



NY State of Health
Comments on Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023

NY State of Health, the State's Official Health Plan Marketplace submits the following comments on the proposed regulations contained in the Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023.

III. Provisions of the Proposed HHS Notice of Benefit and Payment Parameters for 2023

D. Part 155—Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act

General Program Integrity and Oversight Requirements (§ 155.1200)

State Exchange Improper Payment Measurement Program (§§ 155.1500-155.1540)

- **Proposed Rule**

The proposed rule seeks to enhance HHS' ability to oversee the operations of State-based exchanges ("SBEs"), particularly as applied to advance payments of premium tax credits. While States are currently required to perform programmatic audits pursuant to 45 CFR § 155.1200(c), the proposed rule would add a requirement for Improper Payment Measure tracking under §§ 155.1200(e) and 155.1500 *et seq.* The new regulations would allow states to satisfy the programmatic audit requirements by submitting the mandatory SEIPM documentation. HHS intends to use the submitted documentation to calculate improper payment rates and make findings of errors. HHS would then at its discretion, require State Exchanges to submit and complete Corrective Action Plans to address errors. The first year for which improper payment rates would be calculated would be 2023, with calculations performed in 2024, rates released in 2025, and any required Corrective Action Plans would be submitted no earlier than 2026.

- **NY State of Health Comments**

While NY State of Health appreciates the impetus behind HHS' proposed implementation of the Improper Payment Measurement Program, as proposed the SEIPMP is duplicative of activity the state will already have to undertake and constitutes a one-size-fits-all approach that will place undue burden on State Exchanges. State Exchanges are already subject to extensive audit requirements, including the annual programmatic audit in compliance with 45 CFR 155.1200(c). This is a comprehensive financial and programmatic audit that is conducted by an independent third-party following a competitive process, in accordance with Government Auditing Standards and includes eligibility and enrollment as well as other program areas.

While the proposed Improper Payment Measurement Program is framed as a vehicle to provide HHS with additional insight into exchanges' payment processes; it is not evident that the information gained through the SEIPMP would warrant the additional resources and administrative burden that would be required to implement an entirely new auditing

scheme. Advance payments of premium tax credits are additionally subject to a reconciliation process between consumers and the IRS to avoid and address potential errors. As a comprehensive annual audit process is already in place, we believe that the resources required to implement the new SEIPMP would be better allocated to directly supporting its programs and existing systems, including established audit and reporting processes covering payments. Establishing the separate SEIPMP would unnecessarily fragment and complicate the audit process.

B. Part 147—Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets

Nondiscrimination Based on Sexual Orientation and Gender Identity

- Proposed Rule
HHS proposes to amend 45 CFR § 147.104(e) such that the nondiscrimination protections would again explicitly prohibit discrimination based on sexual orientation and gender identity.
- NY State of Health Comments
New York strongly supports the proposal to revert 45 CFR § 147.104(e) to explicitly prohibit discrimination based on sexual orientation and gender identity to ensure that the LGBTQI+ population is afforded greater protections from discrimination.

New York adamantly opposed the amendments made in 2020 that removed sexual orientation and gender identity from HHS' interpretation of ACA Section 1557 requirements and strongly supports the reinstatement of those crucial protections. New York has and continues to offer robust anti-discrimination provisions to protect vulnerable populations. Consistent with New York State law, all programs within the Department of Health provide eligible services to individuals regardless of sexual orientation and gender identity. NY State of Health helps New Yorkers enroll in healthcare programs including Medicaid, Child Health Plus, the Essential Plan, and Qualified Health Plans (QHP) and explains what financial assistance is available to help applicants purchase health insurance.

E. Part 156—Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges

Essential Community Providers (§ 156.235)

- Proposed Rule
HHS proposes to increase the ECP provider participation standard for QHPs from 20 percent to 35 percent of available ECPs based on the applicable plan year ECP list, including approved ECP write-ins that would count towards the QHP issuer's satisfaction of the 35 percent threshold.

- NY State of Health Comments

New York supports enhancing access to care for low-income and medically underserved individuals and agrees that Essential Community Providers are an important part of QHP provider networks. Given the unique geographic, fiscal, and demographic characteristics of each state, New York recommends that each State-based Exchange be given flexibility regarding the calculation and implementation of appropriate ECP provider participation standard.