American Cancer Society ☙ Children's Defense Fund/New York ☙ Community Service Society of New York
Institute for Puerto Rican and Hispanic Elderly ☙ Make The Road New York ☙ Medicare Rights Center
Metro New York Health Care for All Campaign ☙ New Yorkers for Accessible Health Coverage ☙
New York Immigration Coalition ☙ Public Policy and Education Fund of New York/Citizen Action of New York
Raising Women's Voices ☙ Schuyler Center for Analysis and Advocacy

Responses to Common Misconceptions about Creating a Health Insurance Exchange in New York

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In a letter dated February 27, 2012, the Senate Majority Leader, Dean G. Skelos, set forth reasons for postponing enactment of enabling legislation for a Health Insurance Exchange. That letter made several assertions about both Exchange legislation and the federal Affordable Care Act (ACA) which HCFANY believes to be inaccurate, for the reasons described below.

Urgent action is necessary to establish a New York State Exchange because it will bring health insurance costs for those in the individual market down by as much as 66% and for employees in the small group market by as much as 22%, according to an analysis conducted by the Urban Institute for the State of New York. Moreover, HCFANY believes that the millions of uninsured New Yorkers cannot wait another day for affordable quality insurance. The establishment of an Exchange is the best chance for uninsured New Yorkers to get the care that they need. To this end, we believe it is important to dispel the misconceptions which are being offered as an excuse for inaction on the Exchange.

HCFANY is a statewide coalition of over 130 organizations committed to winning quality, affordable health coverage for all New Yorkers. We strive to bring consumer voices to the policy conversation, ensuring that consumer concerns are reflected in these decisions. We also provide expert policy analysis, advocacy, and education on important health reform issues and policies that affect New Yorkers around the state. For more information on HCFANY, visit us on the web at www.hcfany.org.

- **MYTH: Federal health reforms could *cost* New York taxpayers more than $65 billion in Medicaid costs.**
- **REALITY: New York will *receive* $18 billion in Medicaid revenues under Federal health reform.**

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The $65 billion Medicaid myth recited in the February 27 letter is derived from a report by the Cato Institute.[1] These alleged costs represent the projected cost of covering the individuals in New York who are *already* eligible but are not enrolled in Medicaid. The report incorrectly assumes that the ACA's individual mandate applies to low-income Medicaid-eligible individuals.

It is true that experts agree that the existence of a mandate for moderate- and high-income individuals will encourage more of the already eligible low-income people to enroll in Medicaid. New York experts expect approximately 110,000 to 440,000 of these already eligible individuals to enroll, come 2014.[2] But many of these individuals will be eligible for enhanced federal matching funds (which ramp up to 90% over a few years).[3] The Cato report omits this important detail.

It is also true that that there are 940,000 currently eligible childless adults in New York State for whom we only get 50% federal matching funds.[4] All of these people will quickly become eligible for the new 90% federal matching rate. The Cato report omits this important detail as well.

Finally, the Cato report arrives at its cost estimate by assuming that the "cost per enrollee" for those currently enrolled in Medicaid will apply to all new Medicaid enrollees. However, it is methodologically incorrect to assume that those who are newly receiving Medicaid benefits will generate the same average costs as those who are currently enrolled in the program. This is because the sickest of the Medicaid-eligible population are already highly motivated to join the program. Most actuaries assume that the new enrollees will have a lower health risk than the currently enrolled population. Accordingly, their utilization of services will be lower and their cost-per-enrollee should likewise be lower than those who are currently enrolled.

At the end of the day, federal health reform will yield a net gain of $18 billion in new Medicaid revenues for New York State—not $65 billion in costs.[5]

Even if there were additional costs to the State from additional Medicaid enrollment resulting indirectly from the ACA's individual mandate, it is hard to see how that would be an argument against enacting Exchange legislation. Exchange legislation simply enables New York to operate its own Exchange, rather than having the federal government operate one for it. If there is an incidental increase in the Medicaid population as a result of federal health care reform, it will

[1] Jagadeesh Gokhale, "Estimating ObamaCare's Effect on State Medicaid Expenditure Growth: A Study of Five Most Populous U.S. States," CATO Institute Working Paper. Available at: http://www.cato.org/pubs/researchnotes/WorkingPaper-4.pdf

[2] "Implementing Federal Health Care Reform: A Roadmap for New York State," New York State Health Foundation, August 2010 at 5.

[3] *Id.* at 10.

[4] *See* Federal guidelines for a schedule of Federal Medicaid (FMAP) reimbursements for newly and currently Medicaid eligible at http://aging.senate.gov/crs/medicaid6.pdf

[5] New York State Department of the Budget.

happen whether the ACA is implemented through a federal or a State exchange. Forfeiting New York's right to operate its own Exchange will not prevent the ACA from taking effect.

- **MYTH: The only reason for enacting Exchange legislation is to take advantage of additional federal funding.**

- **REALITY: Funding is <u>not</u> the only issue: Time is running out now because New York must be certified ready by January 2013, or the state defaults to a federally-run Exchange.**

While New York has received generous federal funding to plan for the Exchange, funding alone does not ensure that the state can meet the fast-approaching federal deadlines for readiness and operation of the Exchange. **In fact, New York would default to a federally-run Exchange if it cannot demonstrate readiness for certification by the U.S. Department of Health and Human Services (HHS) on January 1, 2013.** Under a state-run Exchange, many of the operational requirements should have been determined by the Legislature or a public authority established by the Legislature. While many of the policy issues are being studied, the state must indicate its decision on each issue in its federal certification application.

As reported by the Department of Health and the Department of Financial Services in their initial studies of ACA implementation, the following policy and operational decisions need to be <u>resolved</u> (not just studied) between now and the fall of 2012, in order to be reflected in the state's certification application to HHS:

April – October 2012

- ✓ Policy issues to be determined:
  - Approach to Navigator Program
  - Role of Brokers/alliances/producers
  - Certification for Qualified Health Plans
  - Determination of Essential Health Benefits
  - Whether to Establish a Basic Health Plan
  - Approach to Reinsurance and Risk Adjustment Programs
  - Funding Mechanisms for Exchange Sustainability
  - Integration of Public Programs and NY Bridge Plan Transition
- ✓ Operations functions to be implemented:
  - Appoint Board of Directors
  - Appoint Executive Leadership
  - Hire staff
  - Develop Insurance Electronic Portal
  - Develop Eligibility and Enrollment Processes

- Secure Office Space
- Develop Call Center
- Develop Certification Process for Qualifying Health Plans
- Develop Financial Management Process
- Develop Oversight/Monitoring Procedures
- Develop Appeals Process

October – December 2012

✓ State develops and submits certification application for final approval to implement its health Exchange; responds to HHS inquiries; negotiates adjustments to meet HHS requirements for approval.

✓ State awards contracts for major exchange functions, including but not limited to: IT/Website, Call Center, Marketing and Advertising, Navigators, Financial Systems/Subsidy Reconciliations, etc. Developing and releasing the RFPs, providing adequate time for applicants to respond, reviewing proposals, and awarding contracts is a process that can take at least a year, and should have started already.

January 1, 2013

✓ HHS determines New York's readiness to operate a state-run exchange. Federal government will begin set-up of federal exchange if New York cannot meet all required certification decisions.

Fall 2013

✓ New York (if they are operating a state-run Exchange) must begin receiving applications for coverage from the public.

January 1, 2014

✓ Coverage is available to eligible New Yorkers from a state –run Exchange (or a federal Exchange if a state-run Exchange fails to meet federal benchmarks)

The February 27 Skelos letter asserts that concerns raised last year regarding lost opportunities for federal funding if New York did not pass a bill in 2011 were not borne out, because New York has received over $87 million through various federal planning grants. However, while the administration has done a good job of taking advantage of funding opportunities to date, this does not mean that it will be able to continue to be successful in the future. In the absence of authorizing legislation, New York may miss the opportunity to apply for multi-year Level 2 Exchange Establishment federal funding. The Level 2 federal grant application says that a state must have: "necessary legal authority to establish and operate an Exchange that complies with Federal requirements available at the time of the application."[6]

[6] *See* https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=12241

- **MYTH: "A lack of guidance from the federal government on the services to be provided on the essential health benefit package is further rationale for proceeding with caution."**[7]
- **REALITY: New York does not need to establish the essential health benefit package to establish the Exchange, and it does not need any more federal guidance to move forward with establishing the essential health benefit package.**

The argument regarding uncertainty about the essential health benefit package is irrelevant to the wisdom of establishing the Exchange. The Exchange establishment legislation in the budget bill (which was substantially similar to the Senate/Assembly/Executive negotiated Exchange bill of 2011), in fact leaves the details of the essential health benefits to be established later.

A process for deciding the contents of the essential health benefits package in New York is clearly necessary, and HCFANY believes that such a process would most effectively be undertaken with the advice and involvement of the Exchange board of directors. It is true that some of the decisions regarding the contents of the essential health benefit package may prove difficult, but that is all the more reason to have the Exchange in place as soon as possible to get that process underway.

Contrary to the assertions in the February 27 letter, there are no obstacles to getting the essential health benefits discussion under way. Claims that the federal government has provided inadequate guidance about the essential health benefits package for States to move forward are inaccurate. In fact, HHS has issued multiple bulletins describing their State flexibility approach.[8] In this guidance, the federal government even identifies three existing New York insurance health plans that might be used as benchmarks for essential health benefits. Moreover, New York has already issued a Request for Proposal to move forward on a study to formulate an essential health benefits package that meets the needs of our State residents and passes federal muster.[9]

- **MYTH: "There is a pending lawsuit before the United States Supreme Court challenging the constitutionality of the federal health care reform mandates" which "complicates" passing Exchange legislation.**

- **REALITY: No party petitioned the Supreme Court to decide the validity of the ACA's provisions regarding establishment of Exchanges, and there is no reason to act on the**

[7] Letter from Majority Leader Skelos to Minority Leader Sampson, February 27, 2012.

[8] U.S. Dept. of Health and Human Services EHB Bulletin issued on December 16, 2012 is available at http://cciio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf; U.S. Dept. Health and Human Services EHB Bulletin Q&A issued on 2.17.12 available at http://cciio.cms.gov/resources/files/Files2/02172012/ehb-faq-508.pdf

[9] NYS Dept. of Health, Request for Proposal: http://www.health.ny.gov/funding/rfp/1110141209/1110141209.pdf

remote possibility that this aspect of the ACA might be struck down. New York's families and small businesses need to move forward <u>now</u> with a health insurance Exchange which will drive insurance costs down for all and provide coverage to more than a million New Yorkers.

The federal courts of appeal which have decided challenges to the ACA have decided only two issues: the validity of the ACA's mandate that individuals purchase insurance, and the validity of the terms of the Medicaid expansion. To the extent that those courts have invalidated the individual mandate (none have invalidated the Medicaid expansion), they have restricted their holdings to that mandate. They have not found other aspects of the law to be unenforceable based on the mandate's invalidation; the issues are severable.

To speculate that the Supreme Court might invalidate the Exchange provisions of the ACA based on concerns about the individual mandate is a remote contingency. It is hard to imagine a matter more squarely within the Congress's authority to regulate under the Commerce Clause than the structure of the insurance marketplace. Even in the unlikely case that the Supreme Court were to rule against the mandate, it would not negate the creation of Exchanges and the federal subsidies that are provided through the Exchange to Americans who qualify.

Whatever consequences might ensue from a Supreme Court finding of unconstitutionality of any section of the ACA can be considered at the time the Court renders its decision. The Exchange enabling legislation provides for convening the Legislature in the immediate aftermath of any such Supreme Court decision to determine an appropriate state response. (Article VII bill, Section 6, p. 132). HCFANY believes that this agreed-upon provision is the appropriate way to deal with this possibility of an adverse Supreme Court decision. Rather than deal with the unlikely possibility of a ruling on a provision that is not even before the Court (i.e. the constitutionality of the Exchange provisions), policy makers should consider the consequences of State *inaction* should the Supreme Court uphold the constitutionality of the ACA and New York next winter finds itself no closer to establishing an Exchange.

MYTH:

- **Health and Human Services Secretary Kathleen Sebelius's comments last December endorsing New York's delay of Exchange legislation into 2012 are a reason to delay legislation this term.**
- **REALITY: Secretary Sebelius' diplomatic endorsement of New York's caution does not constitute a formal extension to New York of the federally-set Exchange certification time frame.**

In December 2011, Secretary Sebelius did indeed say that New York's desire for more information before passing an Exchange bill was "appropriate" to do so.[10] However, Secretary Sebelius did not comment on the consequences that New Yorkers would face if the Legislature waits too long to establish an exchange, such as having to default to a one-size-fits-all federal exchange should the state miss the January 1, 2013 federal certification deadline.

CONCLUSION

According to Governor Cuomo and several studies to date, when the Exchange is implemented:

- It will cover over 1 million uninsured New Yorkers.
- Individuals who currently buy their coverage directly will see their cost drop by as much as 66%.
- Small business employees will see the cost of their coverage drop by as much as 22%.[11]
- The $1.7 billion that taxpayers currently contribute to offset the cost of providing care to the uninsured will be significantly reduced.
- The increased federal Medicaid match that recognizes New York's higher Medicaid eligibility levels will bring an additional $18 billion in funds to the state over 10 years.

Health Insurance Exchanges, moreover, are not radical ideas. They were first proposed by the conservative Heritage Foundation as mechanisms to make the private insurance marketplace work better for individual and small business purchasers. As Senator James Seward, the Chair of the Senate Insurance Committee, said in an interview with Kaiser Health News published January 13, 2012, "I believe that one way or another, it would be good for the health insurance market to have an exchange, even if the federal legislation goes away."[12]

The compelling reason to pass the enabling legislation now, however, is to ensure that New York controls its own destiny. We will only have a State-run Exchange, rather than one run by the federal government for us, if we have an entity created, certified, staffed and funded by early 2013. The *only* feasible way to achieve that goal is to enact the basic legislation now.

March 9, 2012

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[10] *See* http://www.cityandstateny.com/no-health-exchanges-no-problem-sebelius-says/

[11] *See* http://www.healthcarereform.ny.gov/timeline/docs/2012-02-02_urban_institute_premium_doc.pdf

[12] *See* Creating health insurance exchange a 'priority' for state lawmakers - FierceHealthPayer, http://www.fiercehealthpayer.com/story/creating-health-insurance-exchange-priority-state-lawmakers/2012-01-13#ixzz1oUIvi0D6.