Health insurance exchange addendum:
Report to the governor[1]

Remaining issues, unknowns and considerations regarding the establishment of a state health insurance exchange

Oct. 25, 2012

Executive summary: The Patient Protection and Affordable Care Act presents Idaho with the option of creating a state health insurance "exchange." We advise the governor that there are many outstanding issues that your taskforce could not resolve and remain outstanding as we submit our findings to you. Our research shows that many problems exist for any state that develops a state exchange. Moreover, the creation of a state exchange could cement this cumbersome, expensive and federally intrusive law in place, fundamentally and permanently altering the relationship between state and federal government, and between the government and its citizens. More reasons for concern follow:

1. ***Creating an exchange may violate Idaho law.*** The Idaho Health Freedom Act (IHFA), Idaho Code §39-9003 (2), provides "that every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty." One of the required duties of exchange officials would be to establish eligibility for and to distribute "premium assistance tax credits" and "cost-sharing subsidies." Under the PPACA, these entitlements trigger penalties against both employers (up to $2,000 per employee) and individuals ($2,085 for a family of four in 2016). State officials who authorize, fund, or administer a PPACA-compliant

[1] Idaho Freedom Foundation Executive Director Wayne Hoffman, a member of the governor's working group examining whether to create a health insurance exchange, recommended that this information be presented to the governor. However, in a 10-3 vote on Oct. 26, 2012, the panel rejected the report. IFF presented the information to the governor anyway. Hoffman and Rep. Lynn Luker worked together to draft this addendum.

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exchange would therefore violate the IHFA's proscription that, "No public official, employee, or agent of the state of Idaho or any of its political subdivisions, shall act to…effectuate any penalty in the state of Idaho that violates the public policy set forth in" the Idaho Health Freedom Act. Unless the legislature repeals the Idaho Health Freedom Act or the duties it imposes on the attorney general, the Idaho Health Freedom Act would require the attorney general to seek an injunction that protects the rights of Idahoans by blocking state employees and their agents from implementing those tax credits, subsidies, and any other facet of an exchange that effectuates the PPACA's penalties on employers and individuals. Idaho Code §39-9004. While the legislature could amend the IHFA, an executive order by the Governor authorizing a State Exchange would not by itself avoid the restrictions contained in Health Freedom Act.

2. ***A state-created exchange could destroy jobs because the right to sue is lost under a state exchange.*** The PPACA authorizes penalties of up to $2,000 per worker against employers. There is a serious ambiguity in the PPACA on whether powers and responsibilities given to and benefits flowing through State Based Exchanges would apply to a Federally operated exchange. The CATO Institute has taken the position that based upon the literal language of the act such authorities and benefits vest only in State Based Exchanges.[2] Jack Rovner, an attorney specializing in health care law, admitted that the language was ambiguous. According to an analysis from the Cato Institute, the legislature can shield Idaho employers from those penalties by rejecting the exchange.[3] At the very least, adopting a state exchange takes away legal recourse from Idaho businesses to challenge the penalty based upon the legal ambiguity. If Idaho creates an exchange, it stands to lose jobs to states that do not acquiesce in imposing that tax on hiring by adopting a state exchange. It is also important to note that the IRS has written regulations that ignore this legal defect.[4] Adopting a state based exchange would also remove legal recourse by Idaho businesses to challenge the authority of the IRS to issue these questionable rules. Perhaps most important is that even if Idaho businesses themselves did not challenge the tax or the IRS rules, adopting a state exchange would foreclose Idaho businesses from taking advantage of any favorable rulings by plaintiff's in other states challenging the tax and rulings.

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[2] Adler, Jonathan H. and Cannon, Michael F., "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA" (July 16, 2012). Health Matrix: Journal of Law-Medicine, Forthcoming; Case Legal Studies Research Paper No. 2012-27. Available at SSRN: http://ssrn.com/abstract=2106789.

[3] Ibid.

[4] IRS regulations regarding health insurance premium tax credits, http://tinyurl.com/8gngn8b.

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3. ***Refusing to create an exchange would exempt 100,000 Idahoans from the PPACA's individual mandate.*** The same ambiguity raises the issue of whether the "premium assistance tax credit" can flow through a federal exchange. If the PPACA's "premium assistance tax credit" does not flow through a federal exchange, then rejection of a state exchange would result in an additional 107,000 Idahoans qualifying for the "affordability exemption" from the law's individual mandate.[5]

4. ***The federal government does not have the money to spend on the PPACA's subsidies.*** If the only way premium tax and subsidy dollars can be distributed is through a state exchange and not a federal exchange, then refusing to create an exchange will prevent the creation of a new, costly federal entitlement program.[6] As Idahoans we have to be concerned not only about the impact of the PPACA in our own state, but also upon the broader issue of the federal deficit and debt which threatens to take down our entire economy.

5. ***Unknowably large future costs.*** At a meeting in August in Boise, U.S. Sen. Mike Crapo commented, "I don't think that anybody can trust that the federal government will continue to pay 100 percent of the increased cost [of Obamacare] … States will have to assume that they will begin assuming increasing portions of that, if not all of it, rather rapidly." That, Crapo said, is "legitimate cause to be very concerned" about taking on new program expenses that threaten to bankrupt states. It is no secret that the federal government is broke. State agencies that take on the responsibility for the delivery of a federal tax credit for health insurance premiums should be prepared to continue that tax credit after the federal government determines it can no longer afford to offer it. Such will make the state liable for the administration, distribution and continuation of the tax credit. The PPACA further requires states to fund the operating expenses of the exchanges they create—costs that have been estimated at $10 million to $100 million per year. These costs must be funded through the exchange which ultimately will come out of the pockets of Idaho consumers and taxpayers. The Obama administration has also proposed shifting additional Medicaid costs to the states, above and beyond the cost of the PPACA's Medicaid expansion.[7]

6. ***Idaho is liable for mistakes in tax credit management.*** It will be up to Idaho to administer premium subsidies and advance tax credits available through the exchange.[8] As part of that administration, the state will have to comply with the standards for eligibility determination. If the state fails in its responsibility to properly determine eligibility, the state could be subject to

[5] Email correspondence with Michael F. Cannon, October 9, 2012. Data available on request.

[7] Forbes, Governors' Worst Nightmare: Obama Proposed Shifting Costs of Obamacare's Medicaid Expansion to the States, July 19, 2012.
[8] HHS health insurance exchanges final rule 155.300.

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fines or penalties by the federal government. As of now, we don't know what those penalties will be.[9] It will be the state which will carry the brunt of complaints and problem solving, rather than the federal government which created the program.

7. ***There may never be a federal exchange.*** It is doubtful whether the federal government has the capacity to build an insurance exchange in every state that rejects a state exchange—a problem that is compounded in the event many states refuse to put together a state exchange. While Congress provided money for states to build exchanges, it did not do so for the U.S. Department of Health and Human Services.[10] This means that HHS will have trouble complying with basic benchmarks to get the job done.[11] This raises the issue of how quickly Idaho should try to facilitate a law that the large majority of Idahoans reject and which the federal government is unable to implement without the help of the states.

8. ***State resistance may force Congress' hand.*** State resistance makes it increasingly likely Congress will have to revisit the law.[12] Members of Congress have urged the nation's governors to reject state insurance exchange implementation.[13] Rather than preserving local control, adopting a State Based Exchange, Idaho and other states actually give up leverage to force a change in the law by adopting a State Based Exchange. It seems evident that the Federal Government is desperate to have states operate the exchanges.

9. ***There is no flexibility for the state in administration of the exchange.*** A state exchange will be responsible for administering and complying with complex regulations that would appear to give the state very little flexibility in terms of how the program is administered. The PPACA gives the Secretary of Health and Human Services the authority to impose on state-created exchanges whatever requirements she considers "appropriate." It requires states to obtain HHS approval of their exchanges. And it prohibits states from enacting any laws that conflict with HHS regulations. HHS' exchange rules use the word "shall" 381 times, the word "must" 13 times and the words "require" or "requirement" 201 times.[14] Several aspects of exchange administration provide states little flexibility. For example, the HHS rules strictly outline how an exchange portal is to be set up, the administration of premium tax and Medicaid eligibility determination and the processing of exchange application.[15] Any state-sought change to the

[9] Minutes of the governor's health insurance exchange working group, Aug. 2, 2012.
[10] Policy Tip Sheet - State Health Insurance Exchanges Post SCOTUS, Heartland Institute, July 11, 2012, http://tinyurl.com/9vpt7fl.
[11] "Feds face challenges in launching health exchange," National Journal, Dec. 19, 2011, http://tinyurl.com/9n8fve5.
[12] "The federal government contends it is moving ahead. "In an Aug 6. 2012 Associated Press article, HHS contends it is "undaunted" about having to run an exchange in more than half of the states. http://tinyurl.com/d4k7tfp.
[13] Letter from members of Congress to members of the National Governors Association, June 29, 2012.
[14] Health insurance exchange final rule.
[15] Ibid.

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operation of the exchange would have to be approved by HHS in advance, much the way states must seek federal approval for changes in the way Medicaid is managed.[16] Even if one argues that the states do have flexibility under the federal rules, it is easy to point out that rules are fluid and can be changed at any time at the discretion of federal agencies. The state would then be required to conform to the federal government's new requirements, whatever they happen to be. In the event that the state has already invested considerable resources into the administration of a state exchange, it is unlikely that the state would withdraw its interest in the exchange, making it far easier for the federal government to impose its mandates without state resistance.

10. ***State exchanges jeopardize the concept of federalism.*** A state-administered exchange that relies on stringent federal requirements provides too little voter accountability. State residents upset with the operation of a state exchange will complain to state officials, who will deflect and complain that they're just following federal orders. Federal bureaucrats, faced with complaints about the operation of a state exchange, will deflect and contend that the operation of the exchange is solely the responsibility of the state government. This blurs the lines of accountability and is injurious to the notion of federalism. In the U.S. Supreme Court case, *National Federation of Independent Businesses v. Sebelius*, both Chief Justice John Roberts and the joint dissenters express concern about this method of governance and its impact on government accountability.[17]

11. ***Key information is missing in the development of a state exchange.*** The state still doesn't know key logistics for the operation of the exchange.[18] While some of the taskforce's questions have been answered—including the estimate that it would cost $77 million to develop an exchange—Idaho taxpayers don't really know what they're getting for that $77 million.[19] Additionally, states are still left with many questions about the operation and funding of the exchanges, because the federal government has yet to answer those questions.[20] Finally, we note that some states are underestimating the long-term costs associated with insurance exchange operations. For example, Nevada is using a budget model that assumes virtually no growth in its operational costs after the initial start-up years.[21] Such estimations ignore inflationary adjustments, staffing and advertising, as well as the tendency of government agencies to propose spending increasing in order to further their objectives.

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[16] Ibid.
[17] NFIB v. Sebelius, 567 U.S. ___ (2012)
[18] Minutes of the governor's health insurance exchange working group, Aug. 2, 2012.
[19] Governor's health insurance exchange working group meeting, Oct. 9, 2012.
[20] Letter from Virginia Gov. Bob McDonnell, RGA chairman, to President Obama, July 10, 2012.
[21] Meeting of the Idaho health insurance exchange task force, Sept. 11, 2012.

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12. ***The state will be responsible for higher insurance costs.*** A health insurance exchange virtually guarantees increased insurance premiums for consumers or higher taxes for Idahoans regardless of the success or failure of the rest of the Affordable Care Act. Under the federal law, a state health insurance exchange must be self-sufficient by 2015.[22] This would require state regulators to provide funding through insurance premium taxes, user fees or general fund support.

13. ***Consumer information privacy could be harmed.*** The health insurance exchange relies heavily on the willingness of state governments to share sensitive information about Idahoans with federal regulators. As such, the state health insurance exchange facilitates and requires the release of information including taxpayer identification numbers, modified adjusted gross incomes and participation in other state-administered programs.[23] The state's participation in the health insurance exchange would facilitate the transfer of private data about Idahoans to untold numbers of federal agencies.

14. ***Centralization of information is an end goal behind the insurance exchange***. The insurance exchange could help centralize citizen participation in government. Some supporters of the ACA contend that the federal health care law, and its component insurance exchanges, could be used as a one-stop shop to access a host of federal and state government programs with a single-point digital application process intended to "maximize enrollment."[24] Such a concept envisions that a resident of any state can input his or her data, including "vital records, employment history, tax records and enrollment in other programs to determine eligibility and in place of paper documentation. Records can be checked in real time, while customers are waiting, so many will be able to receive immediate approval. Applications will be screened simultaneously for Medicaid, CHIP and tax-based subsidies, regardless of where the customer initially applies for benefits."[25] Several states hope to secure as much government data as possible to make utilization more seamless.[26] For this reason, some opponents of health insurance exchanges have described the exchange as a "dependency portal."[27]

15. ***Governor Otter's exchange questions have been ignored by HHS.*** The Republican Governors Association (RGA) on behalf of Governor Otter and 28 additional governors sent a July 10th

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[22] Sec. 155.160 of the health insurance exchange regulations say, "A State must ensure that its Exchange has sufficient funding in order to support its ongoing operations beginning Jan. 1, 2015."
[23] Sec. 155.320 of the health insurance exchange regulations: Verification process related to eligibility for insurance affordability programs.
[24] "The Health and Human Services Integration Toolkit: Short list of Opportunities" by the Coalition for Access and Opportunity.
[25] Ibid.
[26] Strict federal rules for health exchange data rankle states, Sept. 18, 2012. http://tinyurl.com/9mw9ca7.
[27] Rhode Island Center for Freedom and Prosperity's Freedom Blog: "R.I. Creating an Expressway to Dependency" last accessed Oct. 25, 2012. http://tinyurl.com/bmymgmn.

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letter to the Administration seeking answers to 17 specific questions related to exchange implementation in the states.[28] The RGA followed up with a July 23rd letter addressing the U.S. Department of Health and Human Service's response letter that "declin[ed] to directly address" the questions. The RGA letter on behalf of Governor Otter pointed out ambiguous language from the Department's reply that claimed, "more guidance will be issued in the year and half before the...exchanges begin." The letter went on to say that the Department's response, "was neither substantive nor serious and appeared to be more of a marketing tool than serious problem solving." Still not having received adequate answers, the RGA followed up with a third letter on September 27th. The vast majority—15 of the 17 original exchange questions—remain unanswered.[29]

16. ***Idaho could opt-in to a state exchange later if uncertainties are mitigated*.** There is neither the urgency nor necessity for Idaho to establish an exchange at this point. The explicit language of the March 2012 HHS exchange rule states that § 155.106, Election to operate an Exchange after 2014, "alleviates some of the timing pressure" facing states that are unable to have an exchange up and running by plan year 2014 (i.e., meet the November 16, 2012 deadline).[30] The rule provides states the opportunity to seek approval to operate an exchange after 2014 by having an exchange plan conditionally approved under a similar procedure currently facing the states. Given the findings in this report, there are serious doubts that a functioning exchange under the PPACA will ever be viable or preferable. However, if the outstanding questions and concerns are answered and mitigated, Idaho may opt to establish an exchange after the deadline, and does not lose the option by declining to meet the current deadline.

[28] http://rgppc.com/medicaid-and-exchange-letter-2/
[29] http://rgppc.com/rga-letter-pressing-hhs-for-answers/.
[30] http://www.gpo.gov/fdsys/pkg/FR-2012-03-27/pdf/2012-6125.pdf.

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