



State Commissioner Refuses to Confirm that Dayton Administration Will Not Act without the Legislature to Create Obamacare Health Insurance Exchange.

Minnesota Senate HHS Committee March 9, 2011 Hearing

Hann: [...] If Commissioner Gilchrist is here. If she would like to ---

Jesson: Mr. Chair, members of the committee, I'm Cindy Jesson. And Assistant Commissioner Gilchrist could not be here. She wanted me to say that she would be happy to meet with you or talk with you about this subject at a different date; that she had another commitment.

Hann: Alright. Well, thank you for being here. Ah, the reason that I requested that you come to the committee is --stemmed from a meeting I had with Commissioner Gilchrist a couple of weeks back; just an introductory meeting. In the course of the meeting we were talking about she asked about the Health Insurance Exchange which of course is an issue that has been talked about a lot at the federal level and at the state level. And I understand there was even some discussion on a bill that got put forward in the House. I don't think they had a hearing on it.

[But in the course of that conversation one of the comments that Assistant Commissioner Gilchrist made to me I found a little disturbing in that she indicated regardless of whether the legislature acted on a health insurance exchange this year it really didn't matter because in her judgment, the administration through her Department could implement, as she said, 90 percent of what needed to be done without the legislature.](#)

That caused me some concern and in consultation with our counterparts in the other body, we decided what we needed to do was get clarification because frankly, we don't believe that the administration has any authority to implement or spend any money frankly on an exchange without legislative approval.

[And so what we asked for in the letter—and members you have a copy of the letter—just an explanation of what that remark referred to.](#) What is it that the Administration intends to do or thinks it has the authority to do that you do not need legislative acquiescence or legislative input on with respect to implementing the federal health care reforms at least as they've been proposed and I think are somewhat in doubt? But that was the reason why we wrote the letter.

We did not get a responsive letter in return. We got a letter back that indicated that this was an important issue, which we agree, and indicated that there were lots of issues surrounding it, which we agree. I'm not frankly interested today in getting into a discussion about the details of how an exchange might work or what the features of that are.

[What I'm really interested in. What my intent of the letter was to understand what the administration believes it can do without the acquiescence of the legislature.](#) And that's what we need to know. We think it's a serious – I think it's a serious question. I think it raises some implications about separation of powers frankly.

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And I just want to make sure I understand what the position of the administration is with respect to implementing an exchange in Minnesota. So, that's the reason why the letter. I was not intending to have a hearing with you here except that the response we got was a non-responsive response in my opinion. And because I think it's a significant issue, I wanted to have the opportunity to hear directly from you, Commissioner, and from Commissioner Gilchrist, Assistant Commissioner Gilchrist, on what that means and have you describe what the administration's intent is. So, I want to give you a couple of minutes. I know you've got to depart shortly but ---

Newman: Mr. Chairman, Mr. Chairman

Hann: Mr. Newman.

Newman: Commissioner, I will tell you that I'm quite disappointed that Assistant Commissioner Gilchrist is not here this morning. And it seems to me that the conversation that the Chairman is talking about is a conversation that occurred between him and Assistant Commissioner Gilchrist.

It is Assistant Commissioner Gilchrist that [wrote the non-responsive response](#) and Mr. Chairman, I would just ask that you consider either continuing this hearing until such time as Assistant Commissioner Gilchrist appears in front of this committee as requested. Or in the alternative, proceed with the idea that Commis—Assistant Commissioner Gilchrist will in fact come before the committee so that we have an opportunity to ask her questions about what transpired.

Hann: Thank you Senator Newman. I guess we'll wait till we hear from the Commissioner. I respect that Commissioner Jesson, you are the head of the Department. I am assuming that Commissioner Gilchrist is responsive to your lead, and I would hope that you are familiar with the Department's--the Administration's view on implementing the Exchange. And as I said, I'm concerned about the comment. I would like to know what that means and I would invite you to respond.

Jesson: Thank you Mr. Chair and members of the Committee, I would like to –if it's acceptable to you Mr. Chair, I asked Commissioner Rothman, Commissioner of Commerce to join me here. In the Admini – from the Administration's perspective, the Department of Commerce is taking the lead role in the Exchange initiative and developing our policies on that so if it'd be acceptable, I'd like to defer to Commissioner Rothman, but I'm also happy to answer any specific questions.

Hann: Well, let me ask you, just before you do that. [The statement that was told to me that the administration can do 90% of what it needs to do without legislative approval. Is that correct? Is that the position of the administration, that they can implement 90% of what's required for an exchange without the legislature?](#)

Jesson: Um. Mr. Chair, I would defer to Commissioner Rothman because the – I've not looked at the Department of Human Services ah, you know, my ability as Commissioner there to do this because that's outside my purview.

Hann: Commissioner, I would just remind you that I've never had a conversation with the Commissioner of Commerce until just briefly this morning. And the conversation I had was an

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assistant commissioner in your department so my assumption was that she was speaking for you and for your department and for the administration. And if your department has nothing to do with the Exchange then I'm not sure why I had that conversation with Commissioner Gilchrist.

Jesson: No, Mr. Chair, I was not there, so it's hard for me to comment upon that, on what she intended or meant or said during that conversation. I think DHS's role in the Exchange is certainly – um, we are looking at how the public programs will be part of the exchange so certainly we have any interest in how the – from the Department's perspective on how the exchange is developed.

I think we'll – the Department because of the public programs -- will have an important role in the Exchange. But the development is really in the Commerce Department and that's why I thought Commissioner Rothman would be better able to address this because frankly Mr. Chair I haven't been as intricately involved in looking at exchange options as Commissioner Rothman has.

Hann: And setting aside the options for the exchange, which is a policy area that I get, for the purposes of today I'm not interested in discussing the options or the different kinds of things that could be done. What I am interested in knowing is if the administration believes or if it's their position that they can do this without the legislature, which is what I was told. That's what I'm looking for.

Jesson: And Mr. Chair, I've not specifically looked at that issue because it is outside of my purview as commissioner of human services. So I did not authorize or direct Assistant Commissioner Gilchrist to make that statement. And I would really defer to Commissioner Rothman on what power the Commissioner of Commerce has. That's not my area of expertise, Mr. Chair.

Nienow: Mr. Chair.

Hann: Senator Nienow.

Nienow: Mr. Chair, Commissioner, Was there a request made to have Lauren Gilchrist here today?

Jesson: Yes, Mr. Chair. Senator Nienow. I talked with Commissioner Gilchrist on the phone about her schedule, actually about 7:00 this morning. I also talked to her late yesterday.

Nienow: Mr. Chairman, and she's not able to attend, why?

Hann: Commissioner Jesson?

Jesson: Mr. Chair. Senator. [I don't recall what the matter was. I know I spoke with her twice about it.](#)

Nienow: Mr. Chair.

Hann: Senator Nienow.

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Nienow: Would it be unreasonable to ask you to give her a call and report that back to us?

Hann: Commissioner Jessen?

Jesson: Mr. Chair. Senator. I do think – she had a conflict, so I don't think she would be answering her phone.

Nienow: (slight laugh) Mr. Chair, I didn't mean immediately. I'm sorry, I may have been unclear there. Just to let us know what the conflict was; why she wasn't able to make it.

Hann: Senator Nienow, I appreciate that. I do – I respect Commissioner that you do have another commitment. I don't want to keep you past that time. However, I do want to express my disappointment that in asking for clarification of a statement that was made that I think is significant, and I'm disappointed that Assistant Commissioner Gilchrist wasn't here. I respect that you have the authority to speak for the department and that if she can't be here and you're here in her stead. I have still not heard an answer about what the administration believes it can do without the authority of the legislature.

That is the thing that I'm trying to understand. And if you're telling me that you have no authority without the legislature, I'll accept that if that's your statement. Or if your statement is that you do have that authority, I just—I would like to know what the statement of the administration is on their authority to implement an exchange without the legislature.

Rothman: Mr. Chair.

Hann: Just one second Commissioner. Commissioner Jessen, any comment before you depart?

Jesson: Mr. Chair, Members of the committee, I do think that's a serious question and I do think that's a serious matter. I do take that seriously. That's why I asked commissioner Rothman who has responsibility for this area to join me so the committee would be able to ask ques – ask questions of and get answers to their questions.

Hann: Well, Commissioner, with respect to your schedule, I just before as you leave want to make it very clear that my position is that the administration has no authority to enact anything without the approval of the legislature and may not take federal money to enact things that obligates the state of Minnesota, the people of Minnesota. It may not do those things. That's my opinion. If the administration has a differing opinion, which is what I suspect given the comment, I would like to know what that is and why. And so, I understand that you need to go and I will defer to your other commitments and we can talk with the Commissioner of Commerce.

Newman: Mr. Chairman.

Hann: Mr. Newman.

Newman: Mr. Chairman, Thank you. Before you leave, Commissioner Jessen, did you have a conversation with Commissioner Gilchrist following her conversation with Chairman Hann?

Hann: Commissioner Jessen?

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Jesson: Mr. Chair, Senator. I don't recall any conversation. Actually the first time I recall hearing about this was when I was testifying in Senate Finance and Senator Hann asked me about the conversation. That was frankly the first I'd heard about this conversation from anyone. And I think my response then, was that, from my perspective, the administration wanted legislation.

Newman: Mr. Chairman.

Hann: Senator Newman.

Newman: Commissioner, your answer is no, you have not had any conversation with Assistant Commissioner Gilchrist regarding her conversation with Senator Hann. Is that correct?

Hann: Commissioner Jesson?

Jesson: Mr. Chair, Senator Newman. That was not—um—I had—that's not correct. I talked about the first time I heard of it. I thought your question was did I talk to her right after it and my answer is no, that the first I'd heard of it was when Senator Hann asked me.

Newman: Mr. Chair?

Jesson: I did in the context obviously of talking to her about her schedule; about this hearing, you know, talked to her about the conversation in that context.

Hann: Senator Newman.

Newman: I'm sorry Commissioner, but I am confused. Did you or did you not speak to Assistant Commissioner Gilchrist concerning her conversation with Chairman Hann as to what she said to him?

Hann: Commissioner Jesson?

Jesson: Mr. Chair. Senator Newman. I did speak with Assistant Commissioner Gilchrist in the context of—um—asking her about her schedule and getting ready for this hearing.

Newman: Mr. Chairman.

Hann: Senator Newman.

Newman: When you talked to her, did you come to an understanding as to why she made that statement to Senator Hann about the administration having 90% of – or being able to get 90% of what they wanted to accomplish without the assistance of the legislature?

Hann: Commissioner Jesson?

Jesson: Mr. Chair, Senator Newman, um—Assistant Commissioner Gilchrist told me—and these are mostly phone conversations about scheduling—that the conversation wasn't exactly as Senator Hann described it. [But I did not get into details with her about that conversation.](#)

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Hann: Well, and Commissioner Jesson, that was my recollection. That's why I wrote the letter to put my recollection down. I've not heard back from Commissioner Gilchrist at all contesting my recollection if it is—if it needed correction—I'm willing to be corrected. What I understood her to say was that she made the point, that because I – we were talking about the exchange and I expressed doubt about what the legislature might do with an Exchange and her response to me was that that really wasn't much of a concern because the administration, through her department, is what I got the indication, would be able to do 90% is the number I recall of what needed to be done without the legislature.

That is what I'm trying to understand. If that's what she – if she didn't say that, I'd like to have her correct that. If she did say that, I'd like to know what she meant by that. Fundamentally, I would like to know what the administration's position is on what they can do. And I understand that you're deferring to Commissioner Rothman, and, ah, I guess well ask if Commissioner can bring some clarification.

Jesson: And Mr. Chair, would it be acceptable? I do have to be at the University of Minnesota at eleven.

Hann: I understand. You did mention that to me. I appreciate you giving us a few moments here, but I do want to leave you with my point that first of all I am disappointed in the response that we got. I still think we need to have a response. And fundamentally we need to know what the administration's position is on this issue.

Higgins: Mr. Chair?

Jesson: I understand Mr. Chair.

Hann: Thank you Commissioner.

Higgins: Mr. Chair?

Hann: Yes, ah, Senator Higgins?

Higgins: The same question has now been asked to the Commissioner five times. And I think it's bordering on badgering at this point.

Hann: And, ah, Senator Higgins, I appreciate...

Higgins: The Commissioner has said about five times that Commissioner Rothman has been put in charge of the Exchange...

Hann: Senator Higgins, I...

Higgins: And he is the appropriate person to be asking questions of, not the Commissioner who is not in charge.

Hann: Sen. Higgins, I appreciate your comment. I have not talked to Commissioner Rothman before today. I had a conversation with a member of the human services department. That's who this committee has jurisdiction over. That's the context I heard this comment. That why I asked

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Commissioner Jesson and Commissioner Gilchrist to come. I understand Commissioner Gilchrist is not available. I believe Commissioner Jesson has the authority to speak for her. I think it's a fair question to know what was meant by that, what the position of the administration is. I understand that they're not responding to that, but um, but we'll turn it over to Commissioner Roth.

Sheran: Senator Hann.

Hann: Senator Sheran.

Sheran: Thank you. Um, I've become unclear as to what the purpose of this is because if the question is as you've indicated your interest to be, to determine what is allowable and not allowable, with or without legislative action, then we have the right people at the table to answer that question. And I think this committee, and I personally am grateful that the administration has brought two commissioners to this hearing to be responsive to that question. If the issue is that you want to hammer down on a letter here, I don't think that that's a good use of the Senate's time. I do think it's a good use to get a correction if there should be or a clarification to what your essential question is and I would like the answer myself. I would like to get to that.

Hann: Well Senator Sheran, I agree with you completely. It was not my intention to have a hearing on this matter today. We wrote a letter. We asked for clarification. We did not get a response and frankly, that is a source of irritation to me. I think it's a reasonable question and if the response would have been, well, that's not what I meant, or I understood you to ask something else, or whatever it would have been. But we did not get a response. I think it's a significant issue.

I am concerned about if the administration does have in their mind that they're able to do things without the legislature, I think it's important that we know what those things are. And I do appreciate Commissioner Rothman being here, but I have not talked with him before about this issue. If Commissioner Jesson apparently wants to defer to him, and we'll ask him the same question. But you are right, I don't think we ought to have an extended hearing on this but, but the only reason we're doing it is because we didn't get a response to what I thought was a legitimate question from a member of the department. So I take your point. We're not going to belabor this and go on for an hour and a half but...

Sheran: Let's get the answer

Hann: we're going to try to get a response. So Commissioner Rothman, can you answer the question that I'm trying to seek an answer to which is does the administration take it as a matter of authority that they can implement an exchange, or 90% of an exchange, without any action by the legislature?

Rothman: Mr. Chair and members of the committee. I've been asked to be here today to respond to that question and any other questions that you have with respect to the insurance exchange. Just to give you a preview, a little bit of background, the administration, since the day we started has started to work on the exchange piece, um.

And I do believe, ah, we, we've given you the background at least the information that I have to be out of here at 11:05. Because of that, I'm willing to come back. I'm also willing to talk with

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you Mr. Chair and any other members of the committee, one on one, in a meet and greet about the position of the administration with respect to the health insurance exchange. I came in today to be responsive and to be responsive on behalf of the Governor's office, the administration, on behalf of health and human services, the department of health and anybody in the administration with respect to the health insurance exchange legislation that's pending and the initiative, and anything to do with it.

With that background, the – my view of where we stand in implementing the health insurance exchange is this. As everybody knows, the act was passed. We also have been monitoring just as everybody else, the legal challenges that are in federal court. We're also monitoring the federal, you know, Congress and anything there with respect to funding, and as of today, it appears, actually yesterday, that the Department of Justice filed a Notice of Appeal in the 11th circuit which effectively stayed the Florida federal court's decision and then allowing the states to continue their implementation efforts.

When we look, when the administration is looking at the context of all this, we're looking at it from this perspective. By 2014 under the law, federal law, the states are required to, they're required to have their own state-based exchange in place. Otherwise a federal exchange will be implemented for that state and any state that does not have one. In order to get there, but January 1, 2013, Minnesota has to prove that the exchange is up and running, provable from a technological perspective and in all other respects operational. Otherwise the federal government will implement an exchange for Minnesota and for any other state that doesn't.

There's not a lot of time. And in order to do that, since day one the administration has taken immediate steps so that we can attempt to accomplish that. The first is, we looked at the legislation that was dropped in the House and we've monitored that and we've talked to, I've talked with leadership in the House. I've also talked with leadership in the Commerce Committee and discussed generally about what the thoughts are about the exchange on the legislative {inaudible}

It's our view, the administration's view that the best solution to the exchange is to work with the legislature; to develop a plan that's Minnesota-specific, that uses the best of what Minnesota has; the best and the brightest that the legislation that we can do in Minnesota and to do it in a Minnesota way. Minnesota is leader among the states in a large – in a lot of ways because of what it's done to date. Minnesota business community, the health plans and all the folks that are out there are way—in many senses way ahead of the game nationally. We have one of the leading medical institutions or more in Minnesota and we have a lot of resources at our, all of our fingertips to be able to have a best plan for Minnesota.

[Our first preference is to work with the legislature](#), with you folks, in order to come up with a solution for Minnesota that makes sense for Minnesota.

In the event that we're not able to, we have to go back and step back and say to ourselves, what do we do now? Given the time frame and given the federal law, we're just at the starting point on what that looks like, what it could be. We don't have any complete analysis. I don't. Under my authority – my authority is to enforce and to regulate the insurance industry. That includes some aspects of the health industry as you know. And so where we're at on that and where we're going to go is, is, basically we're at the starting point.

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Let me say this. Within 8 weeks, what have we done? We've looked at, first of all, we've applied for the federal \$1 million grant to get the study in place, the implementation money. What does that get? **I can go through all that and explain in detail what we can --- what it allows us to do.** We also are in the process of reviewing the legislation that was dropped in the House. **I understand that there's another bill that's being discussed.** And that the administration has spent weeks analyzing **a legislative option** that we're in the process of reviewing now as another option to work with everybody.

Because of the resources we've spent, personally and within the administration on developing and looking at the legislative stuff, **we're now at a point of where we can take a look at what else is out there.** And again, coming back to my point, we want to work with the legislature. I want to work with leadership in the legislature to find a solution for Minnesota.

Hann: Commissioner Rothman, I appreciate your comments. I'm trying to parse their meaning. I understand that the administration's preference would be to work with the legislature on this issue. I heard that. **I did not hear you say that without the legislature the administration could do nothing in terms of implementation.**

So I take it that you believe, or the administration believes that it may, if the legislature does not act --- I understand that there's a federal requirement and I understand that there is a timeline. I understand all those things. But if the legislature doesn't act, I'm taking it, and correct me if I'm wrong, but your opinion is that the executive branch will act on its own to implement what it believes the federal law requires them to do. Now, am I misunderstanding you, Mr. Commissioner?

Rothman: **Mr. Chair, I did not say that.**

Hann: I know you did not say that Mr. Rothman, but you --- I'm trying to understand if that's what you meant and correct me if I'm wrong. You said your preference was to work with the legislature. In the event that the legislature doesn't act, that the administration's position is that it can, with authority, act on its own.

Rothman: **Mr. Chair, I did say what I meant to say and that's what I meant to say.** And Mr. Chair, just to be clear, we're at the starting point of looking at the question.

Hann: I'm going to again repeat what I understand you to say. I know what you did say but I know what you did not say. **And I'm interpreting what you did not say to mean that if the legislature does not act the administration believes it can do this independently. And I just want to say that my opinion is you cannot.** That's my opinion.

Rothman: For the record, I did not say that. Mr. Chair, it's our preference to work with you; to work with leadership in the Senate and in the House, to work for legislative solutions.

Hann: Mr. Rothman ---

Rothman: And if I may, Mr. Chair, I'm at the starting point with the administration to look at that question so and I'll keep you posted on what our thoughts are on that. I'm happy to come back, but I also think we can have a good working relationship to do that.

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Hann: Well, Mr. Rothman, I expect that, but what I would like to say is I don't believe under the Constitution of the State of Minnesota that the Executive branch has the authority to act independently of the legislature on this matter. That's my opinion and you're not --- you're taking the view that your preference is to work with the legislature. I understand that. [It's my understanding that the Constitution that you are required to work with the legislature.](#) But that's my opinion.

And I understand that you need to depart and I don't want to belabor this. I heard what you said and I heard what you didn't say. I understand that you may have a difference of these of what my understanding of what your remarks means but I'm still looking for a definitive statement from the administration on what they think they can do without the legislature and I have not heard that. I've just heard that you expressed your preferences to work with us, but I haven't heard what you think you can do without us.

Rothman: Mr. Chair, again, I'll go back to this. If I've said it as a preference and be-- and that makes you believe that we don't want to work with the legislature, that's, that's completely untrue. We've been actually working with and I've had discussions with leadership in both the Senate and the House on the Exchange bill and how this would work and what it might look like.

I understand what you're saying. I hope you understand what I'm saying, which is I'm, in terms of analyzing from a Constitutional perspective, what the State Constitution says, how this interplays with federal preemption and the impact on Minnesota and the legislative responsibility and the administrative responsibility, I completely understand what you're saying. I respect that.

And at the same time, from the Administration's perspective, we're looking at it just from the administration's perspective on what best for Minnesota can we do to do what our obligation is on the, in the exchange piece of it. What would make sense and be best for Minnesota.

Hann: Well, Mr. Rothman, we may have to disagree. But just to be very clear. What I believe the State Constitution requires and I just want to be very clear.

I do not believe that the executive branch has the authority, regardless of what the federal government may wish and [regardless of what the administration may believe to be necessary, it may not proceed to obligate the people of the state of Minnesota to establish an exchange, to establish mechanisms, spend money on the state's behalf. It may not do any of those things without the authority of the legislature.](#)

Rothman: Mr. Chair, again I go back to what I indicated earlier which is we're at the start of our review as to where those questions are. I don't, I'm not here today to say I disagree with you or not, because I'm at—we're at the start of our analysis. You seem to be saying there's a disagreement and I'm saying we're at the start of our analysis of it.

Hann: We'll Mr. Rothman, [all I can say is that I haven't heard you say that the administration will not act without the legislature. That's what I'm hoping to hear.](#) So I appreciate you being here this morning. I know you have another commitment ...

Marty: paraphrase) MDH has receive 7.5 million under PPACA. Transfer of \$5 more under executive order. Have those executive orders been mistakenly done?

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Hann: ...I'm trying to understand from the administration what they think they can do?...

Berglin: (pre-ex for children)

Sheran: [...]

Hann: ...The Commissioner indicated he needs to leave by 11:05. It's already five minutes past his time. Since we didn't really ask him to be here, I don't want to --- we appreciate you coming. Perhaps if it's needed we'll ask you to come back when you have more time but I want to respect your commitment and thank you for being here this morning.

Rothman: Mr. Chair, thank you so much and again I'll go back to this. I'm happy to meet with you and anybody else on the Exchange

Hann: Well, I appreciate that, but [I'm interested in a statement that goes on the record](#). Thank you.

[...]

00:38:00

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