



February 8, 2011

Senator Dennis Egan
Chair, Senate Labor & Commerce Committee
Beltz 105
Juneau, Alaska 99801

Re: SB 70, Alaska Health Benefit Exchanges

Dear Senator Egan and Members of the Senate Labor & Commerce Committee:

My name is Mark Regan. I am Legal Director of the Disability Law Center of Alaska, which is the State-designated organization for protection and advocacy of Alaskans with disabilities. I would like to make three points this afternoon in support of the Labor & Commerce Committee's moving forward with Senate Bill 70, the bill that would establish a health benefit exchange that would help people find coverage in the individual and small group insurance markets.

The first point is that it is hard for people with disabilities who have chronic conditions to find private insurance in the individual and small group health insurance markets, and an Exchange can help them find the coverage they need on the same general terms as everyone else who needs to find individual or small-group health insurance.

The second point is there is nothing about an Exchange that requires the State of Alaska to enforce an individual mandate requiring citizens to have private health insurance coverage. SB 70 is a version of the National Association of Insurance Commissioners' model Act, which reflects federal requirements, but if the individual mandate in federal law survives the court challenges to it, enforcing the mandate will be a federal responsibility, not a State one.

Third, and finally, I want tentatively to suggest that even if the individual mandate is found unconstitutional by the U.S. Supreme Court, there is still likely to be a binding federal requirement that there be Exchanges in every State, whether operated by the State of Alaska or by a nonprofit entity set up by the federal government; and that it probably would be best for Alaskans with disabilities if the State does the operating.

An Alaska Health Benefit Exchange is a good way for people to find health insurance

First, an Exchange would make sure Alaskans with disabilities are in the same system as other people who need help finding affordable private coverage in the individual and small group health insurance markets. According to the Kaiser Commission's 2008-2009 data, 128,000 Alaskans were uninsured in that year, 19% of the total population, which is two percentage points higher than the country as a whole. Alaskans with disabilities sometimes have special trouble getting coverage because they have chronic conditions

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that would lead insurance companies either to reject them outright – through a “pre-existing condition exclusion” – or lead private insurance companies to price the coverage that would be available at a level people simply can’t afford. But the high cost of coverage can be a problem for everyone. Even if you don’t have a chronic condition, it can still be hard to afford coverage without assistance from someone, typically an employer, as anyone who has tried to pay the full cost of insurance under COBRA will remember. The existing individual and small group insurance market is a limited one and it is hard for people to find coverage through it.

An Exchange, like the Exchange contemplated in SB 70, is likely to be helpful in several important ways. People can use it to search for insurance policies that they otherwise wouldn’t know about. Insurance companies can compete in terms of price and networks of doctors and other providers of medical services. Because there will be a lot of people participating – we hope – the average cost of coverage should be lower than it would be in a high-risk pool like the pools the State is now operating. Furthermore, the federal government will be assisting people of low- to- moderate incomes with subsidies for premium and cost-sharing payments they need to make, and those subsidies will be available mainly for coverage people would purchase through an Exchange. Again according to Kaiser Commission 2008-2009 data, 90,900 uninsured Alaskan adults had family incomes below 400% of the poverty income guidelines and so, other things being equal, would have been eligible for subsidies under the Act. So an Exchange would be available for people with disabilities on the same terms as everyone else, and the subsidies low-to-moderate income families might need would be available there too.

An Alaska Health Benefit Exchange would not be enforcing a federal health insurance mandate

Second, an Exchange would not be in the business of enforcing any federal requirement that people have insurance coverage. Note that the list of the Board’s duties in section 2 of SB 70, proposed AS 21.54.220(a), does not include enforcing a penalty against anyone for not having health insurance coverage. In fact, it’s the other way around. Instead of penalizing people, the Board’s duties include helping people demonstrate that they would be exempt from any penalty of this sort [proposed AS 21.54.220(a)(14) and (15)], and administering a system through which federal subsidies would be made available so people could afford coverage [proposed AS 21.54.220(a)(17)]. If the individual mandate survives the court challenge to it, the responsibility for enforcing the mandate rests with the federal government, not the State.

That is because the federal health care overhaul’s minimum coverage provision is a federal, not a State, requirement. Under the new federal law, employers and other providers of health care make enrollment reports to HHS, not to a State. [PPACA, § 1502(a); see 26 U.S.C. § 6055.] A person who appears not to have enrolled gets a “notice of nonenrollment,” but this comes from the Treasury, not from a State. [PPACA, § 1502(c).] The “shared responsibility payment” penalty is a payment to the

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federal government to be included with a person's federal tax return. [PPACA, § 1501; see 26 U.S.C. § 5000A(b)(2).] The Secretary of HHS, not a State, serves notice of the penalty. [§ 5000A(g)(1).] The procedure for collecting the penalty, and for defending against collection, is the same general procedure as federal tax procedure. [Id.] The restrictions on criminal prosecution and on liens and levies are restrictions on federal tax enforcement procedures, not on state activities. [§§ 5000A(g)(2)(A) and (B).] Whether or not someone gets a hardship exemption is to be determined by HHS, not by a State. [§ 5000A(e)(5).] There is simply no occasion on which the Alaska Health Benefit Exchange would ever directly impose or collect a penalty on someone who fails to meet the federal minimum coverage provision.

Nor would moving forward with an Exchange force the State of Alaska to drop any argument that the federal individual insurance mandate is unconstitutional. In fact, just about every State which is a plaintiff in the Florida v. U.S. lawsuit has taken steps towards investigating how an Exchange would work – getting Federal planning grants for doing this and considering legislation on the subject – and one State which is challenging the individual mandate, Utah, already has an Exchange statute on its books. (Part of the Utah statute setting up an Exchange on this subject is at Utah Code, § 63M-1-2504, and the website's URL is <http://www.exchange.utah.gov/>.) In fact, Utah not only has an Exchange statute on its books, but it has a "health care freedom act" that says that no citizen of Utah should be required to purchase health insurance. [Utah Code, § 63M-1-2505.5.] If Utah can move forward with an Exchange under those circumstances, so can Alaska.

An Alaska Health Benefit Exchange in state law would keep Alaskans in charge

Finally, there is a question about what federal law is likely to require States to do – or, more accurately, what Federal law is likely to require to be done in every State by someone, State or nonprofit – once the litigation about the individual mandate is over. In the Florida v. U.S. case, the plaintiffs (including the State of Alaska) raised a direct challenge to the federal Act's Exchange provisions, saying that those provisions commandeered State government into enforcing federal law. Judge Vinson actually rejected that challenge, saying States had an option under the Act: set up an Exchange that satisfies federal standards, or watch and wait while the federal government sets up an Exchange through a public nonprofit agency of its own.

Now, it is possible that if the challenge to the individual mandate succeeds at the U.S. Supreme Court, it will be clear that the Act's current standards for Exchanges would have to be modified. Maybe the whole idea of an individual and small group market where there would be "guaranteed issue" – they can't turn you down because you have a pre-existing condition – and "community rating" – they can't charge you more money simply because you have a chronic health condition – would have to be rethought. The reason for this is that the individual mandate prompts relatively healthy people to participate in the system, and unless relatively healthy people participate in the system along with

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people with disabilities and chronic conditions, the average cost of a policy within that system would go way up. So if the mandate is unconstitutional, there would need to be a discussion of other ways to get people to participate in the system. No one can be sure exactly what Congress would decide to do if the U.S. Supreme Court were to throw out the individual mandate.

But the idea of many people participating in the individual and small group health insurance market, and finding out information about which policies would be best for them, and getting subsidies to help them afford insurance, is such a good one that Congress will likely try to encourage this even if the individual mandate disappears. Before the health insurance overhaul passed Congress, there were several suggestions about how to encourage people to participate in the market without actually penalizing them for not doing it. For example, there was a suggestion that people could choose not to have health insurance – but they'd have to promise that they wouldn't ask for any federal subsidies if they did decide to buy insurance, and they'd have to deal with pre-existing condition exclusions if it turned out that they needed insurance after all. It's not clear which of those different suggestions Congress might adopt. But it is quite possible that there would be an Exchange requirement in federal law, no matter what, with the same option for States that is in federal law now – a State could operate an Exchange, or, if the State decided not to operate an Exchange, the federal government would operate one through a nonprofit.

If those turn out to be the circumstances, I'd suggest that Alaskans' preference will be to have the State operate an Alaska Health Benefit Exchange, where the people running the system would be State people who likely would have good ideas about what is best for Alaskans. The alternative would be a federally sponsored nonprofit agency. So, if you want there to be an opportunity for Alaskan control over the Alaskan part of this problem, you should move forward with SB 70.

Thank you very much, again, for the opportunity to testify on this important issue.

Sincerely,

Mark Regan
Legal Director