RHODE ISLAND CENTER FOR FREEDOM & PROSPERITY

POLICY RECOMMENDATION

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Health Care Freedom Act Should Replace Health Insurance Exchanges

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Introduction

In 2010, Congress passed and President Obama signed the Patient Protection and Affordable Care Act (PPACA) amid great controversy. Passage of the bill did not resolve the dispute, and the law has been the source of a great deal of uncertainty for state governments around the country.

Due in part to the great volatility surrounding the federal law and the unknown costs and regulations that will accompany its implementation, the Rhode Island General Assembly was wise not to establish an exchange in 2011, but Governor Lincoln Chafee trumped that decision via executive order later that year, establishing an exchange in September without legislative consent.

In March, the federal health care law reached its two-year anniversary and was closely scrutinized by the U.S. Supreme Court. The court has now determined that PPACA *is* constitutional in all of its provisions. However, resolution of that matter alleviates only one source of instability surrounding the law:

- There is a substantial likelihood that PPACA opponents in Washington, D.C., will be able to stymie implementation and funding of the law or even repeal it, depending on who ends up controlling the U.S. House of Representatives, the U.S. Senate, and/or the White House after the 2012 elections.

- The recent controversy regarding the power of the federal government to mandate provisions that may infringe on the religious rights of Catholic institutions, combined with consistent majorities of Americans who favor repeal,[1] strongly indicate that if the law is not repealed, there will be substantial revisions and changes to it at a minimum, and other undesirable mandates may also be forced upon states that have constructed PPACA Health Insurance Exchanges.

- Multiple provisions of the law, notably services defined as "essential," are left to the whims of the U.S. Secretary of Health and Human Services and will be readily adjusted by future administrations.

- With the Supreme Court's recent decision, a movement will surely begin to pass an amendment to the Constitution of the United States making all or part of the law a violation of the founding document.

When it returns to the State House, Rhode Island's General Assembly has the option of allowing Governor Chafee's order to stand or reversing it and pursuing alternate health insurance reforms that will expand coverage, help rein in premium increases, promote competition, and increase choice for residents of the Ocean State, while avoiding or at least mitigating the uncertainty and likely public discord associated with implementation of PPACA.

This policy brief reviews relevant research relating to health care reform and, specifically, exchanges and recommends that the General Assembly reclaim from the governor its authority concerning health insurance regulation.

Policy Recommendation:

Enact a *Health Care Freedom Act* for RI Citizens

The only way to effectively decrease health care and health insurance costs is to free up market forces so as to reduce prices via increased competition and more choices for consumers. Once the mechanisms are in place to realize more affordable options, our state can decide if it makes sense to subsidize the purchase of health insurance for the most needy citizens. Conversely, it makes little sense for taxpayers to pay for health insurance for others within a system that serves to drive up the cost of that very same insurance.

While there are many policy reforms to consider, the recommendations in a *Health Care Freedom Act* will put the Ocean State's health insurance sector back on a path that produces higher levels of competition, provides more choices for consumers, and shields Rhode Island from current and future federal mandates.

1. Repeal the governor's executive order creating PPACA Health Insurance Exchanges.
2. Apply for a State Innovation Waiver to free RI from certain provisions of PPACA, including exchanges.
3. Enact a *Health Care Freedom Act* that would:
   a. Open up competition by allowing interstate sales to permit Rhode Islanders to purchase health insurance plans from approved providers in other states.
   b. Allow an "opt out" provision from the state's currently burdensome level of health insurance mandates and require insurers to openly display the original mandates not included.
4. Pass an amendment to the state constitution to prohibit the federal government from ever requiring Rhode Island residents to buy health insurance.
5. Pass a resolution calling for amendment of the federal Constitution to invalidate PPACA.

Background

The modern health insurance regulatory regime can be traced to the McCarran-Ferguson Act of 1945, landmark congressional legislation that provided that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[2] The act vested the states with broad authority to regulate insurance within their borders.

Each state has different regulations and requirements for health insurance, and residents of each state are generally limited to those companies operating within their reach. In Rhode Island, only three insurers offer policies, with Blue Cross/Blue Shield and United Health Care dominating the market through a 95% combined share.[3]

Rhode Island residents, therefore, are only able to purchase Rhode Island–approved insurance plans from three Rhode Island–approved insurers, even if plans in other states better suit their needs.

While a plan in Massachusetts, New Hampshire, or Pennsylvania might suit a resident better, he or she is prohibited from purchasing it. This has a number of predictable effects on cost: Administrative redundancies from state to state increase overhead;[4] having fewer competitors in the market increases prices; and states that impose excessive regulation through mandated benefits or other requirements further drive up costs.

Rhode Island, which has limited competition and more mandated benefits than any other state in the nation (at 69[5]) is not surprisingly the fifth-most-expensive state in the country in which to be insured, with family premiums averaging $14,812 a year.[6]

Also as expected, high health care premiums have the effect of pricing some people out of the market, particularly those who work at lower-wage or part-time jobs. The Patient Protection and Affordable Care Act seeks to increase coverage through the development of a series of "state exchanges," which would provide coverage opportunities to residents who either do not have access to or cannot afford health insurance (while being ineligible for Medicaid).

In our Center's recently released "Report Card on RI Competitiveness," the Ocean State graded an "F" in the master category of Health Care, an "F" for having the most health care mandates of any state in the nation, and an "F" (ranking last in New England) in the subcategories of Employer Health Insurance Rates and Medicaid Payments per Enrollee.[7] Implementation of PPACA Health Insurance Exchanges will only serve to worsen the state's already dismal standing.

Health care exchanges are not a new idea. The conservative Heritage Foundation has advocated for their adoption in the past, although in a far different

form than those mandated by PPACA. A recent Heritage Foundation report advocates exchanges that serve "as a common mechanism for administering the transactions entailed in buyers and sellers offering and choosing coverage and paying and collecting premiums — much like a stock exchange."[8]

This is not how the PPACA exchanges will work, however.

Instead, they will "impose new regulations, administer new subsidies, standardize coverage, and restrict consumer choice and (weaken) insurer competition more than is already the case."[9]

As states create and maintain new organizational structures, exchanges could also contribute to higher costs, which will inevitably be passed along to participating insurers and ultimately to policy holders via higher premiums.

Are There Better Solutions?

Rhode Island's General Assembly faces two alternatives: to go along with the governor's executive order and allow a PPACA exchange to be created, or to seek alternate solutions to Rhode Island's health care issues that do not depend on federal legislation potentially in considerable flux and uncertainty for years to come and facing considerable risk of being repealed or defunded.

In addition to the uncertainty around PPACA, there is a substantial likelihood that the exchanges will not work as intended or provide real benefits to Rhode Island's citizens. The following are among the shortcomings of adopting exchanges of this model:

- The exchange can only offer federally qualified plans, which are almost certain to add required benefits to those Rhode Island already has, driving premiums even higher. The recent controversy over contraception, sterilization, and abortifacent coverage by religious institutions is one example of the mandates that will drive up premiums.
- Individuals who cannot afford these higher premiums will be driven into Medicaid. And while the federal government *plans* to reimburse the states in the early years, eventually whatever federal aid is provided will run dry, and the state will be on its own to fund these new and massively higher Medicaid costs.
- The exchange does nothing to bring new entrants into to the health insurance market, making it likely that Blue Cross/Blue Shield, United Health Care, and Tufts will remain the only options.
- Requiring that plans compete largely on price with standardized plan designs, not on innovative plan designs, discourages new entrants to the market because it limits the number of ways they might compete with incumbent insurers.
- Such exchanges in theory may benefit consumers, and thereby justify the substantial tax dollars invested in them, if they allow consumers to compare prices and benefits between several policies from several different insurers. However, in reality, with only three insurers offering substantially identical plans, there is little benefit to such a mechanism in the Ocean State.
- These exchanges are likely to draw individuals with higher-than-average medical costs, while many with lower-than-average medical costs will not purchase insurance until they become ill.[10] This will drive premiums in an exchange up over time, leading to coverage's becoming more unaffordable.[11]
- While the exchange would ostensibly be created and run by Rhode Island, in essence it would largely be run out of Washington, D.C., which is vested with enormous power to decide which policies, insurers, benefits, and providers are allowed to be part of it.

Embracing exchanges is likely to result in reduced consumer choice, reduced competition, higher premiums, suppressed innovation in health plan design, loss of state sovereignty, and substantial uncertainty as PPACA faces legal, political, and public challenges.

Free-Enterprise Alternatives

The alternative would be to adopt real state-based reforms that substantially increase competition and consumer choice, which in turn can lead to reduced premiums and increased coverage — results all of Rhode Island's citizens would value. Furthermore, because PPACA requires the federal government to establish exchanges covering states that don't establish their own, whatever marginal benefits may be gained through the exchanges will not be lost to Rhode Island.

Free markets are exchanges in and of themselves!

There are a large number of market-based and patient-centered policy reforms that states might pursue to drive down costs, increase access, increase the quality of care, reduce bureaucracy, and increase the supply of medical providers. Such policies include establishing high-risk insurance pools or reinsurance programs, expanding the scope of allowable duties for nurse practitioners, providing tax breaks for individuals (not just employers) who purchase insurance, providing pricing transparency and incentives for choosing lower-cost care options, and implementing meaningful medical malpractice reform.

Another approach to reform could combine health savings accounts (HSAs) with high-deductible plans to encourage all Rhode Islanders to participate in the health insurance market without requiring that they do so under penalty of law. In brief, everybody could purchase plans designed to cover emergencies and catastrophes, using money from tax-free HSAs to pay premiums, deductibles, and regular expenses. Owners could contribute to their own accounts, and others — whether employers, charitable organizations, or even the government, for those in serious need — could pay into them, as well.

Rhode Island has already been recognized as a leader in one area of health care, with its Global Medicaid Waiver and related reforms, which have saved upwards of $55 million in fewer than three years of partial implementation.[12] In fact, the Lewin Group report assessing the waiver cited PPACA as a factor *limiting* the savings of the reform.

Each of the above options would require further research and analysis before judging whether or not it is a viable option for the Ocean State. However, the Rhode Island Center for Freedom and Prosperity does recommend that the General Assembly consider three policy options:

1) Allowing citizens to purchase health insurance plans approved in other states
2) Changing the way it mandates benefits in health care policies
3) Constitutionally protecting its citizens from future federal mandates and encroachment

Interstate Sales: Allowing Rhode Islanders to purchase insurance policies that have been approved for sale by regulators in other states would increase competition and give consumers new choices. Next-door Connecticut, for example, has 17 health insurers in the small-group market and 7 providers in the individual market,[13] while Massachusetts residents can choose from 11 insurers that cover both the small group and individual markets.[14] Compare this to Rhode Island's 3 insurers, only 1 of which offers individual plans.[15]

Some minimal additional regulation of out-of-state insurers may be appropriate, particularly network adequacy requirements for plans that include network benefits. Beyond that and the "recommended policy" requirement described below, however, additional regulation should be sparing, if not nonexistent.
By permitting residents to purchase insurance plans from out of state that might better suit their needs, Rhode Island would be joining two other states that have made this move, Maine and Georgia. Both states passed legislation in 2011 to allow interstate insurance purchases, and although it's too early to see any results (Maine's legislation does not go into full effect until 2014, and Georgia only finalized regulations in late 2011), the reductions in the number of uninsured and premium savings could be substantial.

Research by Professor Steve Perente of the University of Minnesota, where he serves as Director of the Medical Industry Leadership Institute, found that the number of uninsured could be cut by more than 8 million people nationally if interstate sales were allowed.[16] And Ed Haislmaier, Senior Research Fellow in Health Policy Studies at the Heritage Foundation, estimates that premiums in high-mandate states like Rhode Island would decline by up to 15 percent.[17]

Mandate Opt Out and Transparency: Interstate purchasing alone will not lead to significantly lower premiums, although increased competition does normally lower prices for consumers. But changing the model Rhode Island uses to dictate which health care services will be included in health insurance policies is likely to result in noticeable premium reductions. As noted earlier, Rhode Island leads the country with 69 mandated benefits relating to health services, providers, and covered persons. The premium increase for such mandates can be considerable. As the Council for Affordable Health Insurance (CAHI) notes in a recent report, "Although most mandates only increase the cost of a policy by less than 1%, 40 such mandates will price many people out of the market."[18]

CAHI also finds that, depending on the mix of mandates and the way they are implemented, mandated benefits can increase insurance premiums by as little as 10 percent or by more than 50 percent.[19]

These mandates force citizens to purchase health insurance with benefits that they do not want. For example, an infertile couple gains little benefit from mandated contraception coverage, which adds approximately 1–3 percent to premiums in Rhode Island.[20] Likewise, a family with several children and no interest in adding more is unlikely to find value in Rhode Island's mandatory *in vitro* coverage, which can add between 3 and 5 percent to the cost of premiums.[21]

As an alternative to mandating that specific benefits be part of all health insurance policies, Rhode Island could require all insurers to offer a "recommended policy" that includes all of the mandates currently in place plus any other features the General Assembly believes appropriate. Insurers would be free, however, also to offer policies that do not include these mandates, with the proviso that consumers are notified in writing when a policy does not include all of the benefits the General Assembly believes are appropriate, listing all recommended benefits that are not part of the policy.

In order to work with out-of-state insurers that may not want to deal with designing and marketing "recommended policies" on top of their existing plan offerings, the state might instead require them to provide information on and referrals to in-state insurers that meet the "recommended policy" requirements.

This would give insurers substantial flexibility in offering low-cost policies that meet the needs of consumers, while also ensuring that buyers are fully aware that their policies may not cover, for example, lay midwives or well child care benefits that are likely important to some but unnecessary for others.

Constitutional Amendments: In reasserting Rhode Island's rights as a state and to protect itself from future power grabs, an amendment to the state constitution would prohibit the federal government from requiring state residents to buy health insurance. The measure should also prevent the federal government from imposing fines or penalties against people who don't buy insurance — up to 2.5 percent of household income per the current PPACA law.

Last November, the people of Ohio voted 66% to 34% to create such an amendment in their state. Although some scholars question the legal weight that the amendment would have against a determined federal government, it at the very least creates grounds for future challenges against federal laws that residents of the state believe are not in their own best interests.

The state should also actively advocate for an amendment to the Constitution of the United States reversing the Supreme Court's decision on PPACA.

As one of 50 independent and unique states in America, with regard to this very important issue, Rhode Island should have the freedom to devise and take care of its own problems as it determines best and should not be subject to one-size-fits-all mandates handed down from Washington, D.C.

Conclusion & Recommendations

Rhode Island faces an important decision: whether or not to continue down the path of creating an exchange as described by the Patient Protection and Affordable Care Act. Beyond that, Rhode Island must decide whether to rely on the promises of the legislation's supporters that such policies serve to correct the problems American citizens face in finding affordable health insurance.

Because the fate and success or failure of PPACA will remain uncertain for years to come, and will be mired in legal, political, and public controversy for the foreseeable future, the Rhode Island Center for Prosperity and Freedom recommends the following:

- That Rhode Island seek a State Innovation Waiver to not create an American Health Benefits exchange and instead pursue policies that more quickly and certainly benefit the public
- That Rhode Island allow the interstate purchase of health insurance policies in order to increase competition and choice
- That Rhode Island require insurers to offer "recommended policies" that include all the mandates currently required of health insurance policies, while allowing them also to offer policies with less-comprehensive coverage so long as they inform consumers about the differences
- That Rhode Island constitutionally protect its residents from individual mandates forcefully imposed on residents by the federal government

These four steps alone will not resolve all or even many of the problems that Ocean State residents have in finding affordable health insurance, but they would represent a significant step in the right direction — the free-market direction.

[1] "53% Favor Repeal of Health Care Law, 50% Say It's Likely" February 20, 2012, Rasmussen Reports http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law

[2] See: http://legal-dictionary.thefreedictionary.com/McCarran-Ferguson+Act+of+1945

[3] "Health Care Competition: Insurance Market Domination Leads to Fewer Choices," Ben Furnas and Rebecca Buckwalter-Poza, June 2009, Center for American Progress http://www.americanprogress.org/issues/2009/06/pdf/health_competitiveness.pdf

[4] [2] Healthcare insurers in Rhode Island is a legally distinct entity from United Healthcare in Massachussetts, and so on.

[5] "Health Insurance Mandates in the States 2010 Executive Summary," p. 5, Victoria Craig Bunce and JP Wieske, Council on Affordable Health Insurance, October 2010 http://www.cahi.org/cahi_contents/resources/pdf/MandatesintheStates2010ExecSummary.pdf

[6] C. Schoen, A.-K. Fryer, S. R. Collins, and D. C. Radley, State Trends in Premiums and Deductibles, 2003–2010: The Need for Action to Address Rising Costs, p. 17, The Commonwealth Fund, November 2011 http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Nov/State%20Trends/1561_Schoen_state_trends_premiums_deductibles_2003_2010.pdf

[7] See: http://www.rifreedom.org/2012/02/rhody-fails-report-card/

[8] "A State Lawmaker's Guide to Health Insurance Exchanges" *Edmund F. Haislmaier*, p. 3, The Heritage Foundation, March 2011 http://thf_media.s3.amazonaws.com/2011/pdf/bg2534.pdf

[9] Ibid. Parenthesis ours.

[10] The Centers for Medicare & Medicaid Services estimate that 18 million Americans will choose not to purchase insurance, most of whom "would be individuals with relatively low health care expenses for whom the individual or family insurance premium would be significantly in excess of any penalty and their anticipated health benefit value." "Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended," p. 8, Richard Foster, Chief Actuary, Centers for Medicare & Medicaid Services, April 2010 http://s3.amazonaws.com/thf_media/2010/pdf/OACT-Memo-FinImpactofPPACA-Enacted.pdf

[11] See *Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States* by Conrad Meier, 2005. Published by the Council for Affordable Health Insurance and The Heartland Institute http://www.cahi.org/cahi_contents/resources/pdf/destroyinginsmrkts05.pdf

[12] "Medicaid Waiver Reform Saved Tens of Millions, Although ObamaCare/ARRA Curtailed Savings," Justin Katz, May 2012, *Ocean State Current,* http://oceanstatecurrent.com/investigative-report/medicaid-waiver-reform-saved-tens-of-millions-although-obamacarearra-curtailed-savings/

[13] See Connecticut Insurance Department: Companies with Approved Small Employer Health Insurance Policies http://www.ct.gov/cid/cwp/view.asp?q=254446 and Companies with Approved Individual Health Insurance Policies http://www.ct.gov/cid/cwp/view.asp?a=1267&q=254440

[14] See Massachusetts Office of Consumer Affairs & Business Regulation, Health Plans for Eligible Individuals and Small Groups http://www.mass.gov/ocabr/consumer/insurance/health-insurance/health-care-access-bureau/health-plans-for-eligible-individuals-and.html

[15] See the Web site of the RI Office of the Health Insurance Commissioner: http://www.ohic.ri.gov/Consumer_Assistance_DirectPay.php

[16] Steve Parente, PhD, Testimony to the U.S. House of Representatives Committee on Energy & Commerce, Subcommittee on Health, Wednesday, May 25th 2011 http://republicans.energycommerce.house.gov/Media/file/Hearings/Health/052511/Parente.pdf

[17] Doug Trapp, "House revives bill to allow interstate health insurance sales," June 6 2011, American Medical News http://www.ama-assn.org/amednews/2011/06/06/gvsb0606.htm

[18] "Health Insurance Mandates in the States 2010" p. 4, Victoria Craig Bunce and JP Wieske, Council on Affordable Health Insurance, October 2010

[19] "CAHI Releases Health Insurance Mandates in the States, 2010," October 20 2010, http://www.cahi.org/article.asp?id=1023

[20] ibid p. 27

[21] ibid p. 28