

### 3.5% Exchange Fee

ACA §1311(d)(5)(A) provides:

NO FEDERAL FUNDS FOR CONTINUED OPERATIONS. – In establishing an Exchange under this section, the State shall ensure that such Exchange is self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations.

45 CFR §155.160 Financial support for continued operations:

- (a) *Definition.* For purposes of this section, participating issuers has the meaning provided in §156.50.
- (b) *Funding for ongoing operations.* A State must ensure that its Exchange has sufficient funding in order to support its ongoing operations beginning January 1, 2015, as follows:
  - (1) States may generate funding, such as through user fees on participating issuers, for Exchange operations; and
  - (2) No Federal grants under section 1311 of the Affordable Care Act will be awarded for State Exchange establishment after January 1, 2015.

45 CFR §156.50 Financial Support

- (a) *Definitions.* The following definitions apply for the purposes of this section:

*Participating issuer* means any issuer offering a plan that participates in the specific function that is funded by user fees. This term may include: health insurance issuers, QHP issuers, issuers of multi-State plans (as defined in §155.1000(a) of this subchapter), issuers of stand-alone dental plans (as described in §155.1065 of this subtitle), or other issuers identified by an Exchange.

- (b) *Requirement for State-based Exchange user fees.* A participating issuer must remit user fee payments, or any other payments, charges, or fees, if assessed by a State-based Exchange under §155.160 of this subchapter.

45 CFR §156.80 Single Risk Pool

- (a) *Individual market.* A health insurance issuer must consider the claims experience of all enrollees in all health plans (other than grandfathered health plans) subject to section 2701 of the Public Health Service Act and offered by such issuer in the individual market in a state, including those enrollees who do not enroll in such plans through the Exchange, to be members of a single risk pool.
- (b) *Small group market.* A health insurance issuer must consider the claims experience of all enrollees in all health plans (other than grandfathered health plans) subject to section 2701 of the Public Health Service Act and offered by such issuer in the small group market in a state, including those enrollees who do not enroll in such plans through the Exchange, to be members of a single risk pool.

...

- (d) *Index rate*

(1) *In general.* A health insurance issuer must establish an index rate that is effective January 1 of each calendar year for a state market described in paragraphs (a) through (c) of this section based on the total combined claims costs for providing essential

health benefits within the single risk pool of that state market. The index rate must be adjusted on a market-wide basis for the state based on the total expected market-wide payments and charges under the risk adjustment and reinsurance programs, and Exchange user fees (expected to be remitted under §156.50(b) or §156.50(c) and (d) of this subchapter as applicable plus the dollar amount under 156(d)(3)(i) and (ii) of this subchapter expected to be credited against user fees payable for that state market). The premium rate for all of the health insurance issuer's plan in the relevant state market must use the applicable market-wide adjusted index rate, subject only to the plan-level adjustments permitted in paragraph (d)(2) of this section.

#### Comments

- Federal law specifically refers to assessments or user fees to support Exchange operations.
- Under federal law, user fees are to be assessed to participating issuers (in more common parlance – carriers offering products through the Exchange).
- Under further federal law, the market-wide (both on and off-Exchange) index and premium rates must include the Exchange user fees.
- Consequently, the participating issuers' inclusion of the Exchange user fee in their premium rate filings with the Division of Insurance across both on-Exchange and off-Exchange business, and the Division of Insurance's approval of rates including such user fees, comply with the requirements of federal law.
- Further, the analysis of the Colorado Supreme Court in Barber v. Ritter, 196 P.3d 238, at 248-249 (Colo. 2008) is instructive.