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OPINION
OF
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Opinion No. 12-07

BY: Mark Reynolds
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TO: The Honorable Gerald Ortiz y Pino
New Mexico State Senator
400 12th Street, NW
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New Mexico State Senator
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QUESTION:

Does the Health Insurance Alliance Act provide the necessary legal authority for the state to establish a health insurance exchange under the federal Patient Protection and Affordable Care Act?

CONCLUSION:

No. The Health Insurance Alliance Act contains provisions that conflict with substantive requirements of the Patient Protection and Affordable Care Act.

BACKGROUND:

In 2010, Congress passed and the President signed the Patient Protection and Affordable Care Act, 111 Pub. L. 148, 124 Stat. 119 ("ACA"). One provision of the ACA is the establishment of health insurance exchanges intended to make the purchase of health insurance easier and more affordable. Exchanges are to begin operating on January 1, 2014 and are designed to be a mechanism for individuals and small businesses to, among other things, compare competing health plans, enroll in an appropriate plan and determine eligibility for tax credits and government health programs.

States have the option of establishing their own health insurance exchanges. A prerequisite for a state exchange is legislation or other enabling authority that allows for the operation of an exchange that is compliant with the ACA and implementing regulations. In 2011, the New Mexico Legislature passed Senate Bill 38/370, which created a state exchange in accordance with the ACA. The legislation was vetoed by the Governor. On or about December 14, 2012, the New Mexico Human Services Department, Office of Health Care Reform formally informed the U.S. Department of Health and Human Services that the Health Insurance Alliance will function as New Mexico's health insurance exchange. The Health Insurance Alliance was established by the Health Insurance Alliance Act passed by the state legislature in 1994. This has raised questions concerning whether the Health Insurance Alliance Act contains the necessary legal authority for the state to establish an exchange under the ACA.

ANALYSIS:

The New Mexico Health Insurance Alliance Act ("HIA Act"), NMSA 1978, ch. 59A, art. 56 (1994, as amended through 2010), does not comport with the ACA for the reasons discussed below. The discussion herein is not intended to be an exhaustive listing of the potential problems of using the Health Insurance Alliance ("HIA") as an ACA health insurance exchange. It is intended to illustrate clear instances of conflict sufficient to support the conclusion that the HIA Act does not contain the necessary legal authority for a state exchange under the ACA.

1. Individual eligibility. To be eligible for individual coverage through the HIA, a person must have, among other requirements: (1) 18 months aggregate of prior "creditable coverage;" (2) not experienced a break in insurance coverage longer than 63 days prior to enrollment in the HIA insurance plan; and (3) exercised and exhausted any applicable COBRA coverage. NMSA 1978, § 59A-56-3(J). None of these restrictions are eligibility requirements for individual insurance coverage under the ACA. See ACA § 1312(f)(1)(A).

The HIA Act therefore contains restrictions on individual eligibility for insurance coverage that are contrary to and conflict with the ACA.

2. Employer eligibility. Under the HIA Act, a small employer is not eligible for health insurance through the HIA if: (1) less than 50% of its otherwise uninsured employees elect to be covered under the approved health plan; (2) the small employer has terminated coverage with an approved health plan within three years; or (3) the small employer offers certain other general group health insurance coverage to its employees. NMSA 1978, § 59A-56-14(A). None of these restrictions are eligibility requirements for small employer insurance coverage under the ACA. See ACA, § 1312(f)(2)(A). The HIA Act therefore contains restrictions on small employer eligibility for insurance coverage that conflict with the ACA.

3. Guaranteed issue. Section 59A-56-14(K)(2) of the HIA Act renders individuals ineligible for coverage if they have "voluntarily terminated health insurance issued through the alliance within the past twelve months unless it was due to a change in employment." The only limitation on guaranteed issue and renewability of coverage in the ACA is that an insurance issuer may restrict enrollment to specified enrollment periods. ACA, § 1201. Therefore, Section 59A-56-14(K)(2) conflicts with the guaranteed issue provision of the ACA because the HIA is not authorized to issue insurance to certain individuals who are eligible for insurance under the ACA.

4. Preexisting conditions. The HIA Act allows insurance issuers, in limited cases, to deny coverage for small employers based on their employees' preexisting health conditions. See NMSA 1978, § 59A-56-14(E),(M). Under Section 1201 of the ACA, insurance issuers are, beginning in 2014, prohibited from making *any* denial of coverage because of a preexisting condition. Beginning in 2014, Section 59A-56-14(E),(M) will be in conflict with the ACA's prohibition on preexisting condition denials.

5. Reinsurance. Both the HIA Act and the ACA contain reinsurance programs to help compensate insurance issuers for the high cost of certain types of plan enrollees. The reinsurance program under the HIA Act is paid for by an assessment made by the HIA on premiums received from plans issued through the HIA. The program applies to both employer and individual plans. NMSA 1978, § 59A-56-9. Under the ACA, the reinsurance program covers plans issued to individuals only and is paid for, until 2016, by assessments on the entire insurance market, including third party administrators, on a per capita basis. See ACA, § 1341, 45 C.F.R. § 153.220. The reinsurance program set forth in NMSA 1978, § 59A-56-9 therefore appears to conflict with the reinsurance program implemented by the federal government under the ACA.

6. Composition of the HIA Board. Under the federal regulations implementing the ACA, a majority of exchange's governing board members cannot be insurance carriers, brokers or agents. See 42 C.F.R. § 155.110(c)(3)(ii) (2011). Under Section 59A-56-4(D) of the HIA Act, the HIA board consists of:

> (1) five directors, elected by the members, who shall be officers or employees of members and shall consist of two representatives of health maintenance organizations and three representatives of other types of members;
>
> (2) five directors, appointed by the governor, who shall be officers, general partners or proprietors of small employers, one director of which shall represent nonprofit corporations;
>
> (3) four directors, appointed by the governor, who shall be employees of small employers; and
>
> (4) the superintendent or the superintendent's designee, who shall be a nonvoting member, except when the superintendent's vote is necessary to break a tie.

"Members" of the HIA are "[a]ll insurance companies authorized to transact health insurance business in this state, nonprofit health care plans, health maintenance organizations and self-insurers not subject to federal preemption...." NMSA 1978, §§ 59A-56-3(T), 59A-56-4.

The HIA Act establishes a governing board that contains a combination of insurance companies, small employers and employees of small employers but it does not contain a prohibition on majority control by insurance carriers, brokers or agents. Majority control by the insurance industry can occur if the board experiences vacancies that render the "member" positions in the majority. Even if there are no vacancies, a violation of the federal regulation can occur if three of the small employer or employee appointees are also insurance carriers, brokers or agents. While it is possible to avoid this defect through careful appointment of directors, the fact remains that, under the HIA Act, the HIA board is allowed to operate even if it has a majority that is disallowed under the ACA. We therefore believe that the failure to prohibit majority board control by the insurance industry violates federal law.

Because state legislation prohibits the HIA from offering health insurance coverage to certain individuals and small employers who are eligible for participation in the exchange under federal law and because of the other conflicts discussed above, the HIA does not qualify and cannot legally act as a health insurance exchange under the ACA. We therefore believe the HIA Act does not contain the necessary legal authority to establish a New Mexico exchange that comports with federal law. A common sense reading of the HIA Act, and all of the conflicts and inconsistencies between the HIA Act and the ACA, make it clear that the legislature did not intend the HIA, in its current form, to be the type of health insurance exchange contemplated under the ACA.

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