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The Honorable Dede Feldman
New Mexico State Senator
1821 Meadowview Dive, NW
Albuquerque, NM 87104

Re: Legal Implications of Health Insurance Exchange Created by Executive Order

Dear Senator Feldman:

This is in response to your letter inquiring into the legal implications of the Governor creating a health insurance exchange (an "exchange") by executive order. Because you have not requested a formal opinion, this letter is intended only as an informal and preliminary assessment of how legal doctrines may apply to your question. As more fully explained below, we believe an executive order that enacts policy decisions by creating an exchange is likely to be unconstitutional.

Should the Governor attempt to create a health insurance exchange by executive order, such an action would implicate the separation of powers provision of the New Mexico Constitution. Article III, Section 1 prohibits any branch of government from usurping the power of the other branches:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers belonging to one of these departments, shall exercise any powers properly belonging to either of the others. . . .

NM Const. art III § 1.

Each branch of government maintains separate functions and "the Legislature makes, the executive executes, and the judiciary construes the laws." *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153. 9 P.2d 691, 692 (1932). It is the unique domain of the legislature to create substantive law and develop public policy. *State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 230-

31, 61 P.2d 240, 246 (1936); *Torres v. State,* 119 N.M 609, 612, 894 P.2d 386, 389 (1995). In the role as executive, the governor must administer laws. While administration involves discretion by executive agencies, *State ex rel. Taylor v. Johnson,* 1998 NMSC 15, 125 N.M. 343, 349, 961 P.2d 768, 774, "such discretion is not boundless" and "may not justify altering, modifying or extending the reach of a law created by the Legislature." *Id.* at 349-50, 961 P.2d at 774-75.

While recognizing the distinct roles of each branch of government, the New Mexico Supreme Court has also stated that total separation of powers is "neither absolute nor realistic.'" *State ex rel. Clark v. Johnson,* 1995 NMSC 51, 120 N.M. 562, 573, 904 P.2d 11, 22. The Court has stated:

> [T]the constitutional doctrine of separation of powers permits some overlap of government functions. Nonetheless, this Court must give effect to Article III, Section 1, and will not be reluctant to intervene where one branch of government unduly encroaches or interferes with the authority of another branch. Such infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions.

State ex rel. Taylor, 1998 NMSC 15, 125 N.M. at 350, 961 P.2d at 774 (citations omitted).

If an action of the executive can reasonably be viewed as execution of law, then it will be found to be within the governor's authority as the state's chief executive officer. If, on the other hand, the governor's actions "conflict with or infringe upon what is the essence of legislative authority--the making of law--then the Governor has exceeded his authority." *State ex re. Clark*, 1995 NMSC 51, 120 N.M. at 573, 904 P.2d at 22. A violation may occur when the governor usurps the legislature's power to control public funds, *State ex rel. Schwartz v. Johnson*, 1995 NMSC 83, ¶14, 120 N.M. 820, 907 P.2d 1001, and when the governor attempts to create new law rather than execute existing law. *State ex rel. Clark*, 1995 NMSC 51, 120 N.M. at 573, 904 P.2d at 22.

In applying the above principles to the question of the Governor creating a health insurance exchange by executive order, we find the case of *State ex rel. Taylor v. Johnson*, 1998 NMSC 15, 125 N.M. 343, 961 P.2d 768, to be the most instructive. In *State ex rel. Taylor*, the federal government had enacted major changes to a federally funded public assistance program. In response to the new opportunities and requirements presented by the federal changes, the state legislature, during the 1997 session, passed the Family Assistance and Individual Responsibility Act to effect an extensive overhaul of the state's public assistance system. The Act was vetoed by then Governor Gary Johnson who then implemented his own public assistance reform plan through administrative regulations promulgated by the Human Services Department. Certain legislators petitioned the state Supreme Court for a writ prohibiting the Governor from implementing his reform plan.

The Court granted the writ and found the Governor's actions to be in violation of the constitutional separation of powers doctrine. The Court held that the Governor's actions constituted "executive creation of substantive law, and as such, is an unconstitutional

encroachment upon the Legislature's role of declaring public policy." *Id.* at 350, 961 P.2d at 775. Important to the Court's decision was (1) the executive's program implemented substantive policy changes, (2) the changes substantially modified and extended existing law, and (3) the Governor's actions foreclosed legislative action where legislative authority was undisputed. *Id.* The Court summarized its holding in this regard by noting that the federal changes required the state to make policy choices and

> By implementing their plan through HSD regulations rather than through the required legislative process, Respondents [the Governor and Secretary of HSD] made these core policy choices themselves, thereby preventing the constitutionally required input of the people's elected law-making representatives.

Id. at 352, 961 P.2d at 777.

The facts in *State ex rel. Taylor* are analogous to the situation we would have should the Governor create a health insurance exchange by executive order. In both situations, the state was faced with policy choices in response to federal legislation. In both situations, the state legislature duly passed legislation that made and implemented policy decisions. And, in both situations, the executive vetoed the legislation and implemented (potentially with regard to the exchange) programs independent from the legislative process. We therefore believe that, under the circumstances at hand, an executive order that creates an exchange and thereby makes public policy decisions would violate separation of powers.[1]

In reaching this conclusion, we note that the three factors important to the Court's decision in *State ex rel. Taylor* appear to be present here: (1) because an exchange could potentially take many different forms and perform several different functions, the creation of an exchange seems to necessarily implement substantive policy; (2) no exchange currently exists in state law and because the creation of a governmental or quasi-governmental body or the authority to regulate a body can only occur through legislation, the creation of an exchange necessarily modifies state law; and (3) vetoing legislation and implementing a different plan through executive order would be an attempt to foreclose legislative action.

We are also guided by federal law on the constitutionality of executive orders. Justice Jackson's concurring opinion in the seminal case of *Youngstown Sheet v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952), has become the foremost authority on balancing executive power in relation to the legislature. Jackson's concurrence pronounced a "sliding-scale" of executive authority. Executive power is at its maximum pursuant to an express or implied authorization from the legislature, is medium in the absence of either legislative grant or denial of authority, and is at is lowest when the action taken is incompatible with expressed or implied legislative will. *Id.* at 635-38. Applying this analysis to the possibility of the Governor creating an exchange through executive order, her power to do so is at the lowest point on Justice Jackson's scale. The

[1] One difference between the question presented here and *State ex rel. Taylor* is that Governor Johnson sought implementation through regulations rather than executive order. We believe that difference, if anything, makes the case for the governor even weaker because administrative regulation requires public notice and input while executive orders have no such requirement.

legislature has expressed its will through the passage of the vetoed legislation and implementing an exchange in a form different than the legislation would be contrary to clear legislative will. The situation would be similar to the facts present in *Youngstown Sheet* where the fact that Congress had taken action contrary to the Presidential executive order was one of the foremost reasons the U.S. Supreme Court invalidated the executive order in that case.

For the above reasons, we believe an executive order that enacts policy decisions by creating an exchange is likely to be unconstitutional. It must be noted that the conclusion we have reached and expressed herein assumes an executive order that actually does create an exchange and implement substantive policy. An order, for example, that merely seeks to explore or facilitate the creation of an exchange may be perfectly valid. In this regard, we reiterate that this letter is only a preliminary analysis. Any formal or final opinion by this office would depend entirely upon a thorough review of the particular terms of an executive order that has been actually issued.

Please do not hesitate to contact our office if we can be of further assistance.

Sincerely,

Mark Reynolds
Assistant Attorney General