are prohibited from retroactively canceling coverage when a covered individual gets sick, to cite just a few examples.

Understanding which protections apply to which health plans can be confusing, however. In particular, health plans that are "grandfathered" (i.e., not new or significantly modified since 2010) are exempt from a number of the new provisions.[4] In addition, even among non-grandfathered plans, plans purchased directly (i.e., in the individual market) are exempt from some of the requirements that employer-sponsored (small and large group market) plans are not.

Some ACA protections that are currently in effect, as well as their applicability to different types of plans based on grandfathering status and insurance market are shown in the table below:

ACA CONSUMER PROTECTION	GROUP PLAN		INDIVIDUAL PLAN	
	Grand-fathered	Not Grand-fathered	Grand-fathered	Not Grand-fathered
Young adults may remain covered under parents' health insurance plan until age 26 [a]	Yes	Yes	Yes	Yes
No LIFETIME dollar limits may be placed on essential benefit amounts	Yes	Yes	Yes	Yes
ANNUAL dollar limits on essential benefits can only be restricted to an extent [b] [c]	Yes	Yes	No	Yes
Many preventive services (e.g., screenings & immunizations) must be covered with zero out-of-pocket cost	No	Yes	No	Yes
Coverage for children (under age 19) must include treatment for pre-existing conditions [d]	Yes	Yes	No	Yes
Insurers may not rescind (retroactively cancel) coverage due to an error or oversight on the insurance application [e]	Yes	Yes	Yes	Yes
All covered individuals have the right to appeal health plan denial of a claim [f]	No	Yes	No	Yes
Direct access to emergency care must be provided without pre-authorization & Insurers may not charge higher out-of-pocket costs for emergency care received outside the plan's network	No	Yes	No	Yes
Insurers must spend a minimum amount of total premium dollars received on direct patient care or quality improvement activities (also known as the "Medical Loss Ratio" requirement)	Yes	Yes [g]	Yes	Yes [h]
Insurers must explain and justify "potentially unreasonable" annual rate increases of more than 10 percent.	No	Yes	No	Yes

Notes:

(a) Does not apply to young adults who can obtain coverage through their own job.
(b) For plan years beginning in 2014, NO annual dollar limits on essential benefits will be permitted.
(c) A number of employer-sponsored plans have received exemptions from this requirement until 2014, although the granting of new exemptions has been discontinued.
(d) Assuming the plan covers that treatment; also applies to adult coverage starting in 2014.
(e) Insurers may still cancel coverage if a consumer deliberately lies on the application or for other legitimate reasons (non-payment, for example).
(f) Appeals must include an internal claims review process and an external appeals process.
(g) At least 80 percent.
(h) At least 80 percent for small group plans and 85 percent for large group plans.

Examining Insurer Compliance with the ACA Provisions Already in Effect:

To assess the extent to which insurers are complying with the first flight of ACA-provided consumer rights and protections, FPIRG reviewers first set out to inquire directly of insurers regarding their efforts. Specifically, the reviewers developed and sent a neutrally worded survey (borrowing heavily from a tool developed by the National Association of Insurance Commissioners[5]) to the 13 insurers with the largest market share in Florida (see table below).[6] Collectively, these insurers account for 90 percent of premiums paid in Florida's individual and group health insurance markets.

Rank	Insurer	Market Share (Florida)
1	Blue Cross & Blue Shield of Florida	26.7%
2	United Healthcare Insurance Company	15.8%
3	Aetna Health	11.7%
4	AvMed	6.6%
5	Humana Medical Plan	5.3%
6	Connecticut General Life Insurance Company	5.0%
7	Coventry Health Care of Florida	4.5%
8	United Healthcare of Florida	3.6%
9	Capital Health Plan	3.3%
10	Neighborhood Health Partnership	2.8%
11	Golden Rule Insurance Company	2.3%
12	Health Options	2.1%
13	Humana Health Insurance Company of Florida	1.9%
	Total	**91.6%**

However, insurers were likely skeptical of the source and nature of the inquiry. Ultimately, no responses to the survey were received, despite reviewers' concerted attempts to contact insurers directly.

Rather than eliminate the longstanding central role played by states in the regulation of health insurance, the ACA reaffirmed and built onto it, deferring to state insurance commissioners to monitor and enforce compliance with the new provisions. Therefore, absent the availability of data provided by insurers directly, it became clear that the state – and specifically OIR – was the only other potential source of information regarding ACA-related actions by insurers.

To obtain this information, the reviewers were required to navigate the I-File System used by insurers to submit proposed rate and form changes to OIR for consideration. Although the I-File System is strictly

intended for use by the insurance industry, insurers' filings are public records and accessible to the public via OIR's website.[7] To complete the analysis, reviewers examined filings on the I-File System made by the same 13 insurers during the two years following the ACA's passage. Reviewers located and combed through complex and lengthy documents on the I-File System in an attempt to identify evidence of compliance.

What the Review of Insurers' Filings and Other Information from OIR Tell Us:

Based on the reviewers' efforts to sort through hundreds of documents filed with OIR by insurers during the past two years as well as other publicly available information about OIR's action (and inaction) with respect to ACA implementation during that period, several conclusions can be drawn:

1. Despite inaction and resistance by state officials, insurers generally appear to be complying with the consumer-related provisions of the ACA that are already in effect.

The reviewers concluded that insurers have in fact been modifying their policy forms to indicate compliance with the ACA. While this does not constitute direct evidence of compliance, these policy forms are the materials that define the contractual relationship between an insurer and a policyholder or plan member, and they include all of the detail information regarding plan benefits and restrictions. In particular, reviewers identified modifications to contracts, member handbooks, and forms, as well as riders and addenda expressly itemizing newly protections afforded under the ACA.

2. Some insurers are doing a better job of informing consumers of new ACA benefits than others.

The reviewers nevertheless found significant variation in the quality and accessibility of materials and terminology used by insurers to inform consumers of the new benefits delivered by the ACA. A majority of the 13 insurers created at least one document clearly intended to explain one or more of the new ACA-related benefits to consumers. By contrast, others created no separate notification of ACA-related consumer protections, instead burying the information in plan documents. In some cases, no evidence of compliance with a particular ACA provision could be identified whatsoever. However, because of the non-uniform manner with which ACA-related implementation was addressed by insurers, it is impossible to conclude with certainty that such an insurer was out of compliance.

3. OIR's claims regarding its lack of ACA enforcement authority have some merit, but appear overstated and selectively applied.

Factors prompting insurers' efforts to comply with the early consumer protections of the ACA include a recognition that the ACA is in fact the law on the books, concerns about the extent to which federal enforcement could be called upon to fill the vacuum left by the lack of state action, and the pressure to be consistent with efforts in other states where ACA provisions are being actively enforced.

For its part, OIR has asserted, and with some justification, that it lacks the authority to enforce the new provisions of the ACA. A survey completed by OIR for the National Association of Insurance

Commissioners sheds additional light on OIR's position.[8] When asked whether Florida has legal authority to enforce ACA provisions, OIR responded unambiguously in the negative. When asked whether OIR has sufficient legal authority to implement ACA reforms, OIR responded, "Yes and No. Carriers are submitting forms required and OIR is reviewing them. But if a carrier does not voluntarily include the [ACA] provisions, OIR has limited legal authority to force them to do so until [Florida] adopts the provisions in statute."

If OIR is specifically monitoring compliance with currently effective ACA provisions, such efforts and the resulting findings are not accessible to the public. The only such publicly available information is scattered among a subset of all insurer filings on the I-File System, which is difficult to navigate and contains every type of filing for every type of state-regulated insurance.

Although three regular legislative sessions have been concluded since the passage of the ACA, the legislature has yet to make any changes to Florida Statutes empowering OIR to directly require insurers to comply with the law or to sanction them for non-compliance. In fact, the only legislative act directly related to any of these provisions was an effort to dilute one of them.

In the absence of such authority, OIR has issued only informational memoranda to insurers, describing such efforts as "a courtesy."[9] Nowhere has OIR indicated that it is requiring compliance or undertaking any enforcement-related action related to the ACA.

To put Florida's inaction in context, a recent report released by The Commonwealth Fund comparing states' efforts to implement these early reforms found that Florida was among only a handful of states that have not passed any laws, issued any regulations or substantive guidance, or indicated the intent to monitoring insurer filings for compliance. Only Arizona, which has taken no official action whatsoever to implement the ACA provisions, has clearly done less than Florida.[10]

Despite this, OIR clearly believes it does in fact have some authority to take action regarding the ACA. In particular, in anticipation of the fact that insurers would be required by *federal* regulation to report Medical Loss Ratios (and issue rebates in the event that they fail to meet the standard), OIR directly requested a three-year federal exemption from the enforcement of the MLR standard in the individual market.[11] In persistently advocating for the exemption, OIR explained that failure to grant the exemption would destabilize the individual market as insurers fled, an argument that federal evaluators soundly (and, in retrospect, rightly rejected).[12] In pursuing the exemption, OIR acted entirely on its own initiative; its actions were not formally approved by the governor or legislature.

4. OIR has generally declined to undertake the ACA-related activity for which it does have authority. In a few cases, OIR even worked to thwart ACA protections.

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scattered among a subset of all insurer filings on the I-File System, which is difficult to navigate and contains every type of filing for every type of state-regulated insurance.

However, OIR could easily report directly and publicly regarding compliance by insurers with the provisions discussed in this report. OIR does not need additional statutory authority to report such information, particularly information already posted on its website, albeit in a diffuse and inaccessible manner.

Yet OIR has shunned these opportunities. For example, the ACA requires that states that conduct their own reviews of proposed insurer rate increases meet specific standards, in particular requiring reporting and justification of "potentially unreasonable" annualized rate increases of more than 10 percent.[13] States are also required to allow public comment on proposed rate increases, something OIR has staunchly refused to do. Even finding out about proposed rate increases prior to their approval by OIR seems an almost impossible task, let alone commenting on them, as doing would require constant and deft navigation of the I-File System.

OIR has gone further, in fact working to thwart transparency. In May, OIR abruptly modified the forms used by insurers to file proposed rate increases, allowing them to exclude from reporting the portion of the increase attributed to increased medical costs.[14] That change not only allows insurers to report smaller proposed rate increases, it allows them to conceal the actual total proposed rate increase. Although not entirely clear of this writing, it appears that OIR may expect that this change will also virtually eliminate the need to report any rate increase as potentially unreasonable.

5. Florida consumers are benefitting from the new ACA provisions, but would clearly benefit more with state cooperation rather than resistance.

Again, although the most significant ACA benefits and protections for consumers will not arrive until 2014, the ones already increasing access to and quality of health care coverage for Floridians. These provisions are working in spite of fierce opposition to the ACA by state officials. Nevertheless, recognition of the ACA at the state level would increase the quantity and quality of ACA benefits available to Floridians as a result of actions such as the development of uniform compliance standards and increased public awareness.

6. With the advent of the more substantial ACA reforms in 2014, OIR will be required to take more concerted action. Authority to do so would need to come from the legislature.

While the reviewers found that insurers are making some effort to comply with the law, the degree of compliance will likely be considerably lower and less continuous over time, absent strong transparency and enforcement efforts by OIR.

Furthermore, unlike the initial wave of ACA protections, the reforms that will follow are more complex, including the potential establishment of a Health Insurance Exchange (Exchange) and the implementation of major insurance market reforms. States have broad discretion in setting up the Exchange and implementing many of the other reforms. The ability of OIR and other state entities to implement, enforce, etc., however, will be dependent in large part on receipt of authority from the legislature.

That said, the need for state action could be diminished to some extent by the availability of federally implemented alternatives. For example, if the legislature declines to authorize the establishment of a state-based Exchange, Floridians will be able to access a federally facilitated Exchange.[15] Even then, Florida will not be able to completely evade involvement.

If this adamant state opposition continues into the next phase of the ACA timeline, consumers will certainly be adversely affected and federal intervention/the use of federally facilitated alternatives may become necessary. Florida and Floridians will be best served by a robust ACA implementation effort, but such an effort will require authorization by the legislature as well as monitoring and enforcement by OIR with full transparency.

Conclusion:

Florida's largest insurers appear to be adhering, at least to an extent, to the first wave of Affordable Care Act requirements to go into effect, and millions of Floridians are already benefitting from these consumer protections as a result. However, this is the case despite a lack of implementation activity at both the legislative and administrative levels of state government.

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This report was researched and written by Greg Mellowe. The report and its findings do not necessarily reflect the views of the FCFEP Board of Directors.

Endnotes

[1] More specifically, P.L. 111-148, as amended, together with the health-related provisions of the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)

[2] Many of the new provisions went into effect on September 23, 2010, but an insurer was required to provide the applicable benefits and protections effective with the start of the next plan year.

[3] See, e.g., U.S. Department of Health and Human Services (HHS), Healthcare.gov - Key Features of the Law, undated

[4] The number of plans that will retain grandfathering status is difficult to estimate. However, HHS projects that, by 2013, 34 to 64 percent of employer group plans with 100+ employees, as well as 49 to 80 percent of group plans with 3 to 99 employees, will not be grandfathered. Few individual plans will remain grandfathered by 2013.

[5] National Association of Insurance Commissioners (NAIC), PPACA Uniform Compliance Survey, July 2010

[6] Florida Office of Insurance Regulation (OIR), CY2010 Accident and Health Markets Gross Annual Premium and Enrollment, September 2011, p. 5

[7] OIR's I-File system search engine can be found at http://www.floir.com/edms.

[8] NAIC, Results of Survey on State Authority to Enforce PPACA Immediate Implementation Provisions, August 2010, p. 5

[9] OIR, Informational Memorandum OIR-10-03M, May 2010, p.1

[10] The Commonwealth Fund, Implementing the Affordable Care Act: State Action on Early Market Reforms ,

[11] OIR, Petition for an Adjustment of the Medical Loss Ratio Provisions of [PPACA] and Regulations Issued Pursuant Thereto, March 2011, p. 7

[12] HHS, Determination of Florida MLR Adjustment Request ,December 2011, pp. 15-16

[13] See 45 CFR Part 154

[14] OIR, Life and Health Forms and Rates, Universal Standardized Data Letter Instruction Sheet - Form OIR-B2-1507 A, Revised May 2012 [Rule 69O-149.022(2)(b) – unpromulgated]

[15] HHS, Center for Consumer Information and Insurance Oversight, General Guidance on Federally Facilitated Exchanges, May 2012