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THE THIN RED FEDERAL POVERTY LINE: HOW REJECTING THE MEDICAID EXPANSION AFFECTS THOSE WITH EXCHANGE COVERAGE

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I. INTRODUCTION

When the Supreme Court struck down the penalty for states refusing to expand Medicaid, it created a great experiment: States could opt to run the Affordable Care Act (ACA) without the Medicaid Expansion.[1] It's akin to removing a critical component from an engine, turning the key, and watching what happens. Given the politics surrounding healthcare reform, some states are surely choosing to run that experiment hoping the machine explodes.

To be sure, implementing healthcare reform without the Medicaid Expansion carries consequences. Five million poor Americans—who would otherwise be Medicaid eligible—going without coverage is only the most obvious consequence.[2] But less obvious consequences will follow. Without the Medicaid Expansion, running the Exchanges—an ostensibly discrete ACA component—can have unexpected and harsh consequences.

The Exchanges were created—statute, regulations, and all—under the assumption that Medicaid would expand.[3] Numerous Exchange rules work, and make sense, because Medicaid is

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1. *See* National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2607 (2012).

2. Michelle Fay Cortez, *Push Against Obamacare Leaves 5 Million Without Coverage*, BLOOMBERG, Oct. 10, 2013, www.bloomberg.com/news/2013-10-17/push-against-obamacare-leaves-5-million-without-coverage.html; Sarah Kliff, *Florida rejects Medicaid expansion, leaves 1 million uninsured*, WASHINGTON POST, May 5, 2013 www.washingtonpost.com/blogs/wonkblog/wp/2013/05/05/florida-rejects-medicaid-expansion-leaves-1-3-million-uninsured (Florida opting out of expansion, alone, left just under one million Floridians out of Medicaid coverage).

3. *See Sebelius*, 132 S. Ct. at 2608 ("It is fair to say that Congress assumed that every State would participate in the Medicaid expansion").

available to all earning below 138% of the federal poverty line. But without that Expanded Medicaid coverage, Exchange rules can be harsh, ironic, and even nonsensical.

For example, it has been widely covered that in non-Expansion states, many earning below the poverty line will be too poor to qualify for subsidies designed to help the poor afford coverage.[4] Exchange premium tax credit subsidies[5] are limited to enrollees earning between 100% and 400% of poverty. In an Expansion state, that makes sense: everyone earning below 138% of the poverty line is covered by Medicaid. But in non-Expansion states, this creates a dividing line between those eligible for affordable coverage and those too poor to be eligible.

Compounding that irony, some of those excluded from subsidies would be eligible if they were lawfully present aliens—rather than US citizens. The Act extends Exchange subsidies to lawfully present aliens earning below the poverty line.[6] Again, in Expansion states, that disparate treatment makes sense: most lawfully present aliens are ineligible for Medicaid, thus Congress extended Exchange subsidies to cover this population. But in non-Expansion states that rule is nonsensical and ironic. This consequence too has been discussed.

This article explores the less-discussed consequences to Exchanges in non-Expansion states. One consequence is that the rules designed to help individuals who fall on hard times maintain coverage can work against the poor in non-Expansion states. In those states, common life events, marriage, divorce, a new child, a job loss, and retirement, can push lower income enrollees out of subsidy eligibility. And if enrollees report income changes to the Exchange—as most Exchanges require—they'll lose their subsidies. But in non-Expansion states, enrollees may be better off not notifying Exchanges of certain income drops.

Indeed, in non-Expansion states, enrollees must play a nonintuitive game of concealing certain information from the Exchange, while playing a pay-now-collect-later game, to eke out the subsidies their income entitles them to. These games can work as a tax on the poor.

Again, all the rules and regulations that require this

4. *See, e.g.* Deena Winter, *I'm too poor for Obamacare and I'm too rich for Medicaid,* NEBRASKA WATCHDOG, Oct. 28, 2013, watchdog.org/113041/im-poor-obamacare-im-rich-medicaid/; PBS NEWSHOUR, *Private alternative to Medicaid expansion faces crucial vote in Arkansas*, Feb. 17, 2014, www.pbs.org/newshour/bb/private-alternative-medicaid-expansion-faces-crucial-vote-arkansas; The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid, KFF (Oct. 23, 2013) http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid.

5. The ACA uses the terms "Premium Tax Credits," "Advanced Premium Tax Credits," or "APTC." I prefer the simpler term "subsidies."

6. 42 U.S.C.A. § 18051 (West 2014).

gameplay in non-Expansion states make perfect sense in states that expand Medicaid—indeed those rules greatly benefit enrollees.

Another consequence is the ease with which one's income may fall below the poverty line can lead to churning in and out of coverage. Similarly, employers of low-wage workers could use subsidy eligibility as leverage over vulnerable employees. A low-income employee's eligibility for subsides can turn on an employer's willingness to add or cut hours, offer overtime, and give or withhold bonuses. Some employers may abuse that power.

And non-Expansion states may see other consequences. For example, having the poverty line as the threshold for subsidies may encourage applicants to overstate income. Indeed, existing regulations appear to make it easy to overstate income in order to qualify for subsidies. Whether this practice will be widespread and whether the Exchange will crack down on it remain to be seen.

Finally, rejecting the Medicaid Expansion threatens the Exchanges' long-term sustainability. Having the poverty line as the threshold for coverage creates a tipping point for low-income wage earners. During a financial downturn, an Exchange could lose many low-income enrollees. This could affect the healthy risk-mix of the pool of insureds, driving up costs, and threatening the long-term survivability of the Exchanges. The lack of Medicaid may also deprive the Exchanges of a new stream of enrollees.

These consequences are explored in turn, following background on how an Exchange determines who is eligible for subsidies and how mid-year income changes are reconciled.

II. BACKGROUND ON EXCHANGE ELIGIBILITY DETERMINATIONS

A. How Subsidies Make Exchange Coverage Affordable

Under the Act, Exchange subsidies[7] are available to those earning between 100% and 400% of the federal poverty line. [8] Subsidies are available either as an end-of-year tax credit, or an advanced payment applied directly to plan premiums.[9]

7. Again, the ACA uses the terms "Premium Tax Credits," "Advanced Premium Tax Credits," or "APTC." I prefer the simpler term "subsidies."

8. 26 U.S.C.A. § 36B (West).

9. *See id.*; Julie Appleby and Kaiser Health News, *Will You Qualify for an Obamacare Subsidy?*, PBS NEWSHOUR, Sept. 10, 2013, www.pbs.org /newshour/rundown/will-you-qualify-for-an-obamacare-subsidy.

2013 Poverty Guidelines for the 48 Contiguous States and the District of Columbia[10]	
Persons in Family/Household	Poverty Guideline
1	$11,490
2	$15,510
3	$19,530
4	$23,550
5	$27,570
6	$31,590
7	$35,610
8	$39,630
For families/households with more than 8 persons, add $4,020 for each additional person.	

Subsidies enable eligible enrollees to purchase coverage at a set percentage of their income: 2% to 9.5%—on a sliding scale.[11] For example, an enrollee earning 150% of the poverty line ($17,235) is expected to contribute 4% or $689.40 or $57.45 a month towards coverage.[12]

Income Contribution for Exchange Plans[13]		
Income as a Percent of Poverty Line	Initial Premium Percentage	Final Premium Percentage
Up to 133%	2.0%	2.0%
133%–150%	3.0%	4.0%
150%–200%	4.0%	6.3%
200%–250%	6.3%	8.05%
250%–300%	8.05%	9.5%
300%–400%	9.5%	9.5%

But the 4% contribution does not apply to every available Exchange plan; it applies to the "the benchmark" plan—the second-lowest-cost-silver level plan.[14] An enrollee earning 150% of poverty will only pay 4% if he enrolls in the benchmark plan. If he enrolls in a less expensive plan, he'll pay less than 4%; if he chooses a more expensive plan, he'll pay more.

Precisely how much he pays for a plan turns on his subsidy—the government's contribution. That subsidy turns on the cost of the benchmark plan. The subsidy is the difference between the

10. U.S. Department of Health & Human Services, 2013 Poverty Guidelines, aspe.hhs.gov/poverty/13poverty.cfm (last visited May 10, 2014).

11. 26 U.S.C.A. § 36B (West).

12. $17,235 × 4% = $689.40.

13. 26 U.S.C. § 36B (2012).

14. *Id.*

monthly premium and the enrollee's contribution. For example, the benchmark plan has a $160 monthly premium. Subtract from that the enrollee's 4% of income contribution, $57.45. That results in a $102.55 government subsidy. The government will contribute $102.55 to any plan the enrollee selects. Depending on the plan, the enrollee's share may be more, less, or exactly 4% of his income. Some low income enrollees could have a no-cost plan if premiums are low enough.

Cost-sharing subsidies also keep care affordable for enrollees earning less than 250% of poverty.[15] For eligible enrollees, cost-sharing subsidies increase the actuarial value and reduce the out-of-pocket limit of Silver level plans, on a sliding scale.[16]

Income	**Silver Actuarial Value Plus Subsidy**[17]
100–150% FPL	94%
151–200% FPL	87%
201–250% FPL	73%

For low-income enrollees, the increased actuarial value, limits out-of-pocket costs and prevents unexpected financial burdens of high deductibles, co-pays, or co-insurances.

B. How Federally Run Exchanges Determine Subsidies Eligibility

Nearly every state that has rejected the Medicaid Expansion has also opted to have the federal government operate its Exchange.[18] Thus, federal regulations determine subsidy eligibility in those states.[19]

Under federal regulations and the Act, when an individual or family applies for coverage, the Exchange determines eligibility.[20] To buy an unsubsidized Exchange plan, applicants provide their names, addresses, dates of birth, social security numbers, and if

15. 42 U.S.C.A. § 18071 (West 2014).

16. *See id.*

17. *Id.*

18. *See* Kaiser Family Foundation, *State Decisions on Health Insurance Marketplaces and the Medicaid Expansion*, 2014, kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicaid/#note-2 (Idaho's exchange is partially run by the federal government; New Hampshire's Exchange is a partnership, but New Hampshire is well on its way to adopting a private option Medicaid alternative).

19. Many states running their own Exchanges have also used the federal regulations as a guide in drafting their own regulations. California's Exchange regulations closely parallel federal regulations.

20. 45 C.F.R. § 155.305.

needed, identifying information with respect to immigration status.[21] The Exchange then verifies citizenship, incarceration, and residency status.[22]

For subsidy eligibility, additional verification is required. The Exchange verifies whether the applicant's expected household income falls between 100% and 400% of the poverty line.[23] For this, an applicant provides income and family size information as well as any change, or expected change, in income.[24] The applicant must also attest that (1) she will file an income tax return for the benefit year; (2) if married, she will file a joint return; (3) no taxpayer can claim her as a dependent; and (4) she will claim a personal exemption deduction for anyone listed on the application as a dependent.[25]

The Exchange then requests information from the IRS and Social Security Administration, including the taxpayer's (i) taxpayer identity information, (ii) filing status, (iii) allowed number of individuals for deduction and (iv) modified adjusted gross income.[26] The Exchange can also access wage information from employers through Equifax.[27]

The Exchange verifies household size by accepting the applicant's attestation without further verification.[28] But if the Exchange finds the attestation is not reasonably compatible with other information provided by the applicant or in the records obtained by the Exchange, the Exchange must verify the attestation.[29]

The Exchange verifies income by comparing the applicant's projected income with IRS and Social Security Administration data.[30] If that data confirms the applicant's attestation, the Exchange determines eligibility based on that projected income.[31]

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21. 42 U.S.C.A. § 18081 (West).

22. 45 C.F.R. § 155.305.

23. *Id.*

24. 42 U.S.C.A. § 18081 (West); 42 U.S.C.A. § 18082. *See Application for Health Coverage & Help Paying Costs*, Health Insurance Marketplace, marketplace.cms.gov/getofficialresources/publications-and-articles/marketplace-application-for-family.pdf (last visited May 10, 2014).

25. 45 C.F.R. § 155.310.

26. 26 U.S.C.A. § 6103 (West); 45 C.F.R. § 155.320; Center for Consumer Information & Insurance Oversight, *Frequently Asked Questions on Health Insurance Marketplaces and Income Verification*, Aug. 5, 2013, www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/income-verification-8-5-2013.pdf.

27. *Id.*

28. 45 C.F.R. § 155.320.

29. *Id.*

30. *Frequently Asked Questions on Health Insurance Marketplaces and Income Verification*, *supra* note 26.

31. 45 C.F.R. § 155.320.

C. The Exchange Verifies Projected Income Increases and Decreases Through Enrollee Attestations and IRS Data

Verification may become more complicated if the applicant attests that the IRA and Social Security data does not represent his projected income. If an applicant attests that his income has increased, or "is reasonably expected to increase," the Exchange "must accept the applicant's attestation regarding a tax filer's annual household income without further verification."[32] But if the applicant attests that his income has decreased, the Exchange must verify significant income drops.[33] If the data available to the Exchange shows that the applicant's income will likely be in excess by "a significant amount" of the applicant's attestation, the Exchange must attempt to resolve the inconsistency.[34] The Exchange will contact the applicant to confirm the information.[35] If that does not resolve the inconsistency, the Exchange must notify the applicant and provide the applicant 90 days to present "satisfactory documentary evidence."[36] The Exchange can extend the 90 days if the applicant demonstrates a good faith effort to obtain the documentation.[37]

During that time, the Exchange continues with all other

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32. 45 C.F.R. § 155.320(c)(iii) (provided the applicant's attested income would not place the applicant in Medicaid or CHIP); 78 FR 42160-01 (we note that, under § 155.320(c)(3)(iii), an attestation that reflects an increase compared to the tax data would generally be accepted without further verification (for purposes of eligibility for advance payments of the premium tax credit and cost-sharing reductions); therefore, if an applicant attests to a projected annual household income that would qualify him or her for advance payments of the premium tax credit or cost-sharing reductions but MAGI-based income sources indicate that income is lower than the applicant's attestation, even if such data indicates Medicaid or CHIP eligibility, the attestation would be accepted without further verification.). *Contra Frequently Asked Questions on Health Insurance Marketplaces and Income Verification*, supra note 26. ("Marketplaces will always use data from tax filings and Social Security data to verify household income information provided on an application, and in many cases, will also use current wage information that is available electronically. . . . If the data submitted as part of the application cannot be verified using IRS and SSA data, then the information is compared with wage information from employers provided by Equifax. If Equifax data does not substantiate the inputted information, the Marketplace will request an explanation or additional documentation to substantiate the applicant's household income. . . . If documentation is requested and is not provided within the specified timeframe, regulations specify that the Marketplace will base its eligibility determination on IRS and SSA data, unless IRS data is unavailable, in which case the Marketplace will discontinue any advance payments of the premium tax credit and cost-sharing reductions.")

33. 45 C.F.R. § 155.320.

34. *Id.*; § 155.315.

35. *Id.*

36. *Id.*

37. *Id.*

enrollment eligibility determinations.[38] And the applicant will receive Exchange subsidies, provided she attests that she understands that the subsidies are subject to reconciliation.[39]

If the Exchange cannot verify the attestation after 90 days (or more), the Exchange must determine eligibility based on the available information.[40] An exception can be made, if the applicant does not have documentation to resolve the inconsistency because the documentation does not exist or is not reasonably available.[41] The Exchange "must" then provide an exception, on a case-by-case basis, and accept an applicant's attestation along with an explanation of circumstances as to why the applicant does not have documentation.[42]

One instance where an expected income decrease may be difficult to verify is if an employee leaves his job to start his own business.[43] Becoming self-employed may initially result in a sharp drop in income, and it may be difficult to project income at the outset. Thus, the Exchange may need to grant an extension and give the applicant time to run his own business and provide income verification as it becomes available, and perhaps grant a case-by-case exception.

The fact that income decreases must be verified, while income increases need not, makes sense in states that have expanded Medicaid. In those states, overstating income carries no risk to the state. Initially, it can only reduce or eliminate subsidies. If the enrollee turns out to be entitled to a greater subsidy, the government reimburses the enrollee through a tax refund—effectively getting an interest-free loan. And the government may save money if the income overstatement avoids cost sharing reductions because cost sharing reductions are not reimbursable through reconciliation.[44]

But projected income decreases should be verified because they can qualify an individual for larger subsidies, costing the government more upfront. And the government's ability to recover those subsidies—if it turns out the enrollee was not entitled to the subsidies—may be limited. Thus, it makes sense that the government verify an applicant's attestation that his income will fall.

Nevertheless, the fact that projected income decreases must be verified, while projected increases need not, may have significant consequences in non-Expansion state.

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38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *See* Angelo DeSantis, *Hanging your own shingle in the age of health exchanges*, THE DAILY JOURNAL, Jan 2, 2014.
44. *See* 26 C.F.R. § 1.36B–4.

D. Subsidy Eligibility Can Be Redetermined During a Benefit Year

If the Exchange receives and verifies new information from an enrollee, or identifies updated information through data matching, the Exchange must redetermine the enrollee's subsidy eligibility.[45]

Enrollees must report changes to information on their application.[46] The Exchange may establish a reasonable threshold for changes in income, so that not all income changes need be reported.[47] For example, California does not require notification if the income change "does not impact" the amount of the subsidies or the cost sharing reduction.[48] But the Centers for Medicare & Medicaid Services guidance to the federal Exchanges do not provide a threshold for changes.[49] All application information changes must be reported within 30 days, or the enrollee "could have potential liability to repay some or all of the APTC received during the year."[50] The insurance application itself states: "I know that I must tell the Health Insurance Marketplace if anything changes (and is different than) what I wrote on this application. … I understand that a change in my information could affect my eligibility."[51]

The Exchange verifies reported changes using available IRS data. Once the data is verified, the Exchange redetermines the enrollee's eligibility, and notifies the enrollee and the enrollee's employer.[52]

The Exchange also periodically examines its data sources to look for changes such as death and eligibility for other plans, including Medicare or Medicaid.[53] The Exchange has the option to attempt to identify changes that may affect eligibility in the Exchange plan or eligibility in insurance affordability programs.[54]

If the Exchange identifies updated income, family size, or family composition information, the Exchange will notify the enrollee and give the enrollee 30 days to notify the Exchange that the data is inaccurate.[55] If the enrollee confirms the information,

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45. 45 C.F.R. § 155.330.

46. Center for Consumer Information & Insurance Oversight, Federally Facilitated Marketplace Enrollment Operational Policy &Guidance, Oct. 3, 2013, www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/ENR_OperationsPolicyandGuidance_5CR_100313.pdf.

47. 45 C.F.R. § 155.330.

48. Cal. Code Regs. tit. 10, § 6496.

49. Federally Facilitated Marketplace Enrollment Operational Policy & Guidance, supra note 46, at 27.

50. *Id.*

51. *Id.*

52. 45 C.F.R. § 155.330.

53. *Id.*

54. *Id.*

55. *Id.*

the Exchange redetermines the enrollee's eligibility.[56] If the enrollee provides new information, the Exchange will attempt to verify that information.[57] But if the enrollee fails to respond, the Exchange will maintain the enrollee's existing eligibility determination, without considering the new information.[58]

This may provide a loophole in non-Expansion states.

E. Subsidies Are Reconciled at the Year's End Through the Enrollee's Tax Returns

Enrollees receive Exchange subsidies based on *projected* income. But the subsidies an enrollee is ultimately entitled to turn on *actual* income for the plan year.[59] Thus, when an enrollee files her return, the IRS reconciles the subsidies she received with the subsidies she is actually entitled to. An enrollee may end up owing a tax equal to some, or all, of the subsidies she received. But two safe harbors can limit or eliminate those taxes.

For those earning less than 400% of the poverty line, the Act caps the amount owed though reconciliation.[60] Individuals earning between 300 and 400% of poverty can owe a maximum of $1,250 (adjusted by the consumer price index); those earning between 200% and 300% of poverty can owe $750, and those earning less than 200% of poverty can owe $300.[61] For married couples, the caps are $2,500, $1,500, and $600 respectively.[62] Cost sharing reductions, however, are not subject to reconciliation.[63]

Those who received subsidies but whose end-of-year income unexpectedly falls below the poverty line will owe no taxes.[64] The enrollee remains eligible for subsidies if (1) he enrolled in an Exchange plan; (2) when he enrolled, the Exchange projected his income to be between 100 and 400% of poverty, for the plan year; (3) the Exchange authorized and paid the advanced subsidies for at least one month; and (4) he would have been eligible if his income was between 100 and 400% of poverty for his family size.[65]

For individuals falling within the safe harbor, subsidies are calculated based on actual income.[66] And their expected contribution towards a Silver plan is reduced to 2% of income.

The safe harbor provisions ensure that a significant,

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56. *Id.*
57. *Id.*
58. *Id.*
59. 26 U.S.C.A. § 36B.
60. 26 C.F.R. 1.36B-4.
61. *Id.*
62. *Id.*
63. *See* 26 U.S.C.A. § 36B.
64. 26 C.F.R. § 1.36B-2.
65. *Id.*
66. *Id.*

unexpected income drop will not trigger an unexpected tax consequence. But the safe harbor provisions may not protect an individual who reports his income decrease to the Exchange from losing his subsidy mid-year.

III. THE CHALLENGES OF MID-PLAN INCOME DROPS IN NON-EXPANSION STATES

One problem of enrolling in an Exchange plan in a non-Expansion state revolves around a mid-year income drop. Consider this scenario: Harry is single and typically earns $22,980 a year—200% of poverty. He enrolls in an Exchange plan and receives advanced subsidies according to his projected income of 200% of poverty (evidenced by prior tax returns). At his income, he'll contribute 6.3% of income towards a benchmark plan. If he enrolls in a benchmark plan[67] with unsubsidized premiums of $327 a month, he will contribute $120.65 a month towards that plan.[68]

For comparison, if Harry's projected income was between 100 and 133% of poverty he would contribute only 2%, or roughly $20 a month, towards coverage. If his income was 400% of poverty, he would contribute $363.85 a month.[69]

Early in the year, Harry loses his job, with no prospects of finding new employment (perhaps he got sick). Harry's projected yearly income is now well below the poverty line.

Under his plan, Harry is almost certainly required to report this income change to the Exchange.[70] But if he does, the Exchange will redetermine his subsidies down to zero. The Exchange must redetermine subsidy eligibility when it receives new information.[71] And with his income now projected to be less than the poverty line, subsidies are not authorized under the Act.[72] Though he'll still be enrolled in his plan.

In a Medicaid Expansion state, this makes sense: if a low-income enrollee loses his job and has no prospects of finding new employment, the prudent move is to terminate Exchange subsidies and enroll the individual in a no-cost Medicaid plan. Indeed, Medicaid eligibility is based on monthly—not yearly—income precisely so someone can quickly switch to Medicaid when hard

67. Given that he earns 200%, buying a benchmark plan, or at least a silver level plan is a good idea because he is eligible for cost sharing subsidies and cost sharing subsidies only apply to silver level plans.

68. $22,980 (Harry's annual income, exactly 200% FPL) × 6.3% = $1,447.74 or $120.65 a month.

69. $45,960 × 9.5% = $4,366.20 or $263.85 a month.

70. Federally Facilitated Marketplace Enrollment Operational Policy & Guidance, *supra* note 46.

71. 45 C.F.R. § 155.330.

72. *See* 26 C.F.R. § 1.36B–2.

times hit.[73] But in a non-Expansion state, where the enrollee is likely ineligible for Medicaid, terminating subsidies after a job loss is a harsh consequence. And no regulation suggests that an Exchange in a non-Expansion state has discretion to act differently.[74]

But Harry can avoid losing his subsidy by not reporting his income change to the Exchange. Although Harry is required to report his income changes, the consequences of failing to do so are not severe. Harry may owe taxes through reconciliation for subsidies received that he was not entitled to.[75] But taxes owed through reconciliation are capped for those earning up to 400% of poverty.[76] And those who end up earning less than the poverty level (and so are ineligible for subsidies) are treated as eligible and thus will owe no taxes for lack of eligibility.[77]

By not reporting his job loss to the Exchange, Harry will continue to receive subsidies for his projected income of 200% of poverty. And he will not face an end-of-year tax liability for the subsidies he receives, if he ends the year earning less than the poverty line.

Still, the Exchange may periodically review Harry's income through payroll taxes, and it may discover his job loss.[78] But this may not lead to termination of subsidies. If the Exchange learns of an income change, it will notify Harry of the discrepancy and request that Harry verify the change.[79] But if Harry fails to verify the income change, the Exchange must continue the subsidies at the original level.[80] Thus, Harry can keep his subsidies if he plays the game right.

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73. *See* John A. Graves, *Better Methods Will Be Needed to Project Incomes to Estimate Eligibility for Subsidies in Health Insurance Exchanges*, HEALTH AFFAIRS (2012).

74. *See* 45 C.F.R. § 155.330 (The Exchange must redetermine the eligibility of an enrollee in a Qualified Health Plan through the Exchange during the benefit year if it receives and verifies new information reported by an enrollee or identifies updated information through the data matching described in paragraph (d) of this section).

75. Federally Facilitated Marketplace Enrollment Operational Policy & Guidance, *supra* note 46, at 27.

76. 26 C.F.R. § 1.36B-4.

77. 26 C.F.R. § 1.36B-2.

78. 45 C.F.R. § 155.330 (The Exchange must periodically examine available data . . . to identify the following changes: (i) Death; and (ii) . . . eligibility determinations for Medicare, Medicaid, CHIP, or the BHP [Basic Health Program], if a BHP is operating in the service area of the Exchange . . . The Exchange may make additional efforts to identify and act on changes that may affect an enrollee's eligibility for enrollment in a QHP [Qualified Health Plan] through the Exchange or for insurance affordability programs").

79. 45 C.F.R. § 155.330.

80. *Id.* ("If the enrollee does not respond within the 30-day period . . . maintain the enrollee's existing eligibility determination without considering the updated information").

The rub is that Harry will continue to pay 6.4% of his income ($120) for coverage, even after losing his job. By comparison, enrollees earning substantially more than Harry (between 100 and 133% of poverty) will pay only 2% of their income toward coverage ($20 a month versus $120). The situation would be even worse if Harry's subsidies were tied to a projected income of 400% of poverty.

Still, Harry can eventually collect additional subsidies if he surmounts a fairly large hurdle. If Harry can continue to pay the $120 a month for the rest of the plan year, he will be refunded the 4.4% difference between the 6.4% he's paying and the 2% he should have paid. Through end-of-year reconciliation, his premium subsidies will be recalculated for his sub-poverty income, and Harry could reap a tax credit of about $1,200: 26 C.F.R. § 1.36B-2 provides not only a safe harbor, it specifies that the enrollee's actual income is used to compute the subsidies.[81]

But that is only if Harry can continue paying the 6.4% of income after losing his job. If he can't, he'll suffer a double loss. He'll go uninsured, and he'll receive a reconciliation tax credit only for the months he paid premiums.

Thus non-Expansion states effectively tax those who lose their jobs and do not have the wherewithal to continue to pay premiums. And these states effectively tax those who do not thoroughly understand the ACA system and fail to determine that they are better off not reporting job losses to the Exchange. Non-Expansion states paradoxically punish enrollees who do what they're supposed to do: report an income change to the Exchange.

A. Significant Life Events Can Make Enrollees Ineligible for Affordable Care in Non-Expansion States

Harry's scenario also illustrates how significant life events can render an enrollee ineligible for affordable coverage in non-Expansion states. Marriage, divorce, a new child, a job loss, retirement, and even the annual increase in the federal poverty line can affect income as a percentage of the poverty line.[82]

For example, if Louise is single and earns $15,000[83] a year (131% of poverty), she's eligible for subsidized Exchange coverage.

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81. 26 C.F.R. § 1.36B–2 ("If a taxpayer is treated as an applicable taxpayer [because his income was below 100% of poverty] under paragraph (b)(5) or (b)(6) of this section, the taxpayer's actual household income for the taxable year is used to compute the premium assistance amounts.").

82. The federal poverty line for an individual was $11,490 in 2013; it is $11,670 in 2014. Internal Revenue Service, *Questions and Answers on the Premium Tax Credit*, Feb. 3, 2014, www.irs.gov/uac/Newsroom/Questions-and-Answers-on-the-Premium-Tax-Credit.

83. For comparison, someone earning the federal minimum wage of $7.25, working 40 hours a week, for 50 weeks would earn $14,500 before taxes.

But if she marries Johnathan who has no income, their combined $15,000 income will be below the $15,510 poverty line for a family of two, leaving them both ineligible.

Conversely, if Louise and Johnathan are single and each earn $10,000 (87% of the poverty line), they are each ineligible for subsidies. But if they marry, their combined income of $20,000 is 129% of the federal poverty line for a household of two, making them eligible for subsidies. If they later divorce, they will again be ineligible. Thus, in non-Expansion states, certain circumstances can incentivize or disincentivize marrage or divorce.[84]

Similarly, having or adopting a child will drop a household's income as a percentage of the poverty line by raising the poverty line by $4,020.[85] Unlike a job loss, a new child must be reported to the Exchange to enroll the child in the plan. That triggers an eligibility redetermination. But if a child makes a family ineligible for affordable coverage, at least the child will be covered by CHIP (and possibly the parents by Medicaid depending on the state and their income), but others may be excluded. Thus, subsidy eligibility may influence decisions to have children or to discontinue pregnancies.

Another consequence is the impact these rules will have on entrepreneurship in non-Expansion states. Presumably, in Harry's scenario he was laid off. But what if Harry left his job to start a new business? Exchange coverage is generally a boon to the self-employed, as it gives them access to high quality, community rated, guaranteed issue coverage. But in non-Expansion states, the fact that becoming self-employed often entails a sharp income drop may deter entrepreneurship.[86]

Thus, in Expansion states, the decision to marry, divorce, change jobs, or have a child are in and of themselves major decisions, but in non-Expansion states they take on an extra dimension in that they can lead to harsh coverage consequences.

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84. *See also* David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 705 (2012) (arguing that, in all states, employer-sponsored health insurance can in some instances penalize marriage, incentivizing divorce. This is because "affordable coverage" turns on the cost of individual coverage, not family coverage).

85. *See* U.S. Department of Health & Human Services, 2013 Poverty Guidelines, aspe.hhs.gov/poverty/13poverty.cfm

86. *See* Shaila Dewan, *How Obamacare Could Unlock Job Opportunities*, N.Y. TIMES, Feb. 20, 2014, *available at* www.nytimes.com/2014/02/23/magazine/how-obamacare-could-unlock-job-opportunities.html.

B. Non-Expansion States May See an Exacerbated Form of Churn

In non-Expansion states, losing coverage due to life events can also exacerbate the consequences of churn. Churn is the term given to enrollees frequently shifting back-and-forth into coverage eligibility due to eligibility status changes.[87] Even for states expanding Medicaid, churn is a problem. Enrollees losing eligibility may switch between plans with different benefits and providers—perhaps on a monthly basis. This can frustrate enrollees and hinder continuity of care.

But for non-Expansion states, churn's consequences are worse. Churning out of subsidized coverage does not entail a loss of continuity of care; it entails a loss of coverage.[88] And while the enrollee can still buy unsubsidized coverage, that is difficult for someone earning below poverty income.

Still, churn may occur less frequently in non-Expansion states. In Expansion states, churn occurs both when an enrollee's income increase places him outside of Medicaid eligibility, and when an income decrease places him outside of subsidy eligibility. By contrast, in non-Expansion states, churn will primarily occur when an enrollee loses Exchange subsidy eligibility. And because Exchange eligibility turns on yearly income, rather than monthly income (Medicaid), churn may be less prevalent—but more consequential.

C. Employers Potentially Wield a Big Stick Over Low-Income Employees

In non-Expansion states, employers of low-wage workers could use subsidy eligibility as leverage over vulnerable employees. Benefits are a major component of job lock. Benefits make it more difficult for employees to leave a job: while employees can replace income with another job, they might not be able to find comparable health benefits. Benefits are a tax-free way for the employer to keep an employee. And from the employee's perspective, there is a quid-pro-quo. Indeed, generous salary and benefits are often called "golden handcuffs."

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87. Churn occurs because those at the margin between Medicaid eligibility and Exchange subsidy eligibility experience significant income fluctuation. Indeed, 35% of adults with income below 200% of the poverty line will experience an income change affecting their Medicaid eligibility within six months; 50% will experience a change within a year. DHMH, et al., *Analysis of the Basic Health Program* (Jan. 17, 2012) at 9, *available at* dhmh.maryland.gov/docs/BHP%2001%2018%2012%20Report%20Analysis%20FINAL.pdf. And 24% will churn at least twice within a year; 39% will churn twice in two years; and in all, 38% will churn at least four times in as many years. *Id.*

88. Unless the enrollee qualified for Medicaid under the states non-Expanded Medicaid program.

But in non-Expansion states, low income employees may see something akin to "lead handcuffs." An employee's Exchange subsidies can turn on how much the employer pays the employee. The pay is a function of hourly salary, available work hours, overtime, and bonuses. Employers who pay hourly wages often reward good workers with more hours and overtime. In non-Expansion states, employers have a new tool to reward or punish employees.[89]

And employers will know which employees are receiving subsidized coverage. The Exchange notifies employers when an employee is determined eligible for advance payments of the premium tax credit or cost-sharing reductions." The notice identifies the employee.[90] Whether some employers will abuse this information remains to be seen.

D. Still, the Unexpected Tax Consequences Could Have Been Worse in Non-Expansion States

But things could be worse in non-Expansion states. Without 26 C.F.R. § 1.36B-2, a mid-year income drop might trigger a substantial tax burden. If, by the end of the year, an enrollee has earned less than the poverty line, the enrollee is technically ineligible for the subsidies. Subsidies are determined by actual, rather than projected, income (though advanced subsidies are provided based on projected income).[91] Thus, under the letter of the law, that enrollee should be obligated to repay the subsidies he received over the plan year.

Fortunately, Rule 1.36B-2 protects individuals who inadvertently end the year earning less than the poverty line.[92] So long as the Exchange determines that the enrollee was eligible for the subsidies at the beginning of the plan year, the enrollee will be treated as eligible for the advanced subsidies he received.[93]

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89. Indeed, there is already concern, and some evidence that employers are moving low- and moderate-income workers to part-time status is probably among the most promising strategies employers might use to reorganize their business operations so as to avoid the employer-mandate penalties and the nondiscrimination rules. *See* Gamage, *supra* note 84, at 711.

90. 45 C.F.R. § 155.310.

91. 26 U.S.C. § 36B.

92. However—and this is not limited to non-Expansion states—there is a possibility of unexpected liability for those who unexpectedly cross 400% of poverty. 77 FR 30377 ("An enrollee who unexpectedly finishes the year earning over 400% of poverty must pay back all advanced subsidies, even if the enrollee dutifully reported all changes in income to the Exchange. Moreover, the reconciliation tax caps do not apply to individuals earning over 400%, so there would be no discount. Still, the IRS will consider possible avenues of administrative relief in appropriate cases for taxpayers who have additional tax liability as a result of excess advance payments.")

93. 26 C.F.R. § 1.36B-2.

Rule 1.36B-2 makes sense in both Expansion and non-Expansion states. In an Expansion state, an enrollee could inadvertently finish the year below the poverty line due to a layoff or reduction in work hours. Further, an enrollee may not wish to switch to Medicaid during a month of fewer work hours or less overtime, on the off-chance he will finish the year earning under the poverty line. Switching to Medicaid could entail changing providers and benefits—a hassle and disruption to continuity of care.[94]

In non-Expansion states, where switching to Medicaid is not an option for most individuals, this rule could provide a lifeline. Individuals eligible for advanced subsidies can generally keep those subsidies for the plan year—provided the Exchange does not undertake a mid-year redetermination of the subsidies. Officials stress, however, that Rule 1.36B-2 is not meant to be a backdoor for coverage in non-Expansion states.

Still, Rule 1.36B-2 illustrates that regulations can mitigate some harsh consequences of running an Exchange without the Medicaid Expansion. Conceivably, new regulations could help individuals earning close to the poverty line receive advanced subsidies in non-Expansion states.

IV. CROSSING THE POVERTY LINE TO FIND COVERAGE

In non-Expansion states, those earning below the poverty line have a big incentive to overstate income. This raises issues of income verification, enforcement of perjury rules, and whether low-income applicants can accurately project their income given the unpredictability of many low-wage jobs.

By contrast, in Expansion states, overstating income is a non-issue: applicants who earn below 138% of poverty enroll in Medicaid; those who do not enroll in Exchange coverage. Thus, federal regulations do not appear to require (or even allow) an Exchange to verify an applicant's attestation to an income increase—applicants do, however, sign their applications under penalty of perjury.[95] But overstating income matters in non-

94. *See* John A. Graves, Ph.D., Rick Curtis, M.P.P., & Jonathan Gruber, Ph.D., *Balancing Coverage Affordability and Continuity under a Basic Health Program Option,* e44(1) ("Avoiding disruptions in coverage is an important goal because it can reduce unnecessary administrative costs and improve health plans' incentives to invest in achieving longer-term health outcomes. Continuity of coverage can also help maintain clinician–patient relationships, especially in places where there are substantial differences between the clinicians participating in Medicaid and those participating only in private plans.")

95. *See* 45 C.F.R. § 155.320(c)(iii);*Application for Health Coverage & Help Paying Costs*, Health Insurance Marketplace, marketplace.cms.gov/getofficialresources/publications-and-articles/marketplace-application-for-family.pdf.

Expansion states, particularly when rule 1.36B-2 lets an applicant, approved for advanced subsidies, keep those subsidies for the plan year (for the most part).

Tax strategies might boost income above 100% of the poverty line. Indeed, tax experts are advising enrollees earning just over 400% of poverty on ways to reduce their income to qualify for subsidies.[96] For example, a household of two might obtain a tax subsidy of $1,207 per month if they can reduce their modified adjusted gross income to below $62,040 (400% of poverty).[97] Income can be reduced through a tax-deductible contribution to an individual retirement account, 401(k) or other workplace plan (and IRA contributions can be made until April 15 of the following year).[98] Deductions that appear above the Adjusted Gross Income line, such as student loan interest and tuition and fees, can also reduce income.[99] And simply working fewer hours can bring income below 400%.[100]

Near the poverty line, different strategies might boost income above 100% of the poverty level. Individuals at the margin could negotiate with an employer to work more hours. Applicants could find a second job or even start a business to boost income above the poverty line prior to applying for coverage. At the extreme end, a strategic marriage or divorce could boost some applicants above the poverty line.[101]

But just how accurately can low-income applicants forecast their income? Professor Timothy Jost argues that: "verification in advance of how much lower-income American families will earn over a year is a fantasy. Lower-income Americans often work in part-time, intermittent, or seasonal jobs and are paid hourly wages, making predicting income exactly a year in advance simply not possible...A good-faith estimate of income is all that is possible. Congress cannot reasonably require the impossible."[102] Income from tips or commission could also be difficult to project.[103]

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96. Kathleen Pender, *Lower 2014 income can net huge health care subsidy*, S.F. Chronicle, Oct. 12, 2013, *available at* www.sfgate.com/business/networth/article/Lower-2014-income-can-net-huge-health-care-subsidy-4891087.php.

97. *Id.*

98. *Id.*

99. *Id.* ("But itemized deductions, including charitable contributions, mortgage interest, and state income taxes, do not.").

100. *Id.*

101. See discussion in section (II)(A.) Significant life events may cause certain individuals to become ineligible for affordable care.

102. Timothy Jost, *Implementing Health Reform: The State Of The Exchanges, Income Verification, And More*, HEALTH AFFAIRS, Oct. 16, 2013, healthaffairs.org/blog/2013/10/16/implementing-health-reform-the-state-of-the-exchanges-income-verification-and-more.

103. A rejoinder might be that the applicant can simply wait to get those subsidies at the end of the year through reconciliation. But that assumes the applicant can afford to buy unsubsidized coverage for the year.

The difficulty in predicting matters because attestations are made under the penalty of perjury.[104] The Act also imposes additional penalties when an individual fails to provide correct information based on negligence or disregard of program rules, or knowingly and willfully provides false or fraudulent information.[105]

But what counts as negligence in projecting future income? Is it enough that a boss mentions there will be more work next year? What about an employee's feeling that the boss likes him and will give him a raise? Or a feeling that customers will be plentiful and tips more generous next year? What if the applicant has a plan to start a new business the next year, or to apply for a higher paying job? What about a feeling that next year, he will win the lotto?

If accurately forecasting income is impossible for some applicants, how can the government distinguish good faith estimates from fraud? And if the government believes applicants are overstating income, will it pursue perjury charges—particularly when the federal government is invested in expanding coverage?[106] Indeed, if the federal government had its way, this population would be covered by the Medicaid Expansion—and the government would be paying that cost (at least initially). Prosecuting murky allegations of perjury in coverage applications can only discourage Exchange enrollment. And opponents would likely make political hay of it: "Under ObamaCare, make a mistake on your application, and you'll go to jail!"[107]

Still federal officials would also like to avoid the appearance

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104. Frequently Asked Questions on Health Insurance Marketplaces and Income Verification, *supra* note 26.

105. *Id.*; Jost, *supra* note 102 (Timothy Jost adds: "Of course, our entire tax system is in large part an 'honor system,' resulting in a 'tax gap' last estimated in 2006 at $385 billion. Of this, an estimated $122 billion was attributable to business income and $67 billion to corporate income taxes, and $57 billion to self-employment taxes. It is quite possible that some individuals will receive premium tax credits to which they are not legally entitled. The CBO estimates the entire cost of exchange subsidies for 2014 will be $26 billion, growing to $87 billion in 2016. If we are genuinely concerned about tax fraud, it would seem there are bigger targets we could be aiming at.")

106. And will employees of Exchanges in non-Expansion states offer "nudge-nudge wink-wink" advice for estimating income on insurance applications?

107. A similar issue is occurring with respect to enrolling Latinos. "The biggest problem is that a lot of people, new immigrants to this country, have a mistrust of government, particularly when they see families being divided and deported." In October, U.S. Immigration and Customs Enforcement, a division of the Department of Homeland Security, said in a memo that it "does not use information about such individuals or members of their household that is obtained for purposes of determining eligibility for such coverage as the basis for pursuing civil immigration enforcement action." Alison Vekshin, *Lag in Enrolling Latinos in Obamacare Spurs New California Push*, BLOOMBERG, Feb. 13, 2014, www.bloomberg.com/news/2014-02-14/lag-in-enrolling-latinos-in-obamacare-spurs-new-california-push.html.

of rampant fraud at the Exchanges. It will be interesting to see whether income overstating occurs and how the government responds.

V. HOW REJECTING MEDICAID COULD AFFECT THE LONG-TERM SUSTAINABILITY OF EXCHANGES

The final consequences considered are to the Exchanges themselves. Will the absence of Medicaid hurt the long-term prospects of the Exchanges?

A. Does the Medicaid Expansion Help or Hinder Exchange Enrollment?

In non-Expansion states, most individuals earning between 100% and 138% of the poverty line are ineligible for Medicaid, but still eligible for Exchange subsidies. Thus in those states, Exchange issuers can access a population that would otherwise enroll in Medicaid plans. Those earning between 100% and 138% of poverty, are disproportionately younger and thus healthier.[108] Enrolling that population could increase the pool of insureds and improve the risk-mix ratio—keeping policies affordable and improving the Exchange's long-term prospects. Thus, states rejecting Expansion, *might* see a healthier exchange.

But it probably won't be that simple. Medicaid enrollment may increase Exchange enrollment. Conversely, hindering Medicaid enrollment may hinder Exchange enrollment. If you're uninsured and you notice friends sign up for coverage, you might be encouraged to explore your own coverage options. As Medicaid enrollment grows, it may bring more people out of the woodwork to sign up for coverage: either through Medicaid or the Exchanges.[109]

Also, access to Medicaid may help enrollees earn out of Medicaid and transition to Exchange plans. A widely cited Oregon study found that Medicaid enrollees' physical health, including

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108. *See* Sara Rosenbaum, *Medicaid's Next Fifty Years: Aligning an Old Program with the New Normal*, 6 ST. LOUIS U.J. HEALTH L. & POL'Y 329, 334 (2013) ("The estimated 56 million low income adults and 35 million children who will experience post-reform churn across the Medicaid and Exchange markets [because they earn near 138% of the poverty line] represent the healthiest risk groups across the two markets. Unlike the millions of older and sicker adults who gain enormous benefits from health reform, this group is in the workforce and in relatively good health.")

109. Indeed, even non-Expansion states are seeing a surge in Medicaid enrollment. All the attention devoted to the ObamaCare launch spurred many already-eligible people to enroll. Sarah Kliff, *Trying to count Obamacare's Medicaid enrollment? Good luck*, WASHINGTON POST, Jan. 23, 2014, www.washingtonpost.com/blogs/wonkblog/wp/2014/01/23/trying-to-count-obamacares-medicaid-enrollment-good-luck.

conditions such as obesity and diabetes, did not change much (at least at the outset), but mental health improved dramatically.[110] Better mental health may improve job prospects. And having coverage in general will avoid catastrophic medical costs, which can lead to bankruptcy. Thus, Medicaid may serve as a feeder for the Exchanges, boosting enrollment.

But non-Expansion states forego that enrollment driver. Even though non-Expansion state Exchanges will have access to a larger population (those earning between 100 and 138% of poverty), the lack of an expanded Medicaid program may ultimately hinder Exchange enrollment.

B. Non-Expansion States Are Susceptible to an Economic Tipping Point

Further, without the Medicaid option for many low-income individuals, the Exchanges in those states may see a tipping point during the next economic downturn.

Individual and family income at the margin of Exchange subsidy eligibility is particularly susceptible to the effects of economic downturns. In recessions, hourly wage earners see their work hours cut. Hourly wage earners—disproportionately low income—are also particularly vulnerable to layoffs during downturns.

Thus, in non-Expansion states, a recession could push many at the margin out of subsidy eligibility. This drop in subsidies—and almost certain drop in enrollment—threatens the health of the Exchange. It reduces the pool of insureds, which can increase premiums. That can lead to adverse selection: those most in need of coverage (and likely needing the most expensive care) keep their plans, while those able to forego coverage (and likely needing the least expensive care) leave, further driving up premiums.

Moreover, Exchange enrollees near the poverty line may represent a disproportionate share of the young and healthy. Their loss will affect the healthy risk-mix ratio of the pool of insureds, driving up premiums.

The drop of insureds during a downturn may also strain care providers by increasing uncompensated care. Providers will pass the costs on to insurers, further driving up premiums. And those losing coverage also lose access to programs designed to reduce the cost of care, such as free preventative care. This can increase future costs, further increasing premiums.

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110. Sabrina Tavernise, *Law's Expanded Medicaid Coverage Brings a Surge in Sign-Ups*, N.Y. TIMES, Jan. 20, 2014, *available at* www.nytimes.com/2014/01/21/health/peace-of-mind-is-first-benefit-for-many-now-getting-medicaid.html; Sarah L. Taubman et al., *Medicaid Increases Emergency-Department Use: Evidence from Oregon's Health Insurance Experiment,* SCIENCE 343, 263 (2014).

But Expansion states will not likely see the same problems during a recession. There, low-income enrollees can shift to Medicaid plans. In some instances, the Exchange issuers also provide the Medicaid plans (thus the issuers may not lose a customer). Enrollees will also continue to receive preventative care through Medicaid and will not be forced to use the Emergency Room to obtain primary care. Finally, the economy will likely avoid the double impact of individual bankruptcies resulting from catastrophic medical care costs.

Thus, Medicaid augments the Exchange making it more robust and less vulnerable to shocks from a financial crisis.

VI. CONCLUSION: WHAT MIGHT BE DONE TO REDUCE THESE CONSEQUENCES IN NON-EXPANSION STATES?

Despite these problems, non-Expansion states are still better off having an Exchange than not. The option to buy community-rated, guaranteed-issue, comprehensive coverage is an enormous improvement over the status quo pre-healthcare-reform, when buying insurance on the individual market was poor choice for all but the youngest and healthiest.

But the absence of Expanded Medicaid diminishes some of the benefits of the Exchange in non-Expansion states. Yet, perhaps as these issues come to light, steps may be taken to solve or mitigate some consequences of running an Exchange in a non-Expansion state. What might be done is beyond the scope of this paper. But here are some initial thoughts.

The obvious solution is to expand Medicaid. This may be a political non-starter. Still, non-Expansion states may be willing to adopt alternatives to covering those earning too little to qualify for Exchange subsidies. States like Arkansas have adopted a "private option," using federal Medicaid dollars to purchase private Exchange plans.

Having an affordable coverage option for individuals falling below the poverty line alleviates many of the problems discussed. It mitigates the consequences of mid-year income drops, and avoids the dilemma of whether to notify the Exchange of an income drop. It similarly would reduce an employer's leverage over vulnerable employees. It may also alleviate the consequences of Churn if enrollees have access to the same coverage above and below the poverty line.[111]

As a more likely, but less efficacious option, new federal

111. Gabriel Ravel and I discuss two solutions to churn in our article *Crossing 138: Two Approaches to Churn Under the Affordable Care Act*, 24 HEALTH MATRIX __ (forthcoming May 2014). The solutions involve providing matching coverage in terms of benefits and provider network on both sides of 138% of the federal poverty line.

regulation could mitigate some consequences. Much like Rule 1.36B-2 provides a safe harbor for enrollees who finish the year earning less than the poverty line, a similar provision could create a mid-year safe harbor. If an enrollee reports an income drop that results in a projection that he will finish the year earning less than the poverty line, the Exchange could treat that enrollee as an eligible enrollee and offer subsidies according to the enrollee's new projected income. That new regulation would effectively apply Rule 1.36B-2 mid-plan-year. It would also avoid the question of whether to report a significant income decrease and the pay-now, collect-later game.

Similarly, regulations and guidance could better acknowledge the difficulty low-wage worker face in projecting future income. When income turns on tips, unpredictable hours, or finding the next odd-job, the presumption should be that the applicant will earn at least the poverty level. Arguably, regulations already do this, by requiring the Exchange to accept, without verification, an applicant's attestation of an income increase. But with the specter of signing the application under the penalty of perjury, the regulations and CCIIO guidance should make clear that low-income workers can make every inference that their income will exceed the poverty level.

An even less dramatic step, Exchanges in non-Expansion states could exercises discretion to require enrollees to report only material income increases, not decreases.[112] This could avoid some mid-year subsidy redeterminations.

No doubt other options exist.

I believe that the Affordable Care Act help millions of Americans. Hopefully, if the problems that arise in its implementation are addressed seriously and swiftly, the most vulnerable Americans will not fall through the cracks.

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112. *Contra* Ken Jacobs, Dave Graham-Squire, Elise Gould & Dylan Roby, *Large Repayments of Premium Subsidies May Be Owed to the IRS if Family Income Changes Are Not Promptly Reported*, 32 Health Affairs no.9 (2013): 1538-1545 ("Prompt reporting of changes in income so that subsidy amounts could be adjusted appropriately would help prevent financial shocks when enrollees file their taxes. Prompt reporting would reduce the number of subsidy recipients who owed repayments by 7–41 percent, depending on the level of changes reported and the method used to adjust the subsidy amounts. It could also reduce the size of median repayment obligations by as much as 61 percent.")