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Issue Brief

Implementing the Affordable Care Act: State Action on Early Market Reforms

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ABSTRACT: The Affordable Care Act includes numerous consumer protections that took effect on September 23, 2010. This issue brief examines new state action on a subset of these "early market reforms." The analysis finds that 49 states and the District of Columbia have passed new legislation, issued a new regulation, issued new subregulatory guidance, or are actively reviewing insurer policy forms for compliance with these protections. These findings suggest that states have required or encouraged compliance with the early market reforms, and that efforts to understand how states are responding cannot focus on legislative action alone. The findings also raise important questions regarding how states may implement the Affordable Care Act's broader 2014 market reforms, and suggest the need for continued tracking of state action.

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OVERVIEW

Many provisions of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, will phase in over time, and the most dramatic changes to private health insurance will not take effect until 2014. However, a number of consumer protections provided by the act—together known as the Patient's Bill of Rights—went into effect on September 23, 2010.[1] These "early market reforms" were designed to fill historic gaps in insurance coverage. For example, they expand access to coverage for young adults, ban lifetime limits on essential health benefits, and end industry abuses such as rescissions, in which insurers terminate subscribers' coverage if they get sick.[2]

Although the Affordable Care Act significantly strengthens standards for private health insurance under federal law and protects all of the nation's consumers, states continue to be the primary regulators of health insurance and thus are key players in implementing federal laws pertaining to health coverage.

This issue brief examines new efforts states took from January 1, 2010, to January 1, 2012, to implement 10 of these early market reforms. Our analysis

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shows that all but one state has taken action on these consumer protections (see Exhibit 1). Nearly half of all states—23 states and the District of Columbia—took new legislative or regulatory action to implement at least one early market reform. Of these, 12 states passed new legislation or issued a new regulation that addressed all 10 reforms.

Another 15 states have issued bulletins or other new subregulatory guidance advising insurers on these early market reforms. And 11 states did not take official action but reported that regulators were actively reviewing insurers' policy forms for compliance with the reforms. Only one state took no action on the early market reforms.

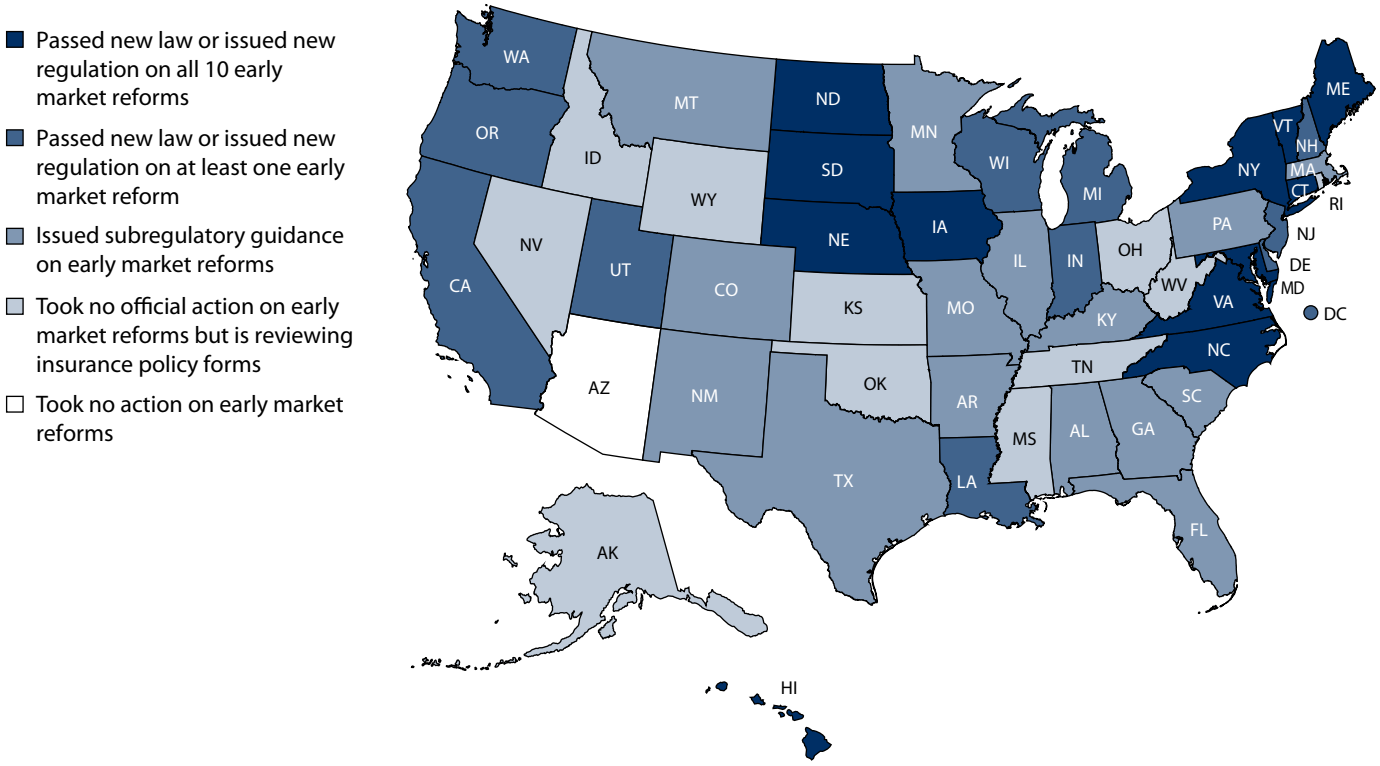
These findings suggest that states have adopted a variety of formal and informal approaches to require or encourage compliance with these early market reforms, and that any effort to accurately capture new state action must look beyond legislative activity alone. Although this variation highlights states' flexibility in addressing these reforms, questions remain about whether they will be able to rely on similar action—particularly subregulatory guidance and review of insurer policy forms—in implementing and enforcing the Affordable Care Act's broader 2014 market reforms.

BACKGROUND

States have historically been the primary regulators of private health insurance.[3] Although states continue to play this role, the Affordable Care Act embraces a "federalism" approach that sets a federal floor for consumer protections such as the early market reforms, and allows—but does not require—states to adopt and enforce these protections.[4]

If a state informs the federal government that it is not enforcing or the federal government finds that a state has failed to "substantially enforce" a provision of the Affordable Care Act, federal officials will enforce it.[5] This is an extension of the regulatory framework that Congress adopted in 1996 with the Health

Exhibit 1. State Action on 10 Early Market Reforms Under the Affordable Care Act, as of January 2012



Note: States may have decided not to address provisions of the Affordable Care Act because state law is already consistent with them. The figure does not take into account these existing laws.
Source: Authors' analysis.

Insurance Portability and Accountability Act (HIPAA), which improved access to insurance as well as its renewability and portability.[6] In response to HIPAA, most states passed new laws or issued new regulations implementing the federal requirements.[7]

The federal floor established by the health reform law includes numerous early market reforms that apply to private health insurers in the individual, small-group, and large-group markets in all 50 states and the District of Columbia (Exhibit 2). Under the law's regulatory framework, states have considerable discretion regarding whether to substantially enforce these and other requirements.[8]

ABOUT THIS STUDY

This analysis is based on a review of new actions taken by all 50 states and the District of Columbia between January 1, 2010, and January 1, 2012, to require or encourage compliance with the 10 consumer protections, often referred to collectively as the "Patient's Bill of Rights," which went into effect for health insurance plan or policy years beginning on or after September 23, 2010. We refer to these provisions as the Affordable Care Act's early market reforms. Our review included new state laws, regulations, and sub-regulatory guidance. The resulting assessments of state actions were confirmed by state regulators.

This issue brief, however, does not include a review of state actions related to other insurance reforms included in the health reform law, including: new medical loss ratio requirements, or the minimum percentage of premium revenues that insurers pay out for medical care;[9] standards for the review and justification of insurers' proposed rate increases;[10] standards for consumer grievances and appeals;[11] and market reforms scheduled to go into effect for health insurance plan or policy years beginning on or after January 1, 2014.[12] Preliminary research suggests that states have

Exhibit 2. Ten Early Market Reforms Under the Affordable Care Act, Effective September 23, 2010

Early market reform	Description
Lifetime dollar limits	Prohibits lifetime limits on the dollar value of essential health benefits.*
Annual dollar limits	Restricts annual limits on the dollar value of essential health benefits, unless waived by HHS.** Waivers to be discontinued in 2014.
Dependent coverage up to age 26	Requires plans that provide dependent coverage to make it available until a child turns 26.*
Rescissions	Prohibits plans from retroactively cancelling coverage, except in the case of a subscriber's fraud or intentional misrepresentation of material fact, and requires prior notice to the insured.*
Preventive services without cost-sharing	Requires coverage of specified preventive health services without cost-sharing, such as copayments, coinsurance, and deductibles.***
Preexisting conditions for children under age 19	Prohibits plans from imposing preexisting condition exclusions on individuals under age 19.**
Access to emergency services	Requires plans that provide benefits with respect to emergency services to cover such services without prior authorization, and regardless of whether the provider participates in the plan's network; requires equivalent cost-sharing for network and non-network providers; and prohibits requirements or limitations on non-network providers that are more restrictive than those imposed on services provided by network providers.***
Choice of primary care providers	Requires plans to allow subscribers to designate any available participating primary care provider (PCP) as their provider.***
Choice of pediatricians	Requires plans to allow parents to choose any available participating pediatrician to be their children's PCP.***
Access to obstetrical and gynecological care	Prohibits plans from requiring a referral for obstetrical or gynecological (OB/GYN) care.***

* Applies to new plans in all markets and grandfathered plans (those in existence before the Affordable Care Act that have not made significant changes since March 23, 2010) in the individual, small-group, and large-group markets.
** Applies to new plans in all markets and grandfathered plans (those in existence before the Affordable Care Act that have not made significant changes since March 23, 2010) in the small-group and large-group markets.
*** Applies to new plans in all markets.
Source: U.S. Department of Health and Human Services (HHS).

taken new action on these protections, but they raise different regulatory issues, so we did not include them in our study.

We also did not examine additional state action to address insurers' response to the law's provision that insurers cannot deny coverage for children under age 19 because of a preexisting condition.[13] Some insurers, out of fear they would attract a disproportionate number of sick children, withdrew or threatened to withdraw from the child-only health insurance market in some states. As a result, a number of states took legislative or regulatory action to stabilize their child-only markets, such as requiring all insurers to sell child-only coverage, or by establishing standardized open enrollment periods.[14]

A state may not have taken action to implement the early market reforms if existing state law is consistent with the Affordable Care Act, or if the state already has the authority to enforce federal law.[15] We did not analyze whether such laws are consistent with the federal requirements.

OUR FINDINGS

All but one state has taken new action to require or encourage insurers to comply with at least one of the 10 early market reforms studied. Below we describe the steps they have taken and discuss the possible legal effect of these actions.

Nearly Half of States Took Binding Action on at Least One Early Market Reform

Twenty-three states and the District of Columbia took legislative or regulatory action to implement at least one of the early market reforms, and half of these states took action on all 10 reforms (Exhibit 3). The binding nature of legislative and regulatory action means that a state has full authority to enforce those consumer protections.

States That Tackled All Early Market Reforms

The 12 states that addressed all 10 early market reforms include Connecticut, Hawaii, Iowa, Maine, Maryland, Nebraska, New York, North Carolina, North Dakota, South Dakota, Vermont, and Virginia. All 12 states passed new legislation to implement these reforms, and Maryland and South Dakota also issued or amended a regulation. Some of these states—Connecticut, Maine, Maryland, Nebraska, and Virginia—also issued subregulatory guidance on these reforms.

The legislation usually took one of three forms: conforming legislation, enforcement legislation, and enabling legislation. States that wanted to "bake in" federal law—to write it into state law—passed conforming legislation, which amends existing state law or adopts new state law that complies with the federal law. Virginia, for example, passed conforming legislation that created a new article in its insurance code entitled Federal Market Reforms, and included all 10 early market reforms as new statutory requirements.[16]

States may also pass enforcement legislation that directs the state to enforce federal law, or that requires insurers to comply with federal law. North Dakota, for example, passed legislation directing its insurance commissioner to "administer and enforce the provisions of the Patient Protection and Affordable Care Act."[17] Connecticut similarly passed legislation requiring its insurers to comply with specific provisions of the new law, including the 10 early market reforms.[18] States that have only enforcement authority may be limited in their ability to issue interpretive guidance on the early market reforms, although this authority varies by state.

Finally, a state may pass legislation giving its department of insurance (DOI) the power to implement federal law. Such enabling legislation means that the DOI can issue a regulation implementing a provision of the Affordable Care Act—but may choose not to. Iowa, for example, approved legislation allowing its insurance commissioner to "propose and promulgate administrative rules to effectuate the insurance provisions of the federal Patient Protection and Affordable Care Act."[19] Iowa has so far issued only one new rule related to the 10 early market reforms. Iowa regulators reported that the state is relying on other mechanisms to enforce these provisions, such as review of insurer

Exhibit 3. State Action on Early Market Reforms, Provision by Provision, as of January 1, 2012[1]

State	Prohibition on lifetime dollar limits	Restrictions on annual dollar limits	Dependent coverage to age 26	Prohibition on rescissions	Preventive services without cost-sharing	No exclusion of preexisting conditions under age 19	Access to emergency services	Choice of primary care provider/pediatrician	Access to ob/gyn care
State legislative or regulatory action on all 10 early market reforms									
CT	L	L	L	L	L	L	L	L	L
HI	L	L	L	L	L	L	L	L	L
IA	L	L	L	L	L	L	L	L	L
ME	L	L	L	L	L	L	L	L	L
MD[2]	(L)	(L)	(L)	L	(R)	(L)	(L)	L	(L)
NE	L	L	L	L	L	L	L	L	L
NY	L	L	L	L	L	L	L	L	L
NC	L	L	L	L	L	L	L	L	L
ND	L	L	L	L	L	L	L	L	L
SD	R	R	L	R	R	L	R	R	R
VT	L	L	L	L	L	L	L	L	L
VA	L	L	L	L	L	L	L	L	L
State legislative or regulatory action on at least one early market reform									
CA	L	L	L	L	L	L	—	—	—
DE[3]	—	—	—	L	L	L	—	—	—
DC	G	G	L	L	G	G	G	G	G
IN	FR	FR	L	L	FR	L	FR	FR	FR
LA	G	G	L	L	G	G	G	G	G
MI[4]	R	R	R	R	R	R	R	R	G
NH[5]	G	G	L	G	G	G	G	G	G
NJ[6]	G	G	(R)	(R)	G	(R)	—	—	—
OR[7]	L	(L)	L	L	L	L	L	—	L
UT	L	L	L	L	L	L	FR	L	—
WA[8]	G	(G)	L	—	G	L	G	G	—
WI	G	G	L	G	R	G	G	G	G
State subregulatory action on the early market reforms									
AL	G	G	G	G	G	G	G	G	G
AR	G	G	G	G	G	G	G	G	G
CO	G	G	G	G	G	G	G	G	G
FL	G	G	G	G	G	G	G	G	G
GA	G	G	G	G	G	G	G	G	G
IL	G	G	G	G	G	G	G	G	G
KY	G	G	G	G	G	G	G	G	G
MA	G	G	G	G	G	G	G	G	G
MN	G	G	G	G	G	G	G	G	G
MO	G	G	G	G	G	G	G	G	G
MT	G	G	G	G	G	G	G	G	G
NM	G	G	G	G	G	G	G	G	G
PA	G	G	G	G	G	G	G	G	G
SC	G	G	G	G	G	G	G	G	G
TX	G	G	G	G	G	G	G	G	G

Key	Definition
L	The state passed a new law on the early market reform.
R	The state issued a new regulation on the early market reform.
G	The state did not pass a new law or issue a new regulation, but did issue subregulatory guidance to insurers on the early market reform.
FR	The state did not pass a new law, issue a new regulation, or issue subregulatory guidance, but officials report that they are reviewing insurance policy forms to ensure that they comply with the early market reform.
—	The state has taken no noted action on the early market reform.
( )	The state addressed the early market reform differently in at least one of its markets.

Click here to see an interactive map of state action on early market reforms

Exhibit 3. State Action on Early Market Reforms, Provision by Provision, as of January 1, 2012[1] (continued)

State	Prohibition on lifetime dollar limits	Restrictions on annual dollar limits	Dependent coverage to age 26	Prohibition on rescissions	Preventive services without cost-sharing	No exclusion of preexisting conditions under age 19	Access to emergency services	Choice of primary care provider/pediatrician	Access to ob/gyn care
States reporting action on the early market reforms through form review only									
AK	FR	FR	FR	FR	FR	FR	FR	FR	FR
ID[9]	FR	FR	FR	FR	FR	FR	FR	FR	FR
KS	FR	FR	FR	FR	FR	FR	FR	FR	FR
MS	FR	FR	FR	FR	FR	FR	FR	FR	FR
NV	FR	FR	FR	FR	FR	FR	FR	FR	FR
OH	FR	FR	FR	FR	FR	FR	FR	FR	FR
OK	FR	FR	FR	FR	FR	FR	FR	FR	FR
RI	FR	FR	FR	FR	FR	FR	FR	FR	FR
TN	FR	FR	FR	FR	FR	FR	FR	FR	FR
WV	FR	FR	FR	FR	FR	FR	FR	FR	FR
WY	FR	FR	FR	FR	FR	FR	FR	FR	FR
States reporting no action on early market reforms									
AZ	—	—	—	—	—	—	—	—	—

Key	Definition
L	The state passed a new law on the early market reform.
R	The state issued a new regulation on the early market reform.
G	The state did not pass a new law or issue a new regulation, but did issue subregulatory guidance to insurers on the early market reform.
FR	The state did not pass a new law, issue a new regulation, or issue subregulatory guidance, but officials report that they are reviewing insurance policy forms to ensure that they comply with the early market reform.
—	The state has taken no noted action on the early market reform.
( )	The state addressed the early market reform differently in at least one of its markets.

Click here to see an interactive map of state action on early market reforms

[1] States may have decided not to address a particular reform because state law is already consistent with it. The table does not take into account such existing laws.

[2] Maryland did not include preventive services in its legislation, but did amend regulations governing the small-group market to include preventive services under the Affordable Care Act.

[3] Regulators in Delaware did not confirm state action, so we could not determine whether the state is reviewing forms for compliance with federal law.

[4] Michigan issued an emergency regulation on the early market reforms that expired on March 23, 2011. Regulators in Michigan did not confirm state action, so we could not verify whether the state had proposed permanent regulations as suggested by the Web site of the Michigan Office of Financial and Insurance Regulation. According to the Web site, such proposed regulations are "substantively similar to the Emergency Rules."

[5] Although New Hampshire passed a law granting the Department of Insurance authority to take action on the Affordable Care Act, such action is subject to prior approval from a joint health care reform oversight committee.

[6] New Jersey amended its regulations to address some early market reforms in the individual and small-group market, and received a waiver for plans in the individual market to comply with the Affordable Care Act's provision on annual limits. In its subregulatory guidance, New Jersey also noted that it believes that state law is already in compliance with the early market reforms related to access to emergency services, choice of primary care provider and pediatrician, and access to obstetricians and gynecologists.

[7] Oregon did not include a restriction on annual limits in the individual market. Regulators are expected to seek a technical fix to include this provision in state law during the 2012 legislative session.

[8] Washington did not include a restriction on annual limits in the individual market.

[9] The governor of Idaho issued Executive Order 2011-03 prohibiting executive agencies from implementing any provisions of the Affordable Care Act.

Source: Authors' analysis.

policy forms.[20] These forms define the contractual relationship between an insurer and a subscriber, and typically list the policy's benefits and restrictions.[21] (See more on this below.)

Many states combine these legislative strategies in a single bill. Connecticut, Maine, and Virginia, for example, each passed legislation with provisions conforming state law to federal law while also granting state agencies with broad enforcement authority.[22]

States may have also taken action that does not fit into these three categories. Nebraska, for example, passed legislation that requires insurer policy forms to note that an insurer must "conform to the minimum requirements" of federal or state law if there is a conflict with these laws in the policy form.[23] Regulators reported that the state is using this provision to review insurer policy forms for compliance with the early market reforms.[24]

Such variation—even among the 12 states that passed legislation or issued regulations regarding all 10 early market reforms—suggests that states are responding to the federal law in pragmatic ways that suit their political culture and regulatory needs.

States That Tackled at Least One Early Market Reform

Eleven states and the District of Columbia passed a new law or issued a new regulation taking action on at least one early market reform (Exhibit 3). These states are California, Delaware, Indiana, Louisiana, Michigan, New Hampshire, New Jersey, Oregon, Utah, Washington, and Wisconsin. Some of these states—Indiana, Louisiana, New Hampshire, New Jersey, Oregon Washington, and Wisconsin, as well as the District of Columbia—also issued subregulatory guidance on the early market reforms, or reported that the state is taking action by reviewing insurer policy forms. It is important to note that state legislatures or officials may not have taken new action on all of the early market reforms out of the belief that existing state law does not conflict with the Affordable Care Act (such existing law is not regarded as new state action and is thus not represented in Exhibit 3).

Nine states and the District of Columbia passed legislation on the early market reforms, while two states, Michigan and New Jersey, issued or amended regulations. Wisconsin both passed new legislation and amended a regulation. The legislation usually amended existing state law or created new law that complies with the Affordable Care Act. California, for example, passed a series of conforming bills that incorporated six early market reforms as new statutory requirements in its insurance code and health and safety code.[25] Other states, such as New Hampshire and Wisconsin, amended existing state law on dependent coverage to conform to the federal standard allowing coverage for all dependents up to age 26.[26]

The majority of these states and the District of Columbia took action on two or more early market reforms, while only New Hampshire addressed one reform. States were most likely to expand dependent coverage up to age 26 (addressed by all these states except Delaware) and prohibit insurers from rescinding coverage, except under limited circumstances (addressed by the District of Columbia and all these states except New Hampshire, Washington, and Wisconsin).

States chose to take action on only some early market reforms for a number of reasons. First, some states reported that existing state law is consistent with the Affordable Care Act. Oregon, for example, did not take action regarding subscribers' choice of a primary care provider or pediatrician, because state officials do not believe that state law conflicts with the federal provision.[27]

Second, states may have acted only where existing state law directly conflicted with federal law. Indiana, for example, amended state law only on dependent coverage, rescissions, and exclusions on preexisting conditions among children for that reason.[28] Although the reasons vary on why states acted on some early market reforms but not others, such variation raises the question of whether the lack of action on some reforms could result in regulatory or enforcement gaps in some states.

Fifteen States Issued Subregulatory Guidance on Early Market Reforms

The 15 states taking subregulatory action to require or encourage compliance with the early market reforms include Alabama, Arkansas, Colorado, Florida, Georgia, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, Pennsylvania, South Carolina, and Texas. Subregulatory guidance usually expresses the state's interpretation of existing law, and can include bulletins, memoranda, and notices from the state division of insurance to insurers. Although subregulatory guidance is usually not legally binding, insurers are likely to conform to guidance issued by the state agency empowered to approve or disapprove their product marketing. Such guidance is therefore likely to spur a change in practice, if not in law.

State action varied considerably even among states that issued subregulatory guidance. This guidance usually fell into one of two categories. First, a minority of states in this group issued subregulatory guidance notifying insurers of Affordable Care Act–related provisions, but did not explicitly require compliance with federal law.

Florida, for example, issued a memorandum to "notify [insurers] of the federal legislative changes that become effective six (6) months after enactment of the Patient Protection and Affordable Care Act," and instructed insurers to review the law to determine which provisions apply to them.[29] The memorandum did not say that the state would enforce the early market reforms or otherwise require insurers to comply, and Florida issued the memorandum as "a courtesy to inform [insurers] of new federal requirements."[30]

Second, the majority of states in this category issued subregulatory guidance requiring insurers to amend their policy forms to reflect the early market reforms. Most states have the authority to review and approve or disapprove policy forms, and thus can ensure that they comply, or do not conflict, with the reforms.[31]

For example, Alabama issued a bulletin requiring all health insurance policies to comply with "all applicable health insurance requirements of the Patient Protection and Affordable Care Act."[32] According to the bulletin, the Alabama DOI will not approve policy forms that do not fulfill such requirements.[33]

By issuing subregulatory guidance and reviewing policy forms, states use existing legal authority to promote compliance with the reforms.[34] Review of policy forms appears to be a pragmatic approach toward ensuring that consumers benefit from the new federal protections, particularly in states that have not passed new legislation.

Despite this advantage, however, subregulatory guidance and form review alone are likely only temporary solutions to ensuring that consumers benefit from the early market reforms. State authority to review policy forms varies widely, and the processes for doing so may be very different from state to state.[35] A state's authority to review policy forms may also vary by market or product: thus, the state may not have the authority to review all such forms.[36]

States without legislative or regulatory authority may also be unable to issue interpretive guidance on a specific provision of the Affordable Care Act, or to take enforcement action against an insurer whose practices do not comply with the early market reforms. For example, if a consumer complains that he or she is not receiving the full benefit of a particular reform, can a state without express legislative authority to enforce federal law require the insurer to change its practices, and can the state impose any sanctions?

Lastly, while most states have the authority to approve or disapprove policy forms, some do not.[37] Those states may to have to wait for consumer complaints before stepping in to assess compliance with federal or state laws.

Eleven States Took No Official Action But Are Actively Verifying Insurers' Compliance with Early Market Reforms

Eleven states that did not take official action on the reforms, such as by passing a new law or issuing subregulatory guidance, did report that they are reviewing policy forms for compliance with all 10 reforms. These states are Alaska, Idaho, Kansas, Mississippi, Nevada, Ohio, Oklahoma, Rhode Island, Tennessee, West

Virginia, and Wyoming. As noted above, most states have legal authority to review and approve insurer policy forms and are using it to ensure that forms are in compliance with the early market reforms, even if no official state action is otherwise taken. Although reviewing policy forms is not an official response to the Affordable Care Act, such action is likely to produce a change in practice, if not in law.

If we include the 15 states that have issued subregulatory guidance, a total of 26 states have used nonlegislative and nonregulatory mechanisms to require or encourage compliance with the early market reforms. This suggests that any effort to accurately capture state efforts on the reforms must look beyond legislative action.

Only One State Took No Action

Only Arizona did not pass a new law, issue a new regulation, issue subregulatory guidance, or report that the state was reviewing policy forms for compliance with the early market reforms. However, the state did indicate that it is informally advising insurers if their policy forms do not comply with federal law, although officials are taking no other corrective action.[38] Arizona regulators review forms for compliance only with state law, but have flagged those not in compliance with the Affordable Care Act.[39] When the DOI notified insurers whose forms were not in compliance, they corrected all the violations.[40]

POLICY IMPLICATIONS

Our findings reveal that states have adopted both formal and informal approaches to requiring or encouraging compliance with the early market reforms. Variations in state responses may reflect the different timeframes that officials faced in implementing the reforms.

President Obama signed the Affordable Care Act on March 23, 2010, and the early market reforms took effect for plan or policy years beginning on or after September 23, 2010—that is, after most state legislatures had adjourned that year. Although states may have planned to take formal legislative or regulatory action to implement the reforms the following year, many states faced short legislative sessions in 2011, a changed political environment given midterm elections, or a budget crisis. Some states may also have taken a cautious approach to implementing the early market reforms pending a decision on the law's constitutionality by the U.S. Supreme Court. Because of the circumstances surrounding the early market reforms and the timing of their implementation, states may take further action to implement them in the future.

State regulators have reported that subregulatory guidance or review of policy forms appears to have been effective in promoting compliance with the reforms. However, many questions remain about the usefulness of these options in implementing and enforcing the broader 2014 market reforms.

Unlike the early market reforms, many of the 2014 reforms—such as a ban on preexisting condition exclusions, guaranteed access to coverage regardless of health status, and new rating requirements that allow insurers to vary their rates based only on age, location, tobacco use, and family composition—do not exist in state law. And where state standards do exist, they may be inconsistent with these reforms more often than with the early market reforms. Addressing these gaps will likely require states to make legislative or regulatory changes.

What's more, at least some of the 2014 market reforms regulate insurers' marketing practices rather than the content of their policies, and states cannot easily track those practices by reviewing policy forms. For example, beginning in 2014, insurers must make policies available to all individuals who apply for coverage.[41] Although states have some tools to monitor such practices, states that review only policy forms and lack clear enforcement authority may be limited in their ability to hold insurers accountable.

CONCLUSION

Nearly half the states—23 states and the District of Columbia—took legislative or regulatory action on at least one early market reform, while another 26 states took action through subregulatory guidance or review of policy forms. These findings suggest that states have

many options to require or encourage compliance with the reforms. These options give states the flexibility to take action to ensure that consumers receive the protections promised under the Affordable Care Act. Though subregulatory guidance or review of policy forms may not be a perfect solution in all cases, states may not be in a position to make legislative changes to implement early market reforms, or may wish to avoid using state resources in the face of uncertainty surrounding the health reform law.

Our findings also suggest that policymakers will benefit from continued analysis of the actions states take to bring insurers into compliance with the Affordable Care Act.

NOTES

1 Pub. L. 111-148, 124 Stat. 782 (2010) §§ 2711-2714, 2719A, 10103; Pub. L. 111-152, 124 Stat. 1029 (2010).

2 Most of the early market reforms were included in legislation introduced and debated in prior congresses, such as S. 2706/H.R. 6528, “”Health Insurance Coverage Protection Act” (2008) (restricting lifetime limits), S.3115/H.R. 2842, “Children’s Health Protection Act of 2007,” (prohibiting preexisting condition exclusions for children under 19), and S.114/H.R. 1668, “KIDS First Act of 2005” (requiring coverage for young adults on a parent’s health plan). In addition, some of the reforms dated to provisions included in earlier legislation generally known as the “Patient Bill of Rights.” J. P. Hearne and H. R. Chaikind, *Patient Protection and Managed Care* (Washington, D.C.: Congressional Research Service, Oct. 25, 2002); President’s Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Appendix A: Consumer Bill of Rights and Responsibilities*, http://www.hcqualitycommission.gov/final/append_a.html.

3 T. S. Jost, “The Regulation of Private Health Insurance” (Washington, D.C.: National Academy of Social Insurance, National Academy of Public Administration; Princeton, N.J.: Robert Wood Johnson Foundation, Jan. 2009). Congress reaffirmed this role in 1945, when it passed the McCarran-Ferguson Act, which recognized state authority over private health insurance unless Congress expressed its intent to regulate coverage. See 15 U.S.C. §§ 1011, 1012 (2006).

4 See, for example, “Request for Comments Regarding Section 2718 of the Public Health Services Act (Medical Loss Ratios)” (Washington, D.C.: Departments of Health and Human Services and Labor, and the Internal Revenue Service, April 8, 2010), which notes that “the Secretaries of HHS, Labor, and Treasury have shared interpretive and enforcement authority under Title XXVII of the PHS Act, Part 7 of ERISA, and Chapter 100 of the Code.”

5 Public Health Services Act § 2723(a)(2); 45 C.F.R. § 150.203.

6 Pub. L. 104-191, 110 Stat. 1936 (1996) (codified at 42 U.S.C. §§ 300gg, 1320d et seq. and 29 U.S.C. § 1181 et seq.).

[7] U.S. Government Accountability Office, "Private Health Insurance: Federal Role in Enforcing New Standards Continues to Evolve," letter to Sen. Jeffords (Washington, D.C.: GAO, May 7, 2001), http://www.gao.gov/assets/100/90726.pdf.

[8] Public Health Services Act § 2723(a)(2) (codified at 42 U.S.C. § 300gg-22).

[9] Pub. L. 111-148, §§ 1001, 10101(f), 10103(d)(3).

[10] Ibid. §1003.

[11] Ibid. §§ 1001, 10101(g).

[12] See, for example, ibid. §§ 1201, 1562.

[13] 75 Fed. Reg. 37188, 37235 (June 28, 2010).

[14] Letter from Health and Human Services Secretary Kathleen Sebelius to the National Academy of Insurance Commissioners (Washington, D.C.: DHHS, Oct. 13, 2010), http://cciio.hhs.gov/resources/files/letter_to_j_cline.pdf.

[15] See National Association of Insurance Commissioners, "Survey on State Authority to Enforce PPACA Immediate Implementation Provisions" (Washington, D.C.: NAIC, 2010), http://www.naic.org/documents/index_health_reform_section_ppaca_state_enforcement_authority.pdf.

[16] Va. Code Ann. § 38.2-3438 et seq. (2011).

[17] N.D.C.C. § 26.1-02-29 (2011).

[18] Conn. Pub. Act 11-58, H.B. 6308, § 53(b).

[19] Iowa Admin. Code § 505.8(19) (2011).

[20] Iowa Admin. Code § 191-36.13 (2011); personal correspondence with health insurance regulator, Iowa Insurance Division (Dec. 16, 2011) (on file with authors).

[21] G. Claxton, *How Private Insurance Works: A Primer* (Menlo Park, Calif.: Kaiser Family Foundation, 2002).

[22] Conn. Pub. Act 11-58, H.B. 6308, § 53(b); Me. P.L. 2011, ch. 364 (L.D. 1554); Va. Pub. Act 882, H.B. 1958.

[23] Neb. Rev. Stat. § 44-710.03(13) (2011).

[24] Personal correspondence with health insurance regulator, Nebraska Department of Insurance (Feb. 9, 2012) (on file with authors).

[25] Calif. Pub. Act 656, A.B. 2244; Calif. Pub. Act 658, A.B. 2470; Calif. Pub. Act 660, S.B. 1088; Calif. Pub. Act 644, S.B. 51; Calif. Pub. Act 657, A.B. 2345.

[26] Wis. Pub. Act 32, A.B. 40 (amending Wis. Stat. § 632.885); N.H. Rev. Stat. Ann. § 415:5(I)(3)(a) (2011).

[27] Personal correspondence with health insurance regulator, Oregon Department of Consumer and Business Services, Insurance Division (Dec. 5, 2011) (on file with authors).

[28] Personal correspondence with health insurance regulator, Indiana Department of Insurance (Jan. 11, 2012) (on file with authors).

[29] Florida Office of Insurance Regulation, memorandum 2010–003 (Tallahassee, Fla., May 12, 2010).

[30] Ibid.

[31] National Association of Insurance Commissioners, "Survey on State Authority to Enforce PPACA Immediate Implementation Provisions" (Washington, D.C.: NAIC, 2010).

[32] Alabama Department of Insurance, bulletin no. 2010-08 (Montgomery, Ala., Sept. 10, 2010).

[33] Ibid.

[34] States can also use other existing legal authority to help enforce the Affordable Care Act. For example, most states have the authority to respond to consumer complaints and initiate market conduct examinations against insurers to help ensure that consumers receive the protections promised under the Affordable Care Act.

[35] National Association of Insurance Commissioners, *Compendium of State Laws on Insurance Topics*, "Filing Requirements: Health Insurance Forms and Rates" (Washington, D.C.: Nov. 2011).

[36] Ibid.

[37] Ibid.

[38] Personal correspondence with health insurance regulator, Arizona Department of Insurance (Dec. 29, 2011) (on file with authors).

[39] Ibid.

[40] Ibid.

[41] Pub. L. 111-148, §§ 1201, 1562.

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