



What Now for Health Insurance Exchanges in Missouri?

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Talking Points

- Missouri voters passed a ballot measure that prohibits the adoption of a state-based health insurance exchange without legislative or voter approval. This led to Missouri missing the deadline established by the Affordable Care Act (ACA) to set up a state health insurance exchange for 2014.
- The ballot measure also restricted the ability of state agencies to work with the federal exchange that will be established for Missouri. This paper concludes that the ballot measure, as enacted, could have detrimental effects on the functioning of a federal insurance exchange.

Background

Within the Affordable Care Act (ACA) there were multiple provisions that profoundly affected the availability, cost and quality of health insurance. Some of those provisions included the extension of coverage to young adult children under parental health insurance plans, pre-existing condition insurance plans, coverage requirements of evidenced based preventative services and mandatory reporting by insurance companies of their medical loss ratios with a rebate requirement.

In addition, the ACA required the establishment of American Health Benefit Exchanges (aka insurance exchanges). The idea behind the insurance exchanges was to create a marketplace for individuals and small businesses to purchase health insurance with competitive rates and coverage. Historically, individuals and small business owners enrolled in non-group health insurance policies paid more for health care than those individuals enrolled through larger corporations or organizations. The non-group health insurance policies generally had lower premiums, but the individual tended to have greater amounts of out-of-pocket costs for health care.¹ As envisioned, the exchanges will allow individuals and small business owners to access a website that provides comparative health insurance plan information, tools that determine

¹ Comparison of Expenditures in Nongroup and Employer-Sponsored Insurance: 2004-2007, Kaiser Family Foundation, March 2010, <http://www.kff.org/insurance/snapshot/chcm1110060th.cfm> Last accessed January 4, 2013.

whether they are eligible for health insurance subsidies or are eligible for government programs, and facilitate individual enrollment in health insurance plans.² The US Department of Health and Human Services (HHS) has identified three types of exchanges: state-based exchanges,³ partnership exchanges and federally-facilitated exchanges.⁴ Implementation of the Affordable Care Act requires that the federal and state insurance exchanges be operational by October 1, 2013, so that insurance coverage through the exchanges can begin on January 1, 2014.

In accordance with the ACA, the main functions of an insurance exchange include:

- Certifying, recertifying, and decertifying health plans offering coverage through the exchange, these will be known as qualified health plans (QHP).
- Assigning ratings to each QHP on the basis of relative quality and price.
- Providing consumer information on QHPs in a standardized format.
- Creating an electronic calculator to allow consumers to assess the cost of coverage after application of any advance premium tax credits and cost-sharing reductions.
- Operating an internet website and toll-free telephone hotline offering comparative information on QHPs and allowing consumers to apply for and purchase coverage if eligible.
- Determining eligibility for the exchange, tax credits and cost-sharing reductions for private insurance, and other public health coverage programs, and facilitating enrollment of eligible individuals in those programs.
- Determining exemption from requirements on individuals to carry health insurance, granting approvals to individuals relating to hardship or other exemptions.
- Establishing a Navigator program to assist consumers in making choices about their health care options and accessing their new health care coverage, including access to premium tax credits for some consumers.⁵

The exchanges may be funded by fees imposed upon the insurer offering QHPs. The proposed user fees for a federally-facilitated or federally-run exchange are up to 3.5 percent of the monthly premium.⁶ States, such as Massachusetts and Connecticut, are using insurance surcharges to fund their state run exchanges.⁷

A state-based exchange can be a governmental agency or nonprofit entity that only offers qualified health plans.⁸ States were required to notify the federal government by December 14,

² In addition to individuals and small business, members of Congress² will obtain their health insurance through an exchange.

³ 42 USC §18031(b)(2011).

⁴ 42 USC §18041(c)(1)(2011).

⁵ <http://www.healthcare.gov/news/factsheets/2011/07/exchanges07112011b.html>

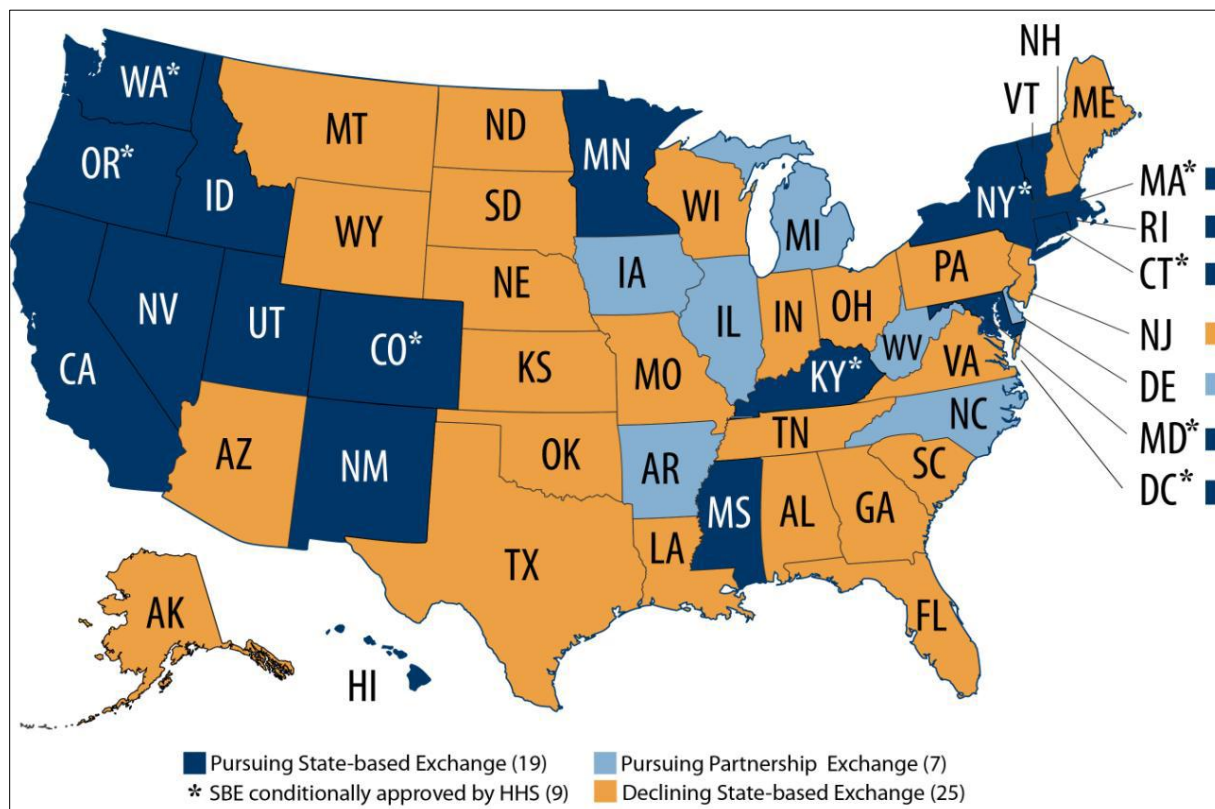
⁶ 77 Fed.Reg. 73117-73218, December 7, 2012. Found at <https://federalregister.gov/a/2012-29184> Last accessed December 21, 2012.

⁷ <http://www.kaiserhealthnews.org/stories/2012/december/01/health-insurance-exchanges-states-fees.aspx>

⁸ 42 USC §18031(d)(2)(B)(i)(2011).

2012 if they were instituting their own exchange. As of January 4, 2013, the federal government had provided conditional approval to eighteen states for operating a state-run exchange and to two states for operation of a federal-state partnership exchange.⁹

Status of State Insurance Exchanges as of December 17, 2012¹⁰



The deadline for HHS to approve or conditionally approve state-based exchanges for 2014 was January 1, 2013. The remaining states and the District of Columbia will either operate a partnership exchange with the federal government or allow the federal government to operate their exchange. If a State desires to create a partnership exchange with the federal government, HHS will accept declaration letters and blueprint applications on a rolling basis with a final deadline of February 15, 2013 for a 2014 exchange.¹¹ If a State does not develop a state-based exchange or a state-federal partnership exchange, then the federal government will establish and operate an exchange within the non-electing State.¹²

On November 8, 2012 Governor Jay Nixon announced that Missouri will not be establishing a state-based exchange as it would be unable to meet the original November 16, 2012 deadline. This was in part the effect of the November 7, 2012 ballot measure that prohibits the

⁹ According to information provided by the Centers for Medicare and Medicaid Services. Available at <http://cciio.cms.gov/resources/factsheets/state-marketplaces.html> Last accessed January 4, 2013.

¹⁰ Status of State Health Insurance Exchange Implementation, Center on Budget and Policy Priorities. Available at <http://www.cbpp.org/files/CBPP-Analysis-on-the-Status-of-State-Exchange-Implementation.pdf> Last accessed January 4, 2013.

¹¹ See Sebelius, K, Letter to Governors. November 9, 2012. Available at <http://www.healthcare.gov/law/resources/letters/exchange-blueprint-letter.pdf> Last accessed on November 15, 2012.

¹² 42 USC 18041(c)(1)(2011).

establishment of an insurance exchange without legislative approval or voter approval, as discussed in more detail below. The legislature would not be returning to session until January, therefore the legislature could not pass any enabling statute that would allow the formation of a State exchange prior to the December deadline.

The ballot measure, known as Senate Bill 464, was introduced in January 2012 by Missouri State Senator Rob Schaaf. Senate Bill 464 proposed to amend the insurance chapter of the Missouri statutes so that the authority to create or operate a state-based insurance exchange must be enacted either through legislation or a referendum voted upon by voters and in no instance can the authority for a state-based health exchange be based upon executive order of the governor. In addition, the bill prohibits any state agency, department, employee or official from assisting with a federal insurance exchange. The bill was truly agreed and finally passed on May 18, 2012, delivered to the Secretary of State on May 30, 2012 and Missouri voters approved the bill as a ballot measure on November 7, 2012.

Senate Bill No. 464

Following the election, Senate Bill 464 was enrolled in the Missouri statutes as section 376.1186. The statute significantly restricts both the establishment of a state-based exchange, and State cooperation with any federally run health insurance exchange.

First, the statute restricts the formation of a state health insurance exchange without statutory or legislative authority¹³ and it specifically precludes executive authority as a basis for establishing a state-based exchange.¹⁴

Second, the statute also forbids any Missouri agency, department, instrumentality or political subdivision from establishing any program, creating any rules and guidelines or changing any program, rule or policy that implements, establishes, or created a state-based health exchange without statutory authority.¹⁵

Third, no agency, department, instrumentality or political subdivision can apply for, accept or expend federal money for the creation of a state-based insurance exchange **or** a federally run health insurance exchange without statutory authority.¹⁶

Fourth, statutory authority is required for any Missouri agency, department, instrumentality, political subdivision, public officer or employee to assist with a federal exchange or to enter into any agreements or obligations to establish, administer or operate a federal health insurance exchange.¹⁷

Finally, any taxpayer or member of the general assembly has standing to bring suit against the state of Missouri or any of its departments or agencies. The court can award attorneys' fees, court costs and reasonable fees. The agency or department being sued bears the cost of litigation without opportunity for additional appropriation.¹⁸

¹³ VAMS 376.1186(1)(2012).

¹⁴ VAMS 376.1186(2) (2012).

¹⁵ VAMS 376.1186(3)(2012).

¹⁶ VAMS 376.1186(4) (2012).

¹⁷ VAMS 376.1186(5) (2012).

¹⁸ VAMS 376.1186(6) (2012).

Real and Potential Effects/Issues

Establishment of federal health insurance exchange rather than a state exchange

The deadline for a letter of intent and a blueprint for the operation of a state-federal partnership insurance exchange is February 15, 2013. Missouri has received two federal grants related to the establishment of a state insurance exchange totaling \$21,856,716.¹⁹ It is not clear how much work has already been done by the various government agencies to create a Missouri-run insurance exchange with federal grants received since 2010. Possibly, enough work has been done that a letter of intent and blueprint could be submitted by February 15th, provided that the legislature enacts the necessary enabling statute in time. The legislature convened its 2013 session on January 9, 2013 and considering that the February 15th deadline is rapidly approaching, there is essentially no chance that a federal-state partnership exchange will be operational by October, 2013. Consequently, Missourians ceded control to the federal government to operate a health insurance exchange, at least for the time being.

Chilling Effect

The prohibition on Missouri agencies and its employees from cooperating with the federal government will have a detrimental effect on the functionality of the federal insurance exchange. If the Missouri legislature does not pass legislation or voters do not approve a statute that enables a state exchange, a federal-state partnership exchange or participation in a federal exchange, then Missourians will likely suffer adverse consequences. Missouri agencies, their employees and officials are exposed to potential litigation if they assist, cooperate or provide any resources to any department, agency or employee of the federal government related to a federal exchange or a federally facilitated exchange, without the requisite enabling law prescribed in the recent ballot measure. Further, any Missouri taxpayer or any member of the legislature may bring the lawsuit and attorneys' fees, court costs and reasonable expenses may be awarded by the court. The agency or department being sued must pay the legal fees out of their own budget, without any additional appropriations.²⁰ This broad legal standing measure, with the attendant financial restraint, creates a chilling effect and will make any individual employee or official understandably leery and less willing to cooperate with a federal exchange.

State Regulation of Insurance

The chilling effect is problematic because the federal exchange will happen regardless of the Missouri legislature's action or inaction on passing or proposing legislation to allow cooperation with a federal or federally facilitated exchange. Pursuant to the 1945 McCarran-Ferguson Act, the regulation of insurance, including health insurance, is within the individual states' purview. There is no federal health insurance regulation covering such attributes as benefit requirements, co-payments, pharmaceutical formularies or claims administration. The Missouri Department of Insurance and Financial Institutions oversees health insurance regulations that govern the details of claims payment, required benefits, co-payments for various services and administrative requirements.²¹ Moreover, any health insurance offered in Missouri must be approved by the

¹⁹ http://www.whitehouse.gov/sites/default/files/01-18-12_exchange_report.pdf. Last retrieved November 13, 2012.

²⁰ VAMS 376.1186(6) (2012).

²¹ See generally VAMS 376

Director of Insurance.²² The collaboration limitations placed on the employees and officials of the Missouri Department of Insurance and Financial Institutions create insecurities concerning the availability of health insurance policies through the federal exchange. For instance, a health insurance plan must be approved by the Director of Insurance and if the Director does not want to approve a plan offered on the federal exchange out of fear of potential litigation, what, if any, plan will be available to Missourians?

Legal Issue-Federal Pre-emption

The statute creates potential legal problems that, if litigated, will cost Missouri both money and government employee time. There is a plausible argument that the statute could be invalidated by federal law under the legal theory of pre-emption and the legal costs to fight the battle regarding preemption will be borne by Missourians.²³ Federal law “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁴ In this instance, express pre-emption or conflict pre-emption would likely invalidate the Missouri statute prohibiting Missouri government employees or officials from cooperating with a federal exchange.

Conclusion

The Missouri statute that restricts State employees, departments or officials from establishing a state exchange and from cooperating with a federal exchange without an enabling statute places an unnecessary impediment on the operation of an insurance exchange for Missourians. As envisioned, the insurance exchanges, state, state-federal partnership or federal, will increase competition, transparency and availability of insurance to a segment of the population that has historically not benefited from competition-decreased price with better offerings and quality. Without enacting an enabling statute, state employees and officials may be unwilling to cooperate with a federal exchange out of fear of legal repercussions. This reticence will undoubtedly affect any insurance offerings to Missourians on a federal exchange. Further, the statute as it stands is not likely to survive a federal pre-emption claim. Missourians may be required to fund futile litigation to defend a statute that is likely to be struck down.

²² VAMS 376.405(2012).

²³ VAMS 376.1186(5) (2012).

²⁴ U.S. Const. Art. VI, cl. 2.