The Future of Exchanges

Prepared for the Arkansas Health Insurance Marketplace
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GETTING ABOVE THE FOG

Legislative/Executive Branch Action Impacting Exchanges
Legal Action Impacting Exchanges
Current national landscape
State Innovation Waivers: Section 1332
Executive Branch Decisions in 2015

- Employer Mandate: Full implementation in 2016 or delay inclusion of employers 51-100 until 2017?

- Requirement to expand small group to 100 in 2016: Implement, delay or “phase in”:
  - Allow employers in this segment to claim the small business tax credit
  - Allow employers in this segment to purchase a small group plan through the exchange if they choose or to remain outside the small group market

- Essential Health Benefits decision

- SHOP: How to increase enrollment

- IRS Implementation Issues
  - Reconciliation of APTC/CSC with actual income
    - EITC payment “surprise”
  - Individual mandate
    - Expand hardship exemptions?
Possible Congressional Actions Impacting Exchanges

- Investigations, investigations, investigations…

- Employer mandate: Repeal or modify
  - 30 hour workweek
  - Veterans/TriCare removed from FTE count

- Reconciliation
  - Mechanism for partial repeal/changes to ACA
  - Must have a budgetary impact: revenue or spending
    - Tax provisions
    - Entitlements
      - Remove the new eligibility group
      - Change the match rate for the group or within the group
• **King v. Burwell**
  - The Issue: Whether IRS tax subsidies are available on both state and federal exchanges (or only on state exchanges)
    - Limiting tax subsidies to state exchanges substantially limits the individual and employer mandates to states that have established their own exchanges
    - KFF has estimated 13.4 million Americans could lose subsidies
  - Factors Suggesting That at Least Four Justices Want to Consider Reversing King and Limiting Subsidies to State Exchanges
    - 4-vote rule
    - failure to defer consideration pending Halbig en banc review
    - vote to grant review often indicates preliminary view that lower court was incorrect
  - Question is whether Congress’s *intent* is clear or ambiguous – not whether *statutory language* is clear or ambiguous
Other Legal Challenges Impacting Exchanges

- Lawsuit challenging Congress purchasing through SHOP exchanges
- House Republicans challenging that President Obama overstepped his authority in giving employers a one-year reprieve on the employer mandate
- Exchange implementation/operational issues:
  - **Nevada** – consumer & broker class action suits
  - **Oregon** – competing lawsuits between exchange & contractor
  - **California** – consumer suits against insurers re: misleading consumer on size and scope of networks
  - **Tennessee** – class action suit against Medicaid agency for not meeting the 45 day application window due to call center issues
  - **Connecticut** – an individual’s suit against the Administration asserting no plans are available that do not cover abortion
  - **District of Columbia**: American Council of Life Insurers (ACLI) suit against the D.C. Health Benefit Exchange Authority re: assessments on insurers selling insurance products that are not and cannot be sold on the Exchange.
• Efforts by states to recover payments for failed exchanges
  – Minnesota, Vermont: contract renegotiations
  – Massachusetts: contract renegotiation and settlement; however, the AG is investigating the state’s Exchange website vendor under the Massachusetts Fair Claims Act
  – Maryland: litigation unlikely but still an option; HHS OIG has subpoenaed vendor documents regarding Maryland’s Exchange
  – Hawaii: “evaluating options”; GAO investigating
  – Nevada: no action by state yet

• Additional consumer actions possible
  – Along the lines of Nevada (payment of premiums but no coverage) or Tennessee (system issues affecting timeliness of service)
  – Billing issues (e.g., out-of-pocket costs for out-of-network services issue): does the consumer owe more than the “reasonable and customary charge” for medical services?
NATIONAL EXCHANGE LANDSCAPE
Federal Operation of Exchanges Continues to Grow

Exchange IT Operations 2014 Open Enrollment

- **14** State-based Exchange
- **3** State-based Exchange using FFE IT
- **34** Federally-facilitated Exchange*

*UT operating SHOP
*MS operating SHOP
*NM operating SHOP
New Category Coming: State-Supported Marketplaces (SSM)
Variations on “Private Option” Reflect Interest in “Skin in the Game” or Using Private Plans
States Currently Seeking Approval of Expansion Waivers

Medicaid: ACA Expansion vs. "Private Option"
States Seriously Contemplating Expansion

Medicaid: ACA Expansion vs. "Private Option"
States Where Expansion Will be a Hot Topic

Medicaid: ACA Expansion vs. "Private Option"

Map showing states that have expanded Medicaid under the ACA and those approved by CMS to use the "Private Option".
Basic Health Program: States to Watch

- Oregon (OR)
- Minnesota (MN)
- New York (NY)
• What are Section 1332 State Innovation Waivers?
• What could a State do with a 1332 Waiver?
• What can’t a State do with a 1332 Waiver?
• What is the process for a Section 1332 Waiver?
• What now?
What is a State Innovation Waiver?

- Use ACA Funding
- Single Waiver for all Federal Health Programs
- Waive ACA Provisions
- Four Core Requirements

State Designed Health Reform
Beginning January of 2017, allows HHS/Treasury to waive significant portions of the ACA, including requirements related to:

- Establishment of qualified health plans, including:
  - EHB requirements*
  - Annual limits on total cost sharing
  - Actuarial value standards for “metal level” plan categories
  - Definition of individual, small group & large group markets, aggregation rules for small and large employers
- Establishment of health benefit exchanges, including:
  - SHOP & Individual
  - Products sold through exchanges
  - Medicaid eligibility and enrollment facilitation
  - Self-sustaining requirements
  - Navigators
  - Single Risk Pool
  - Who can use the exchange
• Allows HHS/Treasury to waive significant portions of the ACA, including requirements related to:
  – Cost-sharing subsidies
  – Refundable tax credits
  – Small business tax credits
  – Employer mandate
  – Individual mandate
• If the waiver eliminates the premium tax credits, cost sharing subsidies and/or small business tax credits, state governments can receive the money that would have gone to their residents and business to fund the alternative health reform design
  – Aggregate, lump sum, periodic payments
  – Annually adjusted
Section 1332 also permits states to apply in a coordinated fashion for waivers from:

- Medicare, Medicaid, the Children’s Health Insurance Program, and
- “any other federal law relating to the provision of health care items or services.”
• The Secretary may grant a request for a 1332 waiver only if the Secretary determines that the State plan—
  – will provide coverage that is at least as comprehensive as the coverage defined in section 1302(b) and offered through Exchanges
  – will provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as the provisions of this title would provide;
  – will provide coverage to at least a comparable number of its residents as the provisions of this title would provide; and
  – will not increase the Federal deficit.
Market reforms:
- No Pre-existing conditions
- Rating bands
- Preventative Care
- Guaranteed issue

Hospital and care provisions
- CMMI
- Readmissions reduction
- DSH reductions

And hundreds of pages of other provisions
The Waiver Process

• Application to the Secretary of HHS; she will refer to the Secretary of Treasury any provisions where he has the waiver authority
• Application must address six major areas:
  – The provisions of federal law that a state seeks to waive
  – How the innovation waiver will meet the ACA’s goals of coverage expansion, affordability, comprehensiveness of coverage, and costs
  – An implementation timeline
  – Include a budget plan that must not increase the federal deficit
  – Actuarial certifications and economic analysis
  – An analysis of the waiver’s impact on provisions of the ACA that are not waived
• For a state to act, its application must be backed up by a state law.
• The Secretary must make a determination within 180 days (but we know how that goes….)
• No waiver can last longer than five years, but can be renewed by the state and the secretary
• Initial regs are final; more to come

On a practical level, a state planning to implement a broad waiver in 2017 must be working in 2015
• We are hearing ideas big and small – but all are based on the individual state’s health care and insurance markets
  – Manage churn between exchange and Medicaid
  – Maximize employer sponsored insurance
  – Address affordability and structural issues that put families in different health programs
  – Address impacts on the small group market/small employers
  – Single Payer System with Medicare Included
  – Private plan or ESI-based exchange designs
  – Eliminate the exchange and direct enroll in Medicaid or state-selected plans
  – Possibilities are limitless…
The Years Ahead…

After climbing a great hill, one only finds that there are many more hills to climb.

Nelson Mandela