

POLICY *Memo*

November 4, 2011

To: Governor Brewer, Legislators, Policymakers
From: Diane Cohen, Senior Attorney, Goldwater Institute
RE: Ten Reasons Why Arizona Must Reject Health Insurance Exchanges

“The key provision of the Affordable Care Act is the implementation of State-run Health Insurance Exchanges.”

The above quote comes not from the Obama Administration, but from Arizona Governor Jan Brewer.¹ In furtherance of this “key provision,” the governor has created the Governor’s Office of Health Insurance Exchange, with a projected budget of more than \$29.5 million over the next 32 months. In recognizing that exchanges are “key” to implementation of the “Affordable Care Act,”² the governor’s office is in lockstep with both the Obama Administration, which argued in its legal briefs defending the law that the establishment of exchanges was critical to enforcing the individual mandate,³ and the *New York Times*, which wrote that the “success of President Obama’s health care overhaul . . . depends on the creation of . . . health insurance exchanges.”⁴ Worse still, the governor’s office is exploring ways to establish an exchange via executive order,⁵ in an attempt to circumvent the legislature, which has opposed a state exchange.

Thus, the legislature may find itself on the front line in protecting Arizona from this unconstitutional law and the state’s interests in the 26-state lawsuit challenging Obamacare, which is currently on its way to the U.S. Supreme Court. The legislature may also be needed to preserve Arizona’s Health Care Freedom Act (HCFA) by stopping Arizona from becoming complicit in Obamacare.

Whether state or federally established, exchanges are government-sanctioned cartels where only government-approved insurers can sell only government-approved insurance. While proponents claim that states should establish an exchange in order to fend off a federally established one and preserve state control, a review of the law and proposed regulations reveal that establishing an exchange will accomplish none of these objectives. Following are select provisions of the law and the proposed regulations that show the extent of federal control over the exchanges. These provisions show that states will not be able to maintain any meaningful control or “flexibility” by establishing an exchange. Likewise, they show that any state that establishes an exchange will be enforcing the individual mandate.

Ten Reasons Why Arizona Must Reject Exchanges

- 1. The federal government controls exchanges.** “An Exchange may not establish rules that conflict with or prevent the application of regulations promulgated by the Secretary [of Health and Human Services (HHS)].”⁶ Further, the Secretary and the General Accounting Office will have continuing oversight over exchanges.⁷
- 2. The federal government controls the doctors and other providers that are allowed to participate in an exchange-offered plan.** The Act mandates that only providers who “implement[] such mechanisms to improve health care quality as the Secretary may *by regulation require*” may participate in a “qualified plan” offered on the exchange.⁸
- 3. The federal government controls health insurance plans and benefits.** The Act prescribes the minimum essential benefits that must be included in a plan and gives authority to the HHS Secretary to prescribe more.⁹ HHS is also required to establish the criteria for the certification of health plans as “qualified.”¹⁰ As a result, only HHS-approved plans may be sold in the exchange.¹¹
- 4. While federal mandates remain, federal funds cease at the end of 2014.** Both PPACA and the proposed regulations prohibit federal funds for state exchanges after January 1, 2015. No federal grants will be awarded after January 1, 2015.¹² States must ensure that the exchanges are self-sustaining by January 1, 2015, and must find other sources of funding, through “assessments and user fees,” “provider taxes,” “State revenues,” or other sources.¹³
- 5. Arizona will surrender its 10th amendment sovereignty by establishing an exchange.** The HHS proposed regulations themselves acknowledge that a state’s submission to an exchange has an adverse impact on federalism principles. In compliance with Presidential Executive Order 13132,¹⁴ which requires agencies to assess whether their rules will affect federalism, HHS reported that the proposed exchange regulations have “*Federalism implications due to the direct effects on the distribution of power and responsibilities among the State and Federal governments.*” However, HHS determined that the federalism implications are “substantially mitigated” because PPACA “does not *require* States to certify an Exchange.”¹⁵ Therefore, when a state *chooses* to establish an exchange, it voluntarily surrenders its sovereignty.
- 6. The state must enforce the individual mandate and penalty.** State exchanges are responsible for determining whether an individual is exempt from the individual mandate and for granting certification for those who are exempt. The exchange must also “support and complement rulemaking conducted by the Secretary of the Treasury” with respect to the law.¹⁶

7. **The state must turn over names of individuals who do not comply with the individual mandate.** Obamacare requires the exchange to give to the U.S. Treasury the names and taxpayer identification numbers of individuals who have changed employers and ceased coverage under a qualified health plan during a plan year.¹⁷ The same would be true for an individual unsuccessfully seeking an exemption from the mandate via the exchange or otherwise subjecting himself to the exchange, but then choosing not to purchase insurance.
8. **The state must report citizen information to the federal government.** Exchanges must record and report to HHS on a monthly basis all individuals who terminate their enrollment in insurance obtained through the exchange.¹⁸
9. **So-called state “flexibility” is belied by the law.** Despite a provision in the Act titled “State Flexibility in Operation and Enforcement of Exchanges and Related Requirements,” the law in fact confers no flexibility to the states, only more authority to the HHS Secretary over the state exchanges. For example, the Act provides that states can establish exchanges, but *only* as “prescribe[d]” by the HHS Secretary.¹⁹ The Act also *allows* states to adopt exchange laws and regulations, but *only* those that “the Secretary determines implements the standards within the State.”²⁰ Moreover, this provision states that “[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title,” which is just another way of saying that a state law is *only* valid if it does not conflict with federal law and regulation.²¹
10. **States are only as flexible as federal law permits them to be.**²² Yes, states can choose whether the exchange will be run by a state agency or a non-profit established by the state, but both are subject to federal approval, regulation, and perpetual oversight.²³ According to the Governor’s Office, an Arizona exchange would be established either in her office or as a separate state agency, but Arizona will not create a non-profit agency to run the exchange.²⁴

States also have so-called “flexibility” to decide whether to open exchanges to all insurers, or to limit the number and participation to only those plans that meet unspecified “exchange criteria.”²⁵ But all this “flexibility” essentially allows is the creation of a state and federally-controlled market where the state determines which insurers participate and which plans and coverage are available. If Arizona exercised such authority to limit the plans, coverage options and companies allowed to participate in the exchange, it would violate the HCFA provision in the state constitution, which protects the right of Arizona citizens to buy (or not buy) insurance plans of their choice that best suit their needs.

Conclusion

As exemplified through Arizona's enactment of the Health Care Freedom Act and Save Our Secret Ballot, Arizona is a leader in defending state sovereignty and individual liberty. Arizona is also a plaintiff in the victorious Florida Obamacare lawsuit, which the Supreme Court will soon consider. While the District Court found Obamacare unconstitutional, it allowed the government to implement the law pending appeal, specifically noting that several of the prevailing states continued to carry out its provisions, including accepting exchange grant money. Arizona should not put this important legal victory in jeopardy by entrenching this unconstitutional law before the Supreme Court decides the case.

ENDNOTES

1. The Governor's Office of Health Insurance Exchange, *About the Exchange*, <http://www.azgovernor.gov/hix/About.asp>.
2. Referred to herein as "PPACA," "Obamacare" or "the Act," Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("HCERA").
3. *Coons v. Geithner*, 10-CV-1714, Defendants' Statement of Facts in Support of their Motion for Summary Judgment, at pp. 17-18, ¶¶ 29-30.
4. Robert Pear, *Health Care Overhaul Depends on States' Insurance Exchanges*, N.Y. Times, Oct. 23, 2010, <http://www.nytimes.com/2010/10/24/health/policy/24exchange.html?pagewanted=all>.
5. State of Arizona Governor's Office, *Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges, Level One Grant Application*, at pp. 9-10, §2.3; p. 23, § 2.24. http://www.azgovernor.gov/hix/documents/Grants/L1EstGrantApp_SubmittedNOTApproved.pdf.
6. 42 U.S.C. § 18031(k).
7. § 18033(a), (b).
8. § 18031(h)(1)(B) (emphasis added).
9. § 18022(a),(b).
10. § 18031(c)(1).
11. § 18031(d)(2)(B)(i) and (e).
12. § 18031(a)(4)(B); *see also*, § 18031(d)(5)(A).
13. *Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers*, 76 Fed. Reg. 41874 (proposed Jul. 15, 2011) (to be codified at 45 C.F.R. pts. 155).
14. Executive Order 13132 of August 4, 1999, "Federalism."
15. 76 Fed. Reg. 41910-11 (emphasis added).
16. *Id.* at 41875.
17. § 18031(d)(4)(H), (I).
18. 76 Fed. Reg. 41885.
19. § 18041(b); *see also* § 18041(a).
20. § 18041(b)(2).
21. § 18041(d).
22. 76 Fed. Reg. 41908.
23. *Id.* at 41870-71.
24. State of Arizona Governor's Office, *Level One Grant Application*, at p. 10, § 2.4, http://www.azgovernor.gov/hix/documents/Grants/L1EstGrantApp_SubmittedNOTApproved.pdf.
25. 76 Fed. Reg. 41891.

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