



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

August 31, 2012

OPINION NO. 2012-03

HEALTH; INSURANCE; FEES:

Imposition of fees through the regulatory process on participating issuers of insurance based on their enrollment of consumers in the Exchange is implicitly within the Exchange's statutory authority to ensure compliance with federal requirements that the Exchange be self-sustaining. The Exchange has statutory authority to charge for advertising on its web portal under its authority to enter into contracts and under its authority to apply for ad accept gifts, donations and other sources of funds.

Jon M. Hager, Executive Director
Silver State Health Insurance Exchange
808 West Nye Lane, Suite 204
Carson City, Nevada 89703

Dear Mr. Hager:

You have requested an opinion from the Office of the Attorney General concerning the authority of the Silver State Health Insurance Exchange (the Exchange) to impose fees on participating health insurance issuers for participating in the exchange and for advertisement on the web portal of the exchange.¹

¹ The opinion request sets forth three questions. The second question is integrally related to the first and is addressed as part of the first.

QUESTION ONE

Does the Exchange have statutory authority to establish, through the regulation process, fees charged to participating health insurance issuers to allow the issuers to place their health plans on the Exchange for sale to consumers if the fees are based on the enrollment of consumers within the Exchange?

ANALYSIS

The Exchange, as an agency of the State of Nevada, has only such powers as are authorized by the legislature. *Clark County School Dist. v. Clark County Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999). A legislative grant of authority to an agency may be either express or implicit. *State, Dept. of Commerce, Div. of Ins. v. Interocean Risk Systems, Inc.*, 109 Nev. 710, 713, 857 P.2d 3, 5 (1993). "Any enlargement by implication of express powers . . . must be fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. County of Clark*, 120 Nev. 948, 956, 102 P.3d 578, 584 (2004).

The Exchange was created to comply with the Patient Protection and Affordable Care Act of 2010 (Pub.L.No. 111-148, H.R. 3590) (PPACA), to provide a marketplace through which health insurance could be purchased. Testimony of Michael Willden, Director of Nevada Department of Health and Human Services, *Hearing on SB 440 Before the Senate Committee on Finance*, 2011 Leg., 76th Sess. 12-13 (May 18, 2011).

The PPACA requires that "in establishing an Exchange under this section, the State shall ensure that such Exchange is self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations." 42 U.S.C. 18031(d)(5).

The legislation enabling the creation of the Exchange (SB 440 (2011) (codified as NRS Chapter 695I) does not expressly direct or authorize the Exchange to charge users of the Exchange a fee for their use. The question therefore is whether the charging of such fees is "fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co.*, 120 Nev. at 956, 102 P.3d at 584. "The intent of the legislature is the controlling factor in statutory interpretation." *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757(1998).

Indicative of its intent, the Legislature has given the Exchange the following duties and powers:

1. The Exchange shall:
 - (a) Create and administer a state-based health insurance exchange;
 - (b) Facilitate the purchase and sale of qualified health plans;
 - (c) Provide for the establishment of a program to assist qualified small employers in Nevada in facilitating the enrollment of their employees in qualified health plans offered in the small group market;
 - (d) Make only qualified health plans available to qualified individuals and qualified small employers on or after January 1, 2014; and
 - (e) *Unless the Federal Act² is repealed or is held to be unconstitutional or otherwise invalid or unlawful, perform all duties that are required of the Exchange to implement the requirements of the Federal Act.*
2. The Exchange may:
 - (a) Enter into contracts with any person, including, without limitation, a local government, a political subdivision of a local government and a governmental agency, to assist in carrying out the duties and powers of the Exchange or the Board; and
 - (b) Apply for and accept any gift, donation, bequest, grant, or *other source of money* to carry out the duties and powers of the Exchange or the Board.

NRS 695I.210 (emphasis added).

The Exchange, through its Board, is further given authority to “[a]dopt regulations to carry out the duties and powers of the Exchange.” NRS 695I.370(2)(a). The Exchange is also empowered to “request from the Department of Administration an advance from the State General Fund for the payment of authorized expenses” if “the current expenses of the Exchange exceed the amount of money available because of a delay in the receipt of money from federal grants *or a delay in the receipt of revenue*

² “‘Federal Act’ means the federal Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the federal Health Care and Education Reconciliation Act of 2010, Public Law 111-152, and any amendments to, or regulations or guidance issued pursuant to, those acts.” NRS 695I.050.

from other sources.” NRS 695I.510 (emphasis added).

Moreover, legislative testimony in support of SB 440 suggested that a premium-based fee would be among the options to be considered by the Exchange and its Board:

SENATOR KIECKHEFER:

How will this be self-supporting by 2015? Where will the money come from? . . .

BRETT J. BARRATT ([then] Commissioner of Insurance, Division of Insurance, Department of Business and Industry):

The methodology for self-funding is undecided at this point. The Board will play an active role in deciding the best method for Nevada. Utah charges a fee that is included in the premium collected by the Exchange. A portion of the fee is distributed to the broker responsible for the individual member or small employer. Part of the fee goes to the administration of the Utah Exchange. Nevada could start the program with something similar to the Utah model.

Hearing on SB 440 Before the Senate Committee on Finance, 2011 Leg., 76th Sess. 12-13 (May 18, 2011) (emphasis added).

Director Willden, in testifying in support of SB 440, provided written testimony as follows:

Nevada received a \$1 million dollar [sic] grant award to begin the process of determining how to create an Exchange to meet the unique needs of Nevadans. A key milestone of the grant requires States to draft and pass enabling legislation that provides the legal authority to establish and operate an Exchange that complies with Federal requirements.

Id., Exhibit F.

The Legislature’s objective in creating the Exchange was to fulfill federal requirements, including that it be self-sustaining. Therefore, the Exchange’s authority to fulfill the duty that it be self-sustaining by charging fees on issuers of insurance is “fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature.” *Nevada Power Co.*, 120 Nev. at 956, 102 P.3d at 584.

Your request further asks whether imposition of user fees would constitute an interpretation of the law that preempts or supersedes the authority of the Insurance Commission to regulate the business of insurance within this State, in violation of NRS 695I.520. NRS 695I.520 provides that “[n]othing in this act, and no action taken by the Exchange pursuant to this act, shall be construed to preempt or supersede the authority of the Commissioner to regulate the business of insurance within this State.”

The “business of insurance” has been defined as “[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement. . . .” *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). The purpose of the Exchange is to enable persons to purchase health insurance by providing a market for that activity. NRS 695I.200. Imposing an access fee for those wanting to participate in the Exchange merely sets a price on a marketing service. As issuers of insurance are not prohibited from marketing outside of the Exchange, it does not affect the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, or enforcement. It merely creates an expense for those issuers who wish to avail themselves of a new mechanism for marketing insurance. Imposition of a fee on issuers of insurance who use the Exchange is therefore consistent with the Exchange’s statutory authority under to NRS 695I.520.

CONCLUSION TO QUESTION ONE

Imposition of fees through the regulatory process on participating issuers of insurance based on their enrollment of consumers in the Exchange is implicitly within the Exchange’s statutory authority to ensure compliance with federal requirements that the Exchange be self-sustaining. This authority is not contrary to NRS 695I.520.

QUESTION TWO

Does the Silver State Health Insurance Exchange have statutory authority to establish fees charged to organizations for placement of advertisements on the web portal of the Exchange? Does establishment of such advertisement fees require creation of regulations?

ANALYSIS

As noted above, the Exchange was created in the context of federal legislation that requires it be self-sustaining by January 1, 2015 and include funding mechanisms, including user fees charged to participating issuers, “and to otherwise generate funding.” 42 U.S.C. 18031(d)(5)(A).

The Exchange has the express power to “[e]nter into contracts with *any person*, including, without limitation, a local government, a political subdivision of a local government and a governmental agency, to assist in carrying out the duties and powers of the Exchange or the Board.” NRS 695I.210(2)(a) (emphasis added). Under this provision, the Exchange may enter into a contract with persons to run advertisements for them on the portal, in exchange for financial assistance that would enable the portal to run after January 1, 2015, when federal funding ceases.

The Exchange also has the express power to “[a]pply for and accept any gift, donation, bequest, grant or *other source of money* to carry out the duties and powers of the Exchange or the Board.” NRS 695I.210(2)(b)(emphasis added). In exchange for financial support from donors or other sources, the Exchange can provide recognition on its web portal. Therefore, NRS 695I.210(2)(b) confers upon the Exchange the authority to charge fees or receive other remuneration for advertising.

Your request also queries whether establishment of advertisement fees requires the creation of regulations. NRS 695I.370(2)(a) confers authority to adopt regulations for the Exchange upon its Board. “Regulation” is defined as “[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. . . .” NRS 233B.038(1)(a).³ Excluded from the definition of “regulation” are contracts or agreements. NRS 233B(2)(j).

As noted above, the Exchange has the authority to enter into advertising contracts, thereby establishing fees on a negotiated basis. However, should the Board choose to set fees by rule, it is required by NRS 695I.370(2)(a) to do so by Board-adopted regulation. See *State Bd. of Equalization v. Sierra Pac. Power Co.*, 97 Nev. 461, 465, 634 P.2d 461, 463 (1981).

CONCLUSION TO QUESTION TWO

The Exchange has statutory authority to charge for advertising on its web portal under its authority to enter into contracts and under its authority to apply for and accept

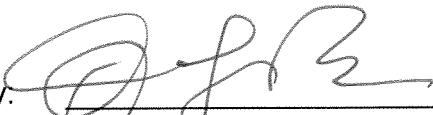
³ While the Exchange is exempt from NRS Chapter 233B rulemaking requirements, the definition of “regulation” contained therein is nevertheless useful in the absence of any other legislative guidance. *Goodman v. Goodman*, 68 Nev. 484, 488, 236 P.2d 305, 307 (1951).

Mr. Jon M. Hager
August 31, 2012
Page 7

gifts, donations and other sources of funds. The Board may choose to leave the fee setting to negotiation, or it may choose to set fees by regulation.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
DENNIS L. BELCOURT
Deputy Attorney General
Division of Business and Taxation

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