



The Health Care Blog

Preparing for the Exchanges

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What is the biggest waste of effort in American health care today?

I'd suggest it is the hustle and bustle to establish PPACA's Health Benefits Exchanges. The health insurers' trade association, AHIP, has an entire educational series on "[preparing for exchanges](#)." The likelihood of exchanges being up and running by January 2014 is vanishingly close to zero. Indeed, they may not exist at all except in very few states – whether or not President Obama wins re-election.

Last January, I wrote in [The Health Care Blog](#) that states should not collaborate with the federal government in establishing exchanges. Almost all states have taken this course. Recent days have brought forward new evidence that exchanges are facing even bigger problems than previously understood. *The New York Times* reports that Republican state senators are blocking a bill that would allow the state to establish an exchange and claim federal handouts to get it up and running. (A few weeks previously, Kansas governor Brownback actually sent a \$31.5 million federal PPACA grant back to D.C.).

If they can't get a PPACA exchange up and running in New York, of all places, where the heck will they? Only [13 states have passed pro-exchange legislation](#) (and some of these bills don't do much more than establish study groups).

Republican state politicians are clearly hardening their stance against exchanges. It appears that they are no longer fooled by the argument that if they do not collaborate to establish state-based exchanges, the federal government will enter their state and do it for them. Recent close reading of the law has debunked this notion. As written, the Patient Protection and Affordable Care Act (PPACA) has (at least) two clauses that will prevent this from happening – even if the Obama Administration had the operational capacity to establish federal exchanges (which it does not. That's why it desperately pitched "[Partnership Options](#)" to states the other day.)

First, courtesy of *Investors' Business Daily's* [David Hogberg](#) and the [Cato Institute's Michael Cannon](#), we learn that federal exchanges will not be able to funnel the gusher of refundable tax credits to individuals who enroll in them. The gist of the argument is that

the law only allows state-established exchanges to funnel the tax credits. If a state fails to establish an exchange, and the federal government steps in, that exchange is not eligible for the tax credits. Neither Hogberg nor Cannon cite it, but it appears that they are referring to section 1401 of PPACA (on page 110 [of this version](#)), which clearly refers to section 1311 (state-based exchanges) as eligible for the tax credits, and does not mention section 1321 (federal exchanges).

Please read the section yourself. I hate to play barrack-room lawyer, but I'm 80% to 90% sure that Hogberg and Cannon are right. Writing in [The Health Care Blog](#), Professor Timothy Stoltzfus Jost makes an argument that no court would accept this interpretation – even though it's what the law states! (The reconciliation act, which Professor Jost cites, does not amend this constraint. It merely demands that federal exchanges report any tax credits, not provide them.) As for “standing,” [Hogberg notes](#) that any business (in a state with a federal exchange) which is fined for not providing health benefits, should have strong claim to standing.

Maybe it is ridiculous to think that a court would actually adjudicate what the law states, rather than what its proponents wish it to state. But courts do interesting things. When I first heard that some attorneys general were planning to challenge PPACA's constitutionality, I thought they were in fantasyland. Today, the law hangs by a judicial threat, and will eventually be adjudicated by the U.S. Supreme Court.

Second, as I noted in a [recent article](#), states can also stop federal exchanges by threatening to pull the licenses of health insurers which intend to participate in them (p. 58 of [this version](#)). The law defines a “qualified health plan” as one that is “licensed and in good standing in each State...”, and only qualified health plans can participate in exchanges.

So, federal exchanges have a double whammy against them. States have learned not to fear that the federal government will step in and operate exchanges for them. Health IT vendors and other businesses that are investing in winning business from exchanges would be well advised to cut their losses, and reinvest in more fruitful business development.