CPPP Center *for* Public Policy Priorities | Policy Page

May 11, 2011 Contact: Stacey Pogue, pogue@cppp.org

SMART MOVE TO KEEP OUR OPTIONS OPEN

TDI Sunset Amendment Leaves Open Possibility of a State-Based Health Insurance Exchange Should State Leadership Decide It Is Advantageous

As the 2011 Legislature winds down, time is running out for Texas to pursue its surest route to a state-based health insurance exchange. A health insurance exchange is a competitive marketplace where individuals and families can purchase private health insurance starting in 2014. Exchanges are established by the Affordable Care Act (ACA or federal health reform), which lets each state choose whether to design and run its own exchange, or turn the task over to the federal government. The ACA's timeline gives states a limited window in which to pursue a state-based exchange before the federal government assumes the responsibility. Inaction this legislative session does not guarantee that Texas will ultimately have a federal health insurance exchange, but it certainly makes that outcome much more likely. Though an amendment by Representative Zerwas to House Bill 1951 (the Sunset bill for the Texas Department of Insurance) added on second reading yesterday gives Texas an option to create a state-based exchange instead of deferring to the federal government if state leadership decides to go that route later. This approach is a smart move for Texas. This *Policy Page* describes the timeline and options for creating a state-based exchange and reasons why Texas should create its own exchange.

Health Exchange Timeline

Health insurance exchanges must open by January 1, 2014, whether they are operated by the state or federal government. The ACA requires readiness checks on state-based exchanges on or before January 1, 2013. This check will allow the U.S. Department of Health and Human Services (HHS) to determine whether a state has taken the steps needed to be ready to open an exchange by January 1, 2014 that meets minimum federal standards. If a state will not be ready, the federal government will establish an exchange in that state.

Texas will have to do much more than merely state its intention to operate a state-based exchange by January 1, 2013 to guarantee that we can implement our own exchange. It is likely that the readiness check will ensure states:

(1) have the legal authority to establish and operate an exchange that complies with federal requirements; and

(2) have already done the planning and groundwork needed to establish a governing structure, create a budget, begin to develop complex information technology systems, etc.[1]

What is a health insurance exchange?

An exchange is a more organized and competitive marketplace for health insurance that will give consumers more control, quality choices, and better protections when buying health insurance. Individuals, small businesses, and members of Congress will be able to buy coverage in the exchange starting in 2014.Sliding-scale federal subsidies will be available through the exchange to low- and moderate-income families to help ensure coverage is affordable. For more background on exchanges, see www.cppp.org/research.php?aid=1049.

Establishing Legal Authority

This Session

The most direct path for establishing legal authority for Texas to create and operate a state-based exchange that meets federal standards is passage of legislation this year. The Legislature will not meet again in a regular session until after the January 1, 2013 readiness check occurs.

Several bills have been introduced this session to establish a state-based exchange in Texas.[2] Only one, House Bill 636 by Representative Zerwas, has been heard in committee. No opposition was expressed at the hearing. In fact, interests as diverse as community health workers and the Texas Association of Business spoke in support of the bill, along with many health care stakeholders like the Texas Hospital Association, the Texas Medical Association, the Texas Association of Health Plans, and a coalition of groups representing health insurance agents. HB 636 is stalled because the Governor opposes legislation authorizing a state-based exchange.[3]

It could be technically possible for the legislature to still pass a bill authorizing an exchange this session, though time is very short. The most likely path at this point is as part of the Sunset bill for the Texas Department of Insurance (TDI). The exchange-related amendment by Representative Zerwas added on the floor on second reading authorizes TDI to perform some, but not all, exchange functions. Specifically, it allows, but does not require, TDI to:

- enter into information sharing agreements with relevant agencies,
- certify qualified health plans,
- assign plans to different tiers of coverage,
- provide information on the availability of coverage and its cost after tax credits,
- provide comparative information on health plans for sale on a website, and
- provide information on and facilitate enrollment in Medicaid and CHIP with HHSC.

Unlike HB 636, which provides a comprehensive structure for the governance and functions of a non-profit exchange, this amendment provides very minimal authority allowing TDI to perform some exchange-related functions. But this authority could be just enough to help Texas preserve the ability to pursue a state-based exchange and avoid a federal exchange.

Special Session

If the legislature fails to pass any exchange-related legislation this session, the Governor could call a special legislative session before 2013 to pass legislation authorizing an exchange. Given the Governor's current opposition, this route may be unlikely; however, some observers believe his decision could shift after the 2012 elections and the U.S. Supreme Court decision on the ACA expected in the summer of 2012.[4] If the Supreme Court upholds the individual mandate in mid-2012 or strikes down the individual mandate while upholding the rest of the ACA including exchanges, state leadership may have more incentive to pursue authority for a state-based exchange. The Governor will have a narrow window in which to call a special session after the November 2012 elections and before a potential January 1, 2013 readiness check. But relying on this wait-and-see approach could prove risky for Texas since the federal law says the readiness check must occur on **<u>or before</u>** January 1, 2013.

Depending on the eventual federal timeline, it is possible that Texas could end up on the path to a federal exchange before a special session in the last half of 2012 is called or completed.

Non-Legislative Options

Other states that have failed to pass exchange legislation in their 2011 sessions are looking at other options. Unlike in Texas, almost all other states' legislatures will meet in 2012, giving other states more opportunities to establish statutory exchange authority. Some states are investigating whether they can establish exchange authority without legislation, possibly by executive order or expanding an existing state agency.[5]

It is not clear whether such an approach is an option in Texas. It will depend on whether the Governor's office has authority to create an exchange through executive order and whether state agencies have sufficient existing authority to spend sizeable federal grants setting up an exchange, establish a governing body, and carry out some or all of the work of the exchange.

Getting the Groundwork Done

Putting aside the complicated and political question of establishing exchange authority, for Texas to secure a state-based exchange, we must still prove on or before January 2013 that the state has done the necessary groundwork to be ready to open and operate an exchange in January 2014. According to HHS' example timeline for milestones in its most recent exchange grant announcement to states, many essential steps must be taken in 2011 and 2012 to be ready for 2014.[6] Exchange IT systems are an example of one exchange capacity that states must be working on now in order to get the job done. HHS' timeline shows several required IT-related milestones in 2011 including conducting a gap analysis of existing systems, completing preliminary business requirements, developing an IT integration framework, and completing a security risk assessment.

The Affordable Care Act authorizes federal grants to states to fully fund states' work to plan, establish, and operate their exchanges through 2014. Starting in 2015, exchanges must be self-sustaining. Texas applied for and received an initial exchange planning grant of $1 million in 2010. Additional federal exchange establishment grant funding is available to states now in two different "levels."

Level One grants do not require that states have legal authority to establish an exchange, but allow states to continue to plan for and establish an exchange while the state decides if a state or federally run exchange is the best route. Level Two grants are available to states that are further along in their implementation process. Level Two grants require that states have legal authority to establish an exchange that meets federal standards, a governance structure, a plan for financial sustainability after 2014, and a plan for consumer assistance capacity.

If Texas leaders choose to postpone 2011 legislative action on a Texas exchange but want to retain the option of a Texas-based exchange, Texas must, at a minimum, apply for and utilize Level One federal exchange establishment grant funding. Since Level One grants provide up to a year of funding and can be renewed once, it appears as if Texas could receive this funding to complete all of the necessary groundwork in 2011 and 2012, even without legal authority to establish an exchange. This funding would allow Texas state agencies to do the extensive background work and preparation needed in 2011 and 2012 to demonstrate that Texas could be ready to open a state-run exchange on January 1, 2014. Without this funding, Texas would be unable to fund the essential groundwork, resulting in a federal exchange.

Benefits of a Texas-Based Exchange

Texas could forfeit its ability to establish a state-based exchange in two different ways: either by deciding to defer to the federal government, or by pursuing a state-based exchange that does not meet the minimum federal standards or timelines. We should avoid both of these paths and instead elect to develop a state-based exchange that meets minimum federal requirements and is also designed to ensure maximum responsiveness to Texas interests.

Controlling the planning, implementation, and operation of our exchange at the state level, rather than federal level, has many benefits for Texans—chief among them is an enhanced ability of the exchange to coordinate with other systems run at the state level, including our health insurance market outside of the exchange and our Medicaid/CHIP enrollment system.

Alignment with the Existing Insurance Market

Regulation of health insurance is largely a state responsibility. Texas currently oversees markets for health insurance available directly to individuals (not through an employer) and small businesses. Both individuals and small business will not only be able to buy health insurance in the exchange starting in 2014, but they will also still be able to buy coverage in the existing market that will operate outside of the exchange.

Issues that would be hard to address may crop up if Texas regulates the market *outside* of the exchange while the federal government oversees the market *within* the exchange. Any inconsistencies between rules in federal exchange and a state-regulated outside market could create advantages for one market or the other. This could lead to "adverse selection," where one market attracts a less healthy population causing premiums in that market to rise dramatically.

The potential for adverse selection poses a real threat to the exchange and has caused previous exchanges, including the Texas Insurance Purchasing Alliance (a small business exchange from the 1990s), to fail in the past. Many ACA provisions apply to both markets inside and outside of the exchange, but not all do. To mitigate adverse selection against the exchange, states must create a level playing field by ensuring the same standards for coverage and requirements for marketing certain tiers of coverage apply equally to the exchange and the outside market.[7]

The potential for adverse selection between the exchange and outside market must be addressed regardless of whether the federal or state government runs Texas' exchange. However, it will likely be much easier to establish consistent rules across markets and monitor adverse selection if the state oversees both the exchange and the outside market.

Alignment with the Medicaid/CHIP Enrollment System

The ACA requires a "no wrong door" approach to eligibility and enrollment among Medicaid, CHIP and the sliding-scale coverage in the exchange. Ensuring seamless enrollment of Texans into the proper insurance program will require a high degree of coordination between relevant agencies, aligned eligibility policies, and fully interoperable IT systems. The state runs the existing Medicaid and CHIP enrollment system. A state-based exchange will likely have an easier time accomplishing the high degree of system coordination needed

The Right Choices for a Texas Exchange

The ACA establishes a federal framework for state exchanges, but provides states that elect to establish their own exchange with broad flexibility to design a health insurance marketplace that meets the needs of its citizens. A Texas-run exchange or a federally run exchange in the state should ensure good governance, stable and affordable coverage options, and robust consumer assistance. For more information on the right design choices for a Texas exchange, see www.cppp.org/research.php?aid=1076&cid=3&scid=4.

with the state Medicaid and CHIP enrollment system than will a federally run exchange.

Conclusion

A Texas-designed and run exchange has several advantages. If Texas chooses to set up and run its exchange, the state will have broad flexibility to design a health insurance marketplace that meets the needs of Texans. The only certain path to a state-based exchange starts with passing authorizing legislation—possibly as part of the TDI Sunset bill—this session. But if Texas leaders do not act soon, the federal government is much more likely to end up with the responsibility of designing and running Texas' exchange. The good news for Texas consumers is that whether decisions are ultimately made by the Texas Legislature or the Obama administration, we can look forward to an exchange opening in 2014 that will give Texas families and small businesses more control, high-quality choices, and better protections when buying health insurance.

Endnotes

1 Such progress is already required for states to qualify for "Level Two" exchange establishment grants. The U.S. Department of Health and Human Services has two levels of exchange establishment grants available to states now. Level One provides up to one year of funding (can be renewed once) and is available to states that do not yet meet the criteria for Level Two establishment grants, but are working toward it. Level Two grants, also available now, are for states that are further along in their implementation and provide funding through December 31, 2014. To qualify for Level Two, states must have legal authority to establish an exchange that meets federal standards, a governance structure, a plan for financial sustainability after 2014, and a plan for consumer assistance capacity. U.S Department of Health and Human Services, HealthCare.gov, Health Insurance Exchange Establishment Grants Fact Sheet, www.healthcare.gov/news/factsheets/exchestannc.html.

2 Bills that would establish a state-based Texas exchange include HB 636 (Zerwas), HB 3402 (Coleman), HB 3419 (Darby), SB 1510 (West), SB 1586 (Ogden), and SB 1782 (Ellis).

3 Sarah Kliff, "Lone Star reform hinges on Gov. Rick Perry," *POLITICO*, April 5, 2011, www.politico.com/news/stories/0411/52507.html; and Emily Ramshaw, "Zerwas: Texas Health Insurance Exchange May Be Dead," *Texas Tribune*, March 29, 2011, www.texastribune.org/texas-health-resources/health-reform-and-texas/zerwas-texas-health-insurance-exchange-may-be-dead/.

4 Sarah Kliff, "Lone Star reform hinges on Gov. Rick Perry."

5 Sarah Kliff, "States turn to work-arounds on health insurance exchanges," POLITICO, March 3, 2011, www.politico.com/news/stories/0511/54109.html.

6 U.S. Department of Health and Human Services, "Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges," Funding Opportunity Number: IE-HBE-11-004, January 20, 2011.

7 For more information on steps Texas must take to mitigate adverse selection, see CPPP testimony on CSHB 636 to the Texas House Insurance Committee at www.cppp.org/research.php?aid=1052&cid=3&scid=4.