NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

HEALTH CARE REFORM REVIEW COMMITTEE

Friday, August 5, 2011
Room 126, Richard H. Barry Hall
North Dakota State University Downtown Campus
Fargo, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives George J. Keiser, Donald L. Clark, Robert Frantsvog, Eliot Glassheim, Nancy Johnson, Lee Kaldor, Jim Kasper, Gary Kreidt, Lisa Meier, Ralph Metcalf, Marvin E. Nelson, Karen M. Rohr, Lonny B. Winrich; Senators Spencer D. Berry, Dick Dever, Jerry Klein, Judy Lee, Tim Mathern

Member absent: Representative Robin Weisz

Others present: See Appendix A

It was moved by Senator Mathern, seconded by Representative Kasper, and carried on a voice vote that the minutes of the July 7, 2011, meeting be approved as distributed.

Chairman Keiser welcomed committee members and thanked the Fargo Moorhead West Fargo Chamber of Commerce for helping arrange the meeting site along with Senator Tim Flakoll. He said as the committee moves forward with designing a proposed health benefit exchange, the committee will need to consider a variety of issues, including how the state-administered exchange will be governed and funded and how the exchange will address risk pools, the sale of insurance inside the exchange versus outside the exchange, and whether to allow unlimited products within each metallic level.

Chairman Keiser also questioned how the recent resignation of Mr. Joel Ario, Director of the United States Department of Health and Human Services (HHS) Office of Health Insurance Exchanges, may impact the states as they work on designing health benefit exchanges. He said Mr. Ario had been the official overseeing federal implementation of the health benefit exchange and had been the contact person for states.

Chairman Keiser reviewed how the federal government will be making state health benefit exchange certification decisions. Additionally, he said, the information he has received indicates that if a state chooses to administer its own health benefit exchange and then changes and has the federal government administer the state's exchange or vice versa, there may be implications of which the state should be aware.

Chairman Keiser said he met with the Attorney General and Insurance Commissioner to discuss the implications of choosing different government structures for administration of a health benefit exchange. He said as the committee moves forward, the committee will want to receive additional information on this matter.

DEPARTMENT OF INSURANCE

Chairman Keiser called on Mr. Adam Hamm, Insurance Commissioner, to provide an update of the status of state implementation of the health benefit exchange provisions of the Affordable Care Act (ACA), including the status of the department's medical loss ratio adjustment application; an update of the status of federal HHS guidelines regarding the ACA; a summary of the governance and administration limitations and prohibitions relating to the ACA health benefit exchange; a summary of the ACA health benefit exchange self-sustaining funding requirements and any limitations and an update of how other states are considering funding the exchanges to be self-sustaining; a review of the Insurance Department's request for proposal for a North Dakota health benefit exchange consultant; and a summary regarding the laws and issues relating to a single versus two risk pools for the health benefit exchange, the sale of health policies outside the health benefit exchange, and the four benefit levels required to be offered through the health benefit exchange.

Mr. Hamm provided written material (Appendix B). Additionally, Mr. Hamm discussed a recent *Politico* article (Appendix C) addressing concerns regarding insurance industry participation in state-administered health benefit exchanges.

Mr. Hamm discussed how he recently received an HHS denial of his request for a medical loss ratio adjustment. He explained the application for the adjustment is available on the Insurance Department website and the application lays out the due diligence his department performed in preparing the adjustment application. A copy of the application is available at *www.nd.gov/ndins/uploads/resources/654/mlradjrequest3.18.11.pdf*. He explained the March 18, 2011, application requested a transitional approach that would allow a three-year period within which the insurers would be required to meet the federal medical risk loss requirement of 80 percent. On July 22, 2011, North Dakota became the first state for which HHS denied an adjustment request.

Mr. Hamm said the HHS denial of the medical loss ratio adjustment request was based on a finding by HHS that the state did not prove health insurance issuers would leave the market if the adjustment is not granted. He said at the end of the day, if no issuers leave the state, there has been no harm to the denial; however, if the state experiences a loss of health insurers, this would be in direct conflict with the Obama Administration's position that the ACA will allow a North Dakotan to continue with the North Dakotan's health insurance provider if happy with that provider.

In response to a question from Senator Klein, Mr. Hamm said one reason he requested the medical loss ratio adjustment was to keep the insurance agent community strong and healthy. He stated there has been an attempt in Congress to pass legislation that would help shield insurance agents from ACA regulations but given the current makeup of Congress, this legislation is not likely to pass.

In response to a question from Representative Frantsvog, Mr. Hamm said although the insurance agents would be in the best position to discuss whether the medical loss ratio adjustment request will impact them, he has some deep concerns because he realizes the insurance industry relies on the services provided by agents. Additionally, he said, he does not see any value in appealing the HHS denial because he would need to provide additional information for HHS to consider and he does not have any new or additional information to submit.

In response to a question from Senator Mathern, Mr. Hamm said there is no way to know right now whether any health insurance contracts will be impacted by the denial of the medical loss ratio adjustment, but if it does turn out that one or more insureds leave the state, this loss will certainly impact agents and policyholders.

Mr. Hamm said as Insurance Commissioner, it is not his concern why a consumer may want coverage from an insurer with a 55 percent medical loss ratio. He said there are innumerable factors policyholders may consider in choosing a policy.

In response to a question from Senator Lee, Mr. Hamm said the Legislative Assembly has amended the medical loss ratio law over the last few legislative sessions. He said in 2007 the ratio was decreased from 65 percent to 55 percent for the individual market. He said the intent of lowering the ratio was to attract more insurers to the state.

Senator Lee said it seems misleading for the federal government to say the ACA will allow consumers to keep their policies.

In response to a question from Representative Kasper, Mr. Hamm said there is an anticipated lag between the pricing of a product to get to the required minimum 80 percent medical loss ratio and the product actually reaching that ratio.

In response to a question from Senator Berry, Mr. Hamm said the ACA timeline for required implementation of the health benefit exchange has moved a bit since he testified during the 2011 legislative session. He said the January 1, 2013, deadline for approval of a state exchange has now moved to a "conditional approval." He said there is no question it will be difficult for states to "turn the lights on" by the January 1, 2014, deadline for implementation of the health benefit exchanges.

In response to a question from Representative Winrich, Mr. Hamm said he does not have a crystal ball and he does not know whether the denial of the medical loss ratio adjustment will result in any insurers leaving the state. He said the insurers will need to make business decisions based on the insurers' needs. He said that although right now the medical loss ratios vary from state to state, by 2014 all states will require a minimum medical loss ratio of 80 percent. However, he said, he thinks the state's lowering of the medical loss ratio has been successful in bringing six new health insurance products to the state over the last two years.

Mr. Hamm reviewed portions of the HHS regulation published July 15, 2011. He said of particular interest is the regulation that now allows states to take over administration of an exchange that was initially administered by the federal government. He said this change is a bombshell because initially the decision of whether to have the federal government administer the exchange was a one-time decision.

A representative of Sanford Health distributed a summary of the new HHS regulations (Appendix D).

In response to a question from Representative Kasper, Mr. Hamm said if the state's health benefit exchange is federally administered, the ACA will require that there be coordination and seamless integration of the private market and Medicaid.

Senator Lee said each state sets its own Medicaid eligibility requirements. She said North Dakota's eligibility requirements are less generous than many other states. The issue, she said, will be creation of a single application that applies to Medicaid and the children's health insurance program (CHIP). She said the expected increase in premiums under the ACA is because of the large influx of Medicaid-eligible applicants.

Representative Keiser said according to statements made by Mr. Ario, if the federal government administers the state's health benefit exchange and the state later decides to take over administration, the state will be required to continue the federal benefits established under the federally administered exchange. Additionally, he said, if the federal government administers the state's exchange, the federal government will not be paying for the exchange but will be looking to the state to pay for the exchange.

Mr. Hamm said he understands that if the federal government administers a state's exchange, the federal government will be responsible for funding the exchange, but he expects the funding source will be premiums. However, Representative Keiser said he is unable to think of a single federal program that the

federal government administers for less money than if the state administered the program.

Mr. Hamm said if the federal government administers a state exchange and the exchange is not successful, the state will not want to take control of the exchange; however, if the exchange is successful, the state will have the ability to take over administration following a 12-month transition. He said if the state's health benefit exchange is begun under federal administration, that exchange likely will look different than it would had it begun under state administration.

In response to a question from Senator Lee, Mr. Hamm said that if the exchange is begun under federal administration, the exchange will not usurp his state regulatory authority and rate approval authority.

In response to a question from Senator Berry, Representative Keiser said the ACA is the law of the land. He said we need to assume this law will remain and therefore we need to take the necessary steps now. Senator Berry said he realizes the ACA is the law of the land, but the qualifiers keep changing. Mr. Hamm said he agrees with Representative Keiser that the four corners of the ACA are not going to change, but the goalpost does keep moving and as a result, the state is being forced to play defense.

Mr. Hamm said the exchange implementation requirements are frustrating in that they keep changing, but allowing the federal government to initially build and run the exchange may be an opportunity for the state. He said by allowing the federal government to initially create and administer the state's exchange, the state is allowed to play offense.

In response to a question from Representative Kasper, Mr. Hamm said the testimony he provided during the 2011 legislative session regarding the anticipated cost of building a state-administered exchange was based on estimates. He said he will reevaluate this cost estimate. He said he is participating in regular meetings with the Department of Human Services and the Information Technology Department to address technology issues related to the exchange.

Representative Kasper said it is very difficult for legislators to make health benefit exchange decisions without knowing the cost. Mr. Hamm said he understands the reluctance to move forward without firm numbers, but he thinks for now the legislators need to fly blind and assume some federal funding will be available. He said current information is that federal funding will be available to the states until 2015, at which time the states will be responsible for funding the exchanges. However, he said, the availability of federal funding is constantly changing.

In response to a question from Representative Glassheim, Mr. Hamm said the Insurance Department should not be charged with building or administering the state's health benefit exchange because of inherent conflicts of interest. He said if a state agency is charged with creating and administering the state's exchange, the Insurance Department could serve in an advisory capacity or the Insurance Commissioner could participate as a board member of a board-administered exchange.

Representative Keiser said in designing the exchange, the legislators need to retain the regulatory integrity of the Insurance Commissioner. Additionally, he reported that he has been participating in meetings with Governor Jack Dalrymple and his staff as well as with representatives of the Office of Management and Budget (OMB) and the Information Technology Department. He said he realizes the Governor understands the health benefit exchange issue is a policy issue, but the Governor does not support federal administration unless the federal government actually funds the exchange without passing the costs on to the consumer.

Representative Kreidt said he thinks federal creation and administration of the state's exchange is still an option the committee should consider. He said regardless of whether the exchange is state-administered or federally administered, the consumer will be paying for the cost of the exchange. Additionally, he said, if all 50 states were to have federally administered exchanges, perhaps it would prevent the exchanges from actually being implemented.

Mr. Hamm said if the state's exchange is federally administered and there is a funding shortfall, the federal government will be required to cover the shortfall. Representative Keiser said in this hypothetical if there were a funding shortfall, the federal government likely would recoup the funds in the following year; however, he said, if the state administered the exchange and had a funding shortfall, the shortfall likely would be covered by the state's budget surplus.

Mr. Hamm reviewed the Insurance Department's request for proposal seeking a qualified and experienced firm to conduct background research, analyze data, identify options, and recommend a viable plan for developing and sustaining a health benefit exchange in the state.

In response to a question from Senator Mathern, Mr. Hamm said the proposed contract schedule does not provide for submission of a final report until December 2, 2011, because that is the absolute minimum amount of time required to perform the research. He said there would not be enough time to complete the research before the November special session. He said the timeline does provide for an interim report that is designed to assist with the special session activities. Senator Mathern noted the Insurance Commissioner is in control of the contract, and therefore he is in control of the dates and deadlines set under the contract.

PANEL DISCUSSIONS

Chairman Keiser called on Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, Fargo; Mr. Geoffrey Bartsh, Medica, Minnetonka, Minnesota;

and Ms. Lisa Carlson, Sanford Health, Sioux Falls, South Dakota, to sit on a panel to discuss whether the state's health benefit exchange should be designed to include two separate risk pools--one for individuals and one for small businesses, called a small business health insurance program (SHOP) exchange--or whether the exchange should be designed to combine both the individual and the small business policies into a single risk pool.

Mr. Hamm did not sit on the panel but did comment he recognizes the details of the exchange are policy decisions, but he does advocate for two risk pools and for allowing for as many consumer options as possible.

Mr. St. Aubyn distributed written testimony (Appendix E). Mr. Bartsh provided a summary of his testimony (Appendix F).

Ms. Carlson testified Sanford Health supports initially retaining the two risk pools in order to foster stability. In 2014, she said, there may be no need for a high-risk insurance product like those policies offered through the Comprehensive Health Association of North Dakota (CHAND). As a result, high-risk individuals will be entering the regular market, and the individual risk pool will likely be impacted by high utilizers entering the pool.

Ms. Carlson said the nature of the individual and small group markets are very different from each other. She said by keeping these two markets separate, it will be easier to track the impact of the ACA and perhaps at a later date, it may make sense to join the two risk pools into a single risk pool. However, she said, before the pools are joined, it would be necessary to conduct a comprehensive risk adjustment.

In response to a question from Senator Lee, Ms. Carlson said the self-funded market needs to be addressed separately. She said the nature of the self-funded system is that it is good to be self-funded when things are going well and then when a period of high use is experienced the self-funded system is no longer appealing. She said it may make sense for the exchange to include conditions as to how a self-funded plan may enter the small group market. Mr. Bartsh said Medica supports keeping the definition of a small group from 2 to 50 employees. He said if the definition were amended to allow for 100 employees, there would be an increased risk of self-funded plans entering and exiting the small group pool.

In response to a question from Senator Mathern, Mr. St. Aubyn said a CHAND policyholder is currently paying more premium than a traditional policyholder. Ms. Carlson said many states have considered transitioning the current high-risk pool charge incurred by insurers to a charge to fund the state-administered exchange.

Representative Kaldor said he would like more information regarding the possible impact of the high-risk market entering the individual market. Senator Lee said she will provide committee members with information regarding the CHAND program.

In response to a question from Representative Frantsvog, Ms. Carlson said the nature of the individual market is that the sick are subsidized by the healthy.

In response to a question from Representative Nelson, Mr. St. Aubyn said the ACA has attempted to address plan jumping as medical status changes by implementing a 12-month lock-in period.

In response to a question from Representative Keiser, Mr. St. Aubyn said he is not certain the number of individuals who will be eligible for federal subsidies. He said he expects that within the 15,000 small businesses in the state, there will be some small groups that will transition from a group policy to individual policies.

In response to a question from Representative Keiser, Mr. Bartsh said because existing insurance law provides for two risk pools, he expects if the federal government administered the exchange, the two risk pools would be retained.

Chairman Keiser called on Mr. St. Aubyn, Mr. Bartsh, Ms. Carlson, and Mr. David Middaugh, National Association of Insurance and Financial Advisors-North Dakota, Fargo, to sit on a panel to discuss whether the state should restrict whether health insurers may choose to offer policies outside the state's health benefit exchange.

Mr. St. Aubyn provided written testimony (Appendix G). Mr. Bartsh provided a summary of his testimony (Appendix H).

Ms. Carlson said that once again, to minimize disruption in the market, Sanford Health supports allowing consumers to purchase health insurance policies outside the market.

Mr. Bartsh said it is important to remember that the risk pool for the individual policies from inside the exchange and from outside the exchange is blended as is the risk pool for the small group policies; thereby protecting against adverse selection between inside and outside the exchange.

Ms. Carlson said she expects the policy selection will be fairly limited inside the exchange and there will be more policy flexibility outside the exchange.

Mr. Middaugh said agents are concerned placing restrictions on policies sold outside the exchange would result in North Dakotans having fewer choices.

In response to a question from Representative Rohr, Mr. Bartsh said HHS is still working on guidelines addressing the risk adjustment formula.

In response to a question from Representative Johnson, Ms. Carlson said there are several ACA provisions that do not apply to policies sold outside the exchange. She said it is apples and oranges to compare exchange policies to policies sold outside the exchange. For example, she said, the medical loss ratio limitations do not apply to policies sold outside the exchange, rating differentials do not apply to policies sold outside the exchange, agent commissions may vary from inside to outside,

wellness programs may vary from inside to outside, and network standards may vary from inside to outside.

In response to a question from Representative Kaldor, Ms. Carlson said the medical loss ratio information is not available to consumers for small group policies.

Mr. Dan Ulmer, Blue Cross Blue Shield of North Dakota, Bismarck, said it is his understanding the medical loss ratio requirements apply both inside and outside the exchange.

Mr. Bartsh said he understands the concerns regarding insurers limiting their plans to outside the exchange; however, if the state requires insurers to sell inside the exchange in order to sell outside the exchange, it has the effect of allowing the exchange to regulate all policies.

Representative Glassheim said he is concerned that policies sold outside the exchange may undermine the policies sold inside the exchange. Mr. St. Aubyn said that other than grandfathered plans, all plans must offer essential benefits.

In response to a question from Representative Johnson, Ms. Carlson said there are seven factors that impact whether a policy may retain its grandfather status. She said the reality is that over time all plans will lose their grandfather status.

In response to a question from Representative Keiser, Mr. Bartsh said for small groups and the individual market, the grandfather status will not last very long. He said when essential benefits are required in 2014, this will likely result in the grandfathered policies loosing that status.

Chairman Keiser called on Mr. St. Aubyn, Mr. Bartsh, Ms. Carlson, and Mr. Middaugh to sit on a panel to discuss whether the state's health benefit exchange under the ACA should limit the qualified health plans offered through the exchange to the four benefit levels--platinum, gold, silver, and bronze--or should allow multiple types of plans within each of the four benefit levels.

Mr. Middaugh said consumer choice and flexibility are key, and therefore he supports no limits on the number of plans offered at the metallic levels.

Ms. Carlson said the exchange is intended to complement the market, not replace it; therefore, it is in the insurers' best interest to create an exchange and market that is not a dumping ground. She said insurers will offer plans that make good business sense.

Mr. Bartsh said choice is good for consumers and insurers will not be flooding the exchange. He said flooding the exchange would not make good business sense.

In response to a question from Senator Mathern, Mr. Bartsh said he thinks the state's health benefit exchange law can be drafted vaguely and still meet HHS certification requirements. He said the law is more flexible now than it was initially.

GOVERNOR'S OFFICE

Chairman Keiser called on Ms. Tami Ternes, Governor's office, for comments regarding the ACA health benefit exchange. Ms. Ternes said Governor Dalrymple has been meeting with state agencies and supports a state health benefit exchange that would provide for OMB to provide administrative services to a board of stakeholders that would actually govern the exchange, the Information Technology Department to provide technology support, and the Department of Human Services to address eligibility for Medicaid and CHIP applicants.

In response to a question from Senator Mathern, Ms. Ternes said under the Governor's plan, OMB would administer the exchange while a board of stakeholders would establish policy for the exchange.

COMMITTEE DISCUSSION AND DIRECTIVES

The committee considered proposed governance structures of the state's health benefit exchange, including consideration of AARP's and insurer's proposed changes to the National Association of Insurance Commissioner's (NAIC) American Health Benefit Exchange Model Act and responses of nonprofit entities to the poll of interest in administering the state's health benefit exchange.

The committee reviewed redline versions of the NAIC model Act submitted by AARP, Blue Cross Blue Shield, Representative Keiser, Medica, and Sanford Health; a state health benefit exchange proposal submitted by Representative Glassheim; comments submitted by the American Cancer Society Cancer Action Network, Bismarck Cancer Center, Blue Cross Blue Shield, Jamestown Community Corrections, March of Dimes, North Dakota Chiropractic Association, North Dakota Hospital Association, North Dakota Medical Association, and North Dakota Women's Network. These documents are attached as Appendix I.

Chairman Keiser said if the committee wants the option of a state-administered health benefit exchange, the elements of the exchange need to be discussed.

Senator Mathern said the committee should consider two bill drafts--one to address how to finance the exchange and one to address the expiration of the CHAND high-risk pool program.

Senator Klein said although it sounds easier to have the federal government administer the state's exchange, there is value to pursuing the option of having a state-administered exchange. He said a state-administered exchange likely is more efficient than a federally administered exchange and the Legislative Assembly is looking to this committee to research and address this issue.

Representative Kasper agreed with Senator Klein's remarks. Additionally, he said, the Insurance Commissioner's testimony provided new information and he would like to have additional information

regarding the anticipated cost of having the state administer the exchange versus having a federally administered exchange. He said he supports state rights and he does not think the federal government can administer an exchange better than the state can, but he wants to make sure the committee does the necessary investigation to ensure the state is spending its money wisely.

Senator Lee said the Legislative Assembly is looking to this committee to do the heavy lifting.

Representative Keiser said he has made it clear he does not support a federally administered exchange. He said the committee can prepare a basic bill draft that is designed to be amended to add more detail in 2013, but the committee needs to be making some decisions now. He said he thinks it is premature to request a bill draft dealing with finances until the committee receives more information at a future meeting.

Representative Keiser said he would propose an exchange governance structure that would place the exchange under OMB, provide for a board to establish policy, and provide for one or more advisory boards. He said it is important the Insurance Commissioner retains regulatory functions and that the rate approval system be actuarially sound.

Mr. Marlowe Kro, AARP, reviewed the AARP bill draft proposal. He said the AARP's primary concern is that the exchange allow for consumer representation as part of the governance model. The committee discussed the challenges associated with having consumer representation that has the necessary level of expertise.

Ms. Carlson reported that the insurers could work together to create a consensus bill draft to present to the committee at its next meeting. She said they could clarify which points the insurers were unable to reach an agreement.

Representative Keiser requested that the insurers include AARP in its discussions to develop a consensus bill draft.

Representative Winrich requested that the committee receive input from consumers at future meetings, as he is concerned the panel discussions were very one-sided in favor of industry. He requested that the University of North Dakota Center for Rural Health be invited to participate in committee discussions.

No further business appearing, Chairman Keiser adjourned the meeting at 2:30 p.m.

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Jennifer S. N. Clark
Committee Counsel

ATTACH:9