

Health Insurance Exchange Working Group
Meeting Minutes
Thursday, August 29, 2012
Department of Insurance

Working Group Members Present

- Director Bill Deal
- Senator John Goedde
- Representative John Rusche
- Representative Lynn Luker
- Zelda Geyer-Sylvia
- Scott Kreiling
- Dave Self
- Tom Shores
- Kevin Settles
- Alex LaBeau
- Wayne Hoffman
- John Watts

Members Absent:

- Dr. John Livingston

Others Present:

- Deputy Director Tom Donovan – Department of Insurance
- Valerie Fend-Boehm – Department of Insurance
- Sean Riley – ALEC (via teleconference)
- Michael Cannon – CATO Institute (via teleconference)
- Jack Rovner – Health Law Consultancy

Call to Order:

Chairman Deal called the meeting to order at 10:05 a.m. He extended a welcome to the committee members and members of the public in attendance. He noted that he thought the committee would meet perhaps 1 or 2 more times.

Chairman Deal asked the committee to review the minutes of the meeting of 8/2/12.

MOTION: Sen. Goedde moved that the minutes of the 8/2/12 be approved with the changes he suggested. Ms. Jones noted that the changes had been made.

There was a second. MOTION passed on a voice vote.

The Chairman noted this is another informational meeting for the committee. He noted that the committee would not be taking comments or testimony from the public, but there would be comment cards available at the back of the room for anyone who wishes to direct a comment or question to the committee.

Director Deal introduced Sean Riley, Interim Director for Health and Human Services Task Force for the American Legislative Exchange Council (ALEC). Mr. Riley noted that the guiding principles behind ALEC are:

- Limited Government
- Free Markets
- Federalism

The reason that ALEC wished to address this group is that the requirements within PPACA do not align with these principles. At this point there is a definite lack of information coming from HHS.

Mr. Riley reminded the committee that 13 states had passed legislation establishing a State-Based Exchange (SBE); 3 states have a commitment to an SBE through Executive Order, 2 already had a form of Exchange, and 33 have not committed to any kind of Exchange. This means that a majority of the states have either rejected a SBE outright, or are still studying options regarding a SBE.

He noted that in July 2012, the Governor of Virginia, on behalf of a group of other governors including Governor Otter, presented a letter to HHS. The letter contained 17 questions for HHS to answer. The only reply from HHS was a 2-page letter noting that more guidelines would be issued later. Virginia's Governor sent another letter later that month again requesting answers to these questions, and noting that HHS's initial answer was not "substantive or serious" and "appears to be more a marketing tool". Another request was forwarded by 2 federal legislators, citing the same 17 questions. HHS' answer, according to Mr. Riley, appears to be that any guidelines will be issued after the deadline of November 2012.

Mr. Riley noted that several states considered a SBE in order to maintain local flexibility and control. If a state does not meet the requirements of a SBE or chooses not to establish a SBE, the federal government is required to step in and establish a Federally-Facilitated Exchange (FFE).

Mr. Riley cited CFR 45 parts 155, 156, and 157, a 600-page document which outlines the Exchange rules and the 19 page CCIIO and CMS *General Guidance on Federally-facilitated Exchanges*. The Guidance, Mr. Riley explained, outlines how the FFE will handle areas where state exchanges have flexibility to address topics. He questioned exactly how much flexibility a state would have under an SBE, since only 19 pages (out of 600) dealt with those specific 'flexible' responsibilities. These responsibilities include plan management functions of certification of Quality Health Plans and, accreditation of health plans, eligibility determination, information technology systems, and consumer support and outreach. The remaining responsibilities in the 600-page regulations are federal minimum exchange requirements, and not subject to states' approval. Thus the only flexibility a state has under an SBE is contained in the 19 pages. Given these federal guidelines, it appears that a state with a SBE would, in effect, be an agency of the federal government managing a federal program within the state. There are simply too many unanswered questions for a state to make a wise decision in this matter.

Mr. Riley enumerated some of the reasons why states have questioned the guidelines of HHS. States have traditionally had the role of insurance regulation in their individual states. HHS guidelines could be interpreted to mean that the federal government could assume that role. He believes that there is very little real flexibility given to a SBE and he points out the difficulty in implementing the provisions of the

ACA by the deadline indicated. He questioned if the federal government can even make its own deadline.

Regarding the Supreme Court decision, Mr. Riley noted that the ruling dealt with a fairly narrow issue, and there are still 11 outstanding lawsuits regarding the ACA.

Mr. Riley noted that there are many people involved in studying the ACA and its provisions. He believes the states are really in control of the process at this point. Even if a state should end up with a FFE, that state can elect to convert to a SBE at a later date. Moreover, with a FFE, the federal government is required to work with the state. Health care reform under ACA is not a one-size-fits-all proposition. Each state has a unique population with its own needs. States will always be a stakeholder in this process.

Mr. Riley repeated ALEC's 3 principles, cited the questions from the Governor of Virginia (still unanswered), noted that a state can convert from a FFE to a SBE at a later date, and said that the federal government will work closely with the states in any case – FFE or SBE.

Chairman Deal asked Mr. Riley about the 19 page *General Guidance on Federally-facilitated Exchange*. (document attached).

Mr. Hoffman asked for verification that the letter sent by Virginia's Governor received a response that answers to his questions would be forthcoming in about a year and a half. Mr. Riley replied that HHS replied the answers would be forthcoming "within a year and a half". Mr. Hoffman inquired if Mr. Riley believed that the rules already written would remain constant and won't change. Mr. Riley replied that HHS has ongoing rulemaking authority; they must operate within the law, but they are granted wide latitude in rulemaking. HHS has the right to interpret the law.

Sen. Goedde asked Mr. Riley if Idaho is a party to any of the pending 11 lawsuits. Mr. Riley said he did not know, but would find out. Sen. Goedde asked exactly how many states had deliberately chosen an FFE. Mr. Riley said that this was difficult to determine because many states were still studying the issue, but had not chosen an SBE. Sen. Goedde reminded him that his question involved how many states had opted for an FFE. Mr. Riley said that, to the best of his knowledge, 22 states had either passed legislation denying establishment of an SBE, or had failed to pass legislation authorizing an SBE. He noted that 6 or 7 governors had been vocal in their opposition to an SBE. Mr. Cannon said that HHS has estimated as many as 30 states could have a FFE; but there are others who say that there may be more states in this category.

Mr. LaBeau noted ALEC has been extremely helpful in the past when dealing with various federal regulations. He said that there are many unanswered questions and very little guidelines from HHS. He noted that the pending lawsuits could take decades to settle. Should Idaho wait until these issues have been decided? Does ALEC think that the idea of an Exchange is a good idea or not as a matter of public policy. Lastly, what can Idaho do to protect itself long term?

Mr. Riley recommended that Idaho not wait for the lawsuits to reach a conclusion. He reminded the committee that the Supreme Court decision involved a very narrow issue. ALEC has no position on a stand-alone exchange but is against an ACA exchange. The issue is with the states' regulatory authority.

Regarding the public policy issue, he pointed out that under the rules of the law, the federal government would assume a regulatory authority. The ultimate cost could be in the trillions of dollars. He said that an Exchange is not just a website. It is a mechanism for accruing subsidies.

Mr. Riley concluded by saying that the more popular parts of the law – pre-existing condition coverage, coverage of children until the age of 26, etc. – had already been addressed in various forms by the states, e.g. High Risk Pools to cover pre-existing conditions. He urged the states to seek free-market solutions.

Mr. Michael Cannon, director of policy studies at the Cato Institute, spoke to the committee by teleconference. He said his opinion was that Idaho should not create a SBE. There is no upside to creating a SBE, only downsides. If Idaho refuses to create a SBE it will protect the state and aid in repealing the law itself. He believes that a SBE is not a viable option because:

- The law is unpopular.
- There is no mandate in the law to create a SBE.
- If Idaho creates a SBE, the state is responsible for the possibility of \$10-\$100 million expense per year to operate the exchange. Oregon is considering a 5% tax on health insurance premiums to pay for their SBE.
- The states can opt for a SBE at a later date.
- The states have a choice between a SBE or a FFE. A SBE does not give the states that much control. The Secretary of HHS has tremendous power under the law.
- Where will the federal government find the funds to pay for the Exchange?
- There is little information regarding guidelines and rules coming from the federal government.
- Lastly, if a state chooses not to create a SBE, it can protect its citizens and employers from the individual and employer mandate, which includes tax credits and penalties.

Regarding the last point, Mr. Cannon said that the language of the law only mentions tax credits (and penalties) in regards to a SBE. Tax credits and penalties are not mentioned when referring to a FFE. Therefore, if Idaho chooses not to create a SBE, the penalties assigned to an individual or to an employer do not apply. Idaho could save its citizens from paying this penalty by simply refusing to create a SBE. If Idaho is a state without these employer penalties, it could easily attract more businesses to the state. Mr. Cannon states that the recent IRS regulations which allow the tax credits in an FFE are illegal and suggested that Idaho could block implementation by revoking issuer licenses for any issuer that accepts the premium tax credits.

Rep. Luker asked Mr. Cannon if he could provide the citation to that part of the law that exempts FFE's from imposing tax credits or penalties. Mr. Cannon referred to an article he wrote. He suggested that Mr. Hoffman could send the link for the article. Rep. Luker asked if there are any legal challenges pending based on this argument. Mr. Cannon replied there were not at this point.

Rep. Rusche said that his understanding of Mr. Cannon's position is that: by choosing to not implement a SBE and arbitrarily pulling licensure of multi-state plans that cooperate with the federal government, Idaho would demonstrate states' rights and would provide value to the families of Idaho? How does this prevent the state from being sued by the federal government? Mr. Cannon replied that this is his personal position, not that of the Cato Institute. He reiterated that there is a real possibility of enormous increases in federal spending. He believes that multi-state insurance companies who provide coverage

to Idaho citizens would be protected especially if the Idaho Legislature enacted legislation to refuse enactment of a SBE.

Sen. Goedde referred to the article published in the Orange County Register. He asked if Mr. Cannon could give him examples of instances where the states have forced the federal government to repeal a law. Mr. Cannon said that he could not at this time. Mr. Cannon said that PPACA is a delicate balance of several factors. If any one of those factors is knocked out, the entire law could collapse.

Mr. LaBeau said that he appreciated the work that the Cato Institute does. He noted that Mr. Cannon's argument features a theoretical versus practical approach. Suspending the licenses of insurance companies isn't practical. He questions the argument that choosing not to receive federal subsidies would save federal dollars. We already pay for health care, if not through an employer, then individually or through state programs. Since there are no lawsuits presently pending on this issue, this is an indication that this approach isn't viable. Mr. LaBeau noted that his members need practical advice on how to deal with this law.

Mr. Cannon said that he would approach Idaho employers with the possibility of being relieved of this "tax", by simply refusing to implement a SBE. He said that at some point, someone would have to file a lawsuit to stop implementation of the law. The whole process begins with the state refusing to create a SBE.

Mr. Self asked that Mr. Cannon send his information to the committee. He especially wanted research into the cost of \$10-\$100 million per year cost to run the exchange, and the estimate that 100,000 families would be involved.

Chairman Deal asked that he send that information by email to members of the committee.

Mr. Jack Rovner, an attorney specializing in health insurance issues with the Health Law Consultancy, spoke next to the committee. Mr. Rovner's presentation (attached) addressed the legal issue of the premium tax credits and cost sharing reductions in a FFE that Mr. Cannon raised. Mr. Rovner pointed out that the law specifically applies to both SBE's and FFE's. He did not feel there was any doubt in his mind that the law meant for the tax credits to apply whether the state opted for a SBE or a FFE. He believes that the legislative intent was that both types of programs would qualify for the tax credit.

Mr. LaBeau asked him to address the advantages and disadvantages of a SBE versus a FFE. Mr. Rovner said that an important advantage to a SBE is the governance issue. A state could decide the SBE's governance structure rather than HHS, i.e. a SBE could operate as a business. There is a greater likelihood of success when controlled and operated by the state. It could be tailored to meet the unique needs of Idaho citizens, rather than a "one size fits all" approach that a FFE would use. The Idaho Department of Insurance would continue to regulate the insurance business in the state. The role of agents and brokers and the role of the Navigator would be determined by the state. He noted that initially 100% of the funding for the exchange would come from the federal government, but that each exchange should be self-sufficient by 2015. Each SBE would determine where the funding for their program should come from.

Rep. Rusche questioned Mr. Rovner about the role of the Navigator in the exchange. Mr. Rovner replied that the Navigator should be a neutral person who could help individuals through the process of selecting a program that would best suit their needs. He noted that agents and brokers could qualify as Navigators, but they could receive no commission from this service from issuers. They would act as consumer advocates. He also mentioned that a “personal assistant” could perform the same duties as a Navigator.

Mr. Settles asked Mr. Rovner to express his opinion on Mr. Cannon’s suggestion that a lawsuit might be a way to aid in the repeal of the law. Mr. Rovner noted that nothing can happen until 2015 when the penalties would be issued. He noted that his business clients need to have accurate information in order to plan for the future. He seriously doubted that anyone would consider a lawsuit given the long timeframe involved, and refusing to pay taxes due would not be a wise business decision. Challenges take a long time, and business owners do not have the luxury of waiting for a favorable decision.

Chairman Deal thanked Mr. Riley, Mr. Cannon and Mr. Rovner for their presentations. He also recognized DOI personnel in the audience.

Lunch break: 12:12 p.m.

The Chairman called the meeting to order at 1:20 p.m.

Ms. Valerie Fend-Boehm provided a high level overview of the *HHS Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges* (presentation and Blueprint attached).

Ms. Fend-Boehm’s document review presentation covered exchange options available to states, approval, conditional approval and transition requirements and timelines, and provided examples of specific blueprint requirements.

Mr. Shores inquired how the states could access the benefits offered in the Blueprint. Ms. Fend-Boehm said that HHS was working with those states who had asked for their help through a series of webinars.

Rep. Luker asked about Navigator oversight. Ms. Fend-Boehm said that currently HHS maintains oversight over the Navigator in the FFE model and final approval of Navigators in the partnership model through FFE issuance of the Navigator grants. Ms. Fend-Boehm confirmed that the blueprint submission requirements for states related to consumer assistance and Navigators would be different for a SBE than a Partnership..

Sen. Goedde noted that November 18, 2014 was the most distant Blueprint due date listed in the presentation for states wishing to switch Exchange models. Could that date be moved to a future date? Ms. Fend-Boehm noted that States can decide to transition any year beyond 2014, but the last possible date to apply for federal grant funds to build a SBE is 2014.

Sen. Goedde also asked if reinsurance would reflect losses nationwide or would it be Idaho-specific? She replied that a FFE would use reinsurance as it currently exists. Chairman Deal clarified that it is specific to the state.

Rep. Rusche noted her comment that conditional approval for a SBE is January, 2013, but the state must be ready by 10/1/2013. What happens if Idaho fails to generate the necessary details for approval? Will the federal government step in at that point? Deputy Director Tom Donovan answered that the federal government would step in, perhaps in a partnership model. It makes sense for a state that is considering a SBE to also have a plan for a partnership model. The state would at least have the ability to fulfill some of those partnership duties. It would give the state some latitude.

Ms. Geyer-Sylvia questioned if the November 16 deadline for all the requirements (especially the testing) of the Blueprint is achievable even at the federal level.

Rep. Luker asked if HHS is ready to do the assessments of the states, and whether there is a deadline for states pursuing an SBE or SPE with conditional approval to default to a FFE?

Ms. Fend-Boehm said that HHS is ready to do the assessments. HHS has a process in place to do so. While HHS has not officially published a default date, a state wishing to establish a SBE should have most of the important components operational by late spring or early summer 2013 to avoid defaulting to the FFE.

Deputy Director Tom Donovan provided some updates from the recent NAIC and CCIIO meetings in a PowerPoint (a copy is attached).

Mr. Donovan noted that the costs associated with an exchange should be clearer soon. The Department is in the process of engaging an outside contractor to help calculate the potential development and operational costs. It is his hope that this contractor could present reasonable figures to the committee in early October.

Immediately after the NAIC meeting, CCIIO held an informational meeting to address exchange issues. A recurrent theme during the meeting was the federal desire to rely on state government to enforce insurance reform and exchange provisions of PPACA.

Mr. Donovan noted that HHS has given the states the opportunity to declare a benchmark plan for essential health benefits. HHS is in the process of collecting pertinent information from the three largest small employer plan carriers in each state. They intend to share this information by the first part of September and for the states to use this information to formulate a benchmark plan. There is no specific date for this to be accomplished at this point. HHS intends to publish the details of these benchmark plans selections or default plans.

While at the conference, Mr. Donovan asked Mike Hash, Acting Director of CCIIO, how much flexibility a state will have regarding an exchange. The answer was that HHS definitely wanted to encourage the states in pursuing an SBE and will try to be flexible, but the states would definitely have to show how they will meet the minimum ACA exchange requirements. States must show "significant progress" as detailed in the Blueprint.

Mr. Donovan noted that the federal services data hub will be the tool that will house information from many different federal agencies. All states will have to connect with this data services hub.

He noted that the traditional role of the states - licensure, regulation, plan review, etc. – would definitely fit within the plan management role of an exchange.

Mr. Donovan addressed the problem of “premium shock” that Idaho might have as discussed by CCIIO. CCIIO suggested that this might be somewhat mitigated by using the tools the state has at its disposal. For example, the essential health benefits could be adjusted to soften the impact, medical loss ratio, the effective rate review provisions, the reinsurance, risk corridor, and risk adjustment programs, and premium tax credits and cost sharing reductions should all help consumers to lower costs.

The role of Navigators was discussed. Mr. Donovan said that the Navigator role is a complex one – to provide outreach, education and information. The Navigator must remain an impartial consumer advocate to those seeking help in the exchange. The state cannot require them to be licensed as a producer, nor can it require errors and omissions insurance. The important issue is that Navigators not receive compensation from health carriers. The role of “assisters” can be viewed similarly to the Navigator. Assisters can be contract employees or employees of the exchange. They also cannot receive compensation from carriers for their work. Both entities appear similar, although Navigators can be compensated through federal grants.

Mr. Shores was concerned that a person offering advice to Idaho citizens, without the requirement to be licensed as a producer or to carry errors and omissions coverage, could harm those asking for their help. What can the state do to protect its citizens? Mr. Donovan said that an assister or Navigator who was providing advice or otherwise acting akin to an agent or broker (producer – i.e. selling soliciting or negotiating insurance) to a citizen would be subject to DOI oversight and subject to penalties for engaging in conduct without a license. It’s important that consumer understand the Navigators and assisters are not acting as agents and brokers. Agents and brokers would have the in-depth knowledge that the Navigator or assister would not have.

Ms. Geyer-Sylvia asked if Navigators in a federal call center located outside Idaho would be able to coordinate answers from different sources. Mr. Donovan replied that the goal of the exchange would be to help prevent any problems. Hopefully, exchange websites would be helpful here in providing accurate information. However, knowledgeable agents and brokers would provide the ultimate source of accurate information including advice to a consumer. With a SBE, Idaho would have more local control, it would be more direct. Moreover, if a consumer had a question and wanted a face-to-face meeting, it would be much easier with a state exchange.

Mr. Watts asked if there were any “firewalls” concerning compensation for Navigators. Mr. Donovan said that there was no barrier to an agent or broker who wished to function as a Navigator. They simply cannot be selling health insurance to the people who consult them in their role as Navigator. The people who choose to assume the Navigator role make the choice not to derive income in the form of commissions while in this role. Mr. Watts was concerned about agents and/or brokers who live in small communities. They could very well see a major loss of income with the advent of an exchange. Mr. Donovan stated that he thought navigators might be able to still sell insurance outside the exchange and derive income from these sales as long as they are not functioning as Navigators, but will double-check. [*Clarification post meeting: per 45 CFR § 155.210(d)(4) navigators are not able to receive consideration directly or indirectly from health insurance issuers for enrolling persons in QHPs or non-QHPs.]

Chairman Deal answered that the Statute was clear on what an agent can and can't do in an exchange. An agent can still keep his/her clients, while functioning as a Navigator. He/she can't sell them insurance in this role. An agent can use the website to help his/her clients. The role of agents is clearly defined in the law and it is important to use our current law to define agents.

Mr. Self asked how the "assister" would be paid in a partnership model. It appears that this cost would be borne by the state. Mr. Donovan stated that assisters can be funded with federal grant money, unlike navigators, and further while navigators must be awarded grants, assisters could be completely volunteer-based without any funding. In a SBE, a state would have more control over assisters.

Chairman Deal answered that the individual state must determine how the funds to pay for this service will be generated. Mr. Donovan noted that assisters can be volunteers. There might be grant funds available for the assisters. The Chairman noted that there are many questions involved in the roles of Navigators and assisters. He suggested a scenario where a Navigator is located in a hospital or other medical facility to help people determine the best coverage for them at that time. There are certain groups of people who might need specific help from a Navigator e.g., tribal members. He suggested that Idaho might generate a list of agents who would be available to help.

Mr. Donovan spoke about future rulemaking (slide 5). There are several guidelines for all phases of the exchange.

Mr. Donovan spoke about future guidance (slide 6). He noted that HHS should be publishing the results of the states' findings on essential health benefits by fall of this year.

Mr. Watts asked about the grants that Idaho could apply for. If we receive them, how long do we have to use them. Mr. Donovan said that Idaho could use them at least through 2015, maybe 2016. [*Clarification post meeting: States could use grant money for the first year of operations of the SBE, even into e.g. 2017.] Mr. Watts asked if Idaho has any discretion in how to use federal funds. Chairman Deal said that individual grants are applied for and awarded for specific uses. There is also a specific timeframe for each grant's use. He believes that HHS will provide more opportunities for grants in the future. He noted that these grants are a "paydown" style.

Mr. Shores presented the findings from his Sub-Committee. His PowerPoint addressed 3 questions:

- #2. Are the available options for an exchange as follows: (1) a State Based Exchange (SBE or State Exchange), (2) a State Partnership Exchange (Partnership) with the federal government, and (3) a full Federally Facilitated Exchange (FFE)?
- #6. Some critics of establishing a state exchange point to detailed requirements mandated by the federal government. In what ways would each option differ with regard to these requirements and how much flexibility is afforded the state in setting up an SBE or Partnership?
- #11. How do the PPACA requirements regarding reinsurance, risk corridors and risk adjustment impact the exchange decision, if at all?

(a copy of the PowerPoint and the written report are attached)

Mr. Settles presented the findings of his Sub-Committee. (a copy is attached).

- #1. Does the Department of Insurance have any federal requirements to meet if the state chooses to do nothing?
- #4. What funding sources are available for the different exchange options and when and how are the funding sources available?
- #10. What options are available to the state regarding choosing a benchmark plan for the Essential Health Benefits and when must that be done? Does the potential decision by the state in choosing a benchmark plan impact the exchange decision?

Mr. Self reported that Dr. Livingston's committee had met but had not yet formulated answers to the following questions posed by Governor Otter:

- #5. When are the key deadlines and benchmarks for each available option? Is it still possible for the state to establish a SBE or Partnership within the timeframe required by PPACA, and if so, what is the latest date formal work must begin on each?
- #9. Does the decision on Idaho choosing to expand or not to expand Medicaid impact the exchange decision, and if so how?
- #14. Does the federal government intend to maintain high-risk pools and how will they be financed? What actions will they take in a state that has opted not to operate a high-risk pool or an exchange?

There were questions from the committee regarding community outreach. Director Deal said that outreach is absolutely essential. The DOI had spent much of 2011 reaching out to all parts of the state. He felt it is more beneficial for the state to conduct outreach than leaving it to the federal government to perform this requirement.

Ms. Geyer-Sylvia expressed the opinion that the state must not give up its regulatory authority over insurance companies. She noted that all carriers offering insurance in the state must be proven to be solvent. How would the federal government be able to determine this – in the case of individual states? The Director agreed that regulatory authority is of paramount importance. He also brought up the case of guaranty associations. How would the federal government implement guaranty associations if a FFE is implemented in Idaho?

The Director noted that the next meetings should begin to find answers to the Governor's questions and make recommendations to the Governor. He suggested that a cost analysis should be available at the October meeting. He said that the DOI had begun negotiations with a contractor who would be able to present cost analyses to the committee.

Rep. Rusche suggested that the committee hear presentations from other states about their exchanges and the costs involved. Mr. Self agreed this would be a very good idea. Mr. Hoffman asked if a representative from HHS could speak to the committee. Mr. Donovan said that he would contact the agency and could arrange a presentation either in person or by teleconference.

The meeting adjourned at 3:00 p.m.

Next Meeting

The next meeting will be September 11, 2012 in the Senate Auditorium in the State Capitol – 10:00-3:00.

Adjournment

The meeting adjourned at 3:22 p.m.

Minutes by Teresa Jones
Idaho Department of Insurance