

State Corporation Commission 2007 Fiscal Impact Statement

1. Bill Number HB2120

House of Origin	<input checked="" type="checkbox"/> Introduced	<input type="checkbox"/> Substitute	<input type="checkbox"/> Engrossed
Second House	<input type="checkbox"/> In Committee	<input type="checkbox"/> Substitute	<input type="checkbox"/> Enrolled

2. Patron Marshall, R.G.

3. Committee Committee on Commerce and Labor

4. Title Small Employer Health Insurance Exchange.

5. Summary/Purpose: Creates the Small Employer Health Insurance Exchange. Provides that the exchange is created for public purposes but with a legal existence separate from the Commonwealth. The exchange must seek not-for-profit status with the IRS pursuant to 26 USC Section 501(c). The exchange's purpose is to provide employees and other eligible individuals with greater access to choice and portability of health insurance products. The exchange must operate according to requirements in the chapter and applicable laws of VA and the U.S. All eligible individuals must be permitted to obtain health insurance benefits through the exchange subject to the provisions of the bill. The bill has a January 1, 2008 effective date.

6. No Fiscal Impact on the State Corporation Commission

7. Budget amendment necessary: No

8. Fiscal implications: None on the State Corporation Commission

9. Specific agency or political subdivisions affected: State Corporation Commission Bureau of Insurance

10. Technical amendment necessary: The Bureau of Insurance offered the following technical comments to the patron:

- Because the Commissioner of Insurance has no authority outside of the authority delegated by the State Corporation Commission (SCC), Bureau staff suggested substituting references to the SCC where reference is to the Commissioner of Insurance wherever possible, or otherwise insert wording indicating the underlying authority of the SCC. Bureau staff pointed out that the Commissioner of Insurance has no authority, for example, to hold hearings, promulgate regulations or impose fines and penalties.
- § 38.2-6300: the term "carrier" is defined to include a multiple employer welfare arrangement (MEWA). A MEWA is not an insurance carrier. It must be fully insured through a licensed insurance carrier.

- § 38.2-6300: the term “principal insured” within the definition of “dependent” is not defined. Also, using the term “birth” as opposed to “dependent child” may lead to questions about eligibility, (i.e. could a parent or grandparent qualify as being related by “birth”?).
- § 38.2-6300: the definition of “preexisting condition” does not refer to any kind of look-back (the period of time preceding the effective date during which the person received diagnosis, advice or treatment for the condition), nor is the look-back period addressed elsewhere in the bill. In order to comply with HIPAA, the look-back period cannot exceed 12 months.
- § 38.2-6303 4 b and c: premium payments will be accepted via assignment of federal Earned Income Tax Credit payments and “any federal or state tax credits or other premium support payments for health insurance.” The mechanisms and logistics for a system like this would be very complicated, and require integration with the Internal Revenue Service, and the Virginia Department of Taxation, at a minimum.
- § 38.2-6303 7: the Commissioner receives an independent audit of the Exchange’s accounts. The Commissioner has no authority to do anything with the audit, nor is he directed to do anything with the audit.
- § 38.2-6306: throughout this section, the term “plans” should be replaced with “participating insurance plans” since the latter is the defined term.
- § 38.2-6306: subsection H refers to “standard rates”, which is not a defined term in this proposed chapter. The term “standard rate” can have different meanings to different carriers.
- § 38.2-6306: subsection I states that rates may be adjusted in subsequent years if “in the judgment of the Commissioner, [such rates] is consistent with the general practice of carriers that issue health benefit plans to large employers.” This appears to allow the Exchange, which is limited to employers of no more than 100 employees, to be charged rates associated with large employers (which is not a defined term). Also, ratemaking methodology is not described and we currently do not have rate approval authority for group health plans. Bureau staff has no means to determine whether a rate adjustment is consistent with carriers’ “general practices”.
- § 38.2-6309 B: as a division head appointed by the State Corporation Commission, the Commissioner of Insurance would not have the competency to hold appellate hearings as contemplated by this section. Bureau staff pointed out that the State Corporation Commission, as an agency, is expressly granted by the Constitution of Virginia any of the powers of a court of record. The Commission is exempt from the Administrative Process Act, pursuant to § 2.2-4002 A 2 of the Code of Virginia. The Constitution and the General Assembly established the Commission’s powers of a court of record and authority to promulgate its own

Rules of Practice and Procedure in Article IX, § 3 of the Virginia Constitution and §§ 12.1-13 and 12.1-25 of the Code of Virginia. The Bureau would therefore suggest the following language at Lines 364-366 as a possible alternative which would be procedurally more correct:

If either the participating individual or the carrier disagrees with the outcome, he or she may file a petition pursuant to the Commission's Rules of Practice and Procedure.

- § 38.2-6310 B 8: an employer must agree “to also sponsor a cafeteria plan as permitted under 26 USC § 125”. However, subsection B 2 of this section states that “only the coverage and benefits offered by participating insurance plans shall constitute the coverage and benefits of the participating employer plan.” The language in these two subsections appear to conflict with each other, as well as with language found in subsection B 4 regarding supplemental benefits.
- § 38.2-6311 B allows a membership organization to participate in the Exchange, without defining the term “membership organization.” It also allows the membership organization to receive commissions while not licensed as an agent.

11. Other comments: The Bureau of Insurance also offered these substantive comments to the patron on House Bill 2120:

Under HB 2120, no individual or employer with 50 or less employees may secure private coverage in Virginia other than through the Exchange. As a regulatory agency, the State Corporation Commission Bureau of Insurance cannot predict the specific immediate and ultimate effects of the creation of the Exchange on the health insurance market. Bureau staff cannot predict the reaction of private insurers to the pricing and underwriting restrictions as well as to other requirements of the bills. The increase, maintenance or decrease in the number of health insurance suppliers would likely have major implications for the level of pricing and availability of insurance in Virginia.

Secondly, Bureau staff pointed out the possibility of adverse selection burdening the health plans available through the Exchange. Federal ERISA laws may offer certain employer-sponsored health plans preemption of state law, and certain group and association health plans covering Virginia residents may be outside the jurisdictional reach of Virginia law. Some health plans may find a relative advantage in migrating to these “safe harbors,” given the pricing and underwriting restrictions proposed by the two bills. Thus, the burden of financing less favorable risks would fall to the Exchange. The question of adverse selection may be of special interest to the Commonwealth of Virginia self-insured health plan for employees in that HB 2121 would mandate its participation in the Exchange.

The Bureau's third major area of concern has to do with the roles contemplated for the Bureau of Insurance in the two bills. As a division of the State Corporation Commission, the Bureau views as its primary responsibility the regulation of insurers and their agents for solvency and compliant market conduct. This responsibility seems to be in potential conflict with the proposed duties given to the Commissioner of Insurance in regard to governance and corporate oversight of the Exchanges.

Under the proposals, the Commissioner of Insurance is a member of the Exchange board. The proposals clearly contemplate the Commissioner as having a fiduciary duty in overseeing and directing the Exchanges' management. This duty seems inconsistent not only with the Commissioner's role as insurance regulator for Virginia, but also with other assigned duties independent of board membership. Examples include:

1. The Commissioner is designated as the outside recipient of the audit report. Yet production of the report is overseen by the board, of which the Commissioner is a member.
2. The Commissioner is given the role of independently resolving disputes among individuals, insurance plans and the Exchanges despite the Commissioner's own board membership and responsibilities.
3. The Commissioner would be given responsibility to set the level of agents' commissions for carriers participating in the Exchanges, which would bear on the pricing of coverage available through the Exchanges. Is this primarily to be a pricing/business or a regulatory decision for the Commissioner of Insurance?

In addition to conflicts with the Bureau's regulatory responsibilities, the bill proposes roles for which the Bureau has little competency or authority. For example, the bill proposes that every employer in the Commonwealth and employees make filings with the Commissioner of Insurance. The Bureau has neither the experience nor the jurisdiction over employers and individual employees to be able to enforce such filings.

Date: 01/28/07 / V. Tompkins

cc: Secretary of Commerce and Trade

Secretary of Health and Human Resources