

EXCHANGE GOVERNANCE WHITE PAPER

Introduction

The West Virginia Offices of the Insurance Commission (OIC) was designated by Governor Manchin to lead the research and planning efforts for West Virginia's health insurance exchange. This project is taking place using both internal OIC expertise and resources made available by two United States Department of Health and Human Services (DHHS) grants, the State Health Access Program (SHAP) grant and the Planning Exchange grant. These two grants continue to provide funding for exchange research and development.

One of the early policy decisions to be made in the planning process for the exchange is governance. The Affordable Care Act (ACA) does not mandate specifically how the exchange shall be governed. However, it does set forth some requirements for governance. Specifically, section 1311(d) of the ACA requires that any exchange established must be a governmental agency or nonprofit entity. Further, section 1321(c) of the ACA provides that if a state does not elect to operate an exchange, or if the Secretary of the DHHS has not taken the actions the Secretary determines necessary to implement an exchange, then the Secretary shall (directly or through agreement with a not for profit entity) establish and operate such exchange within the state and the Secretary shall take such actions as are necessary to implement such other requirements. In other words, if a state does not create a plan for exchange governance on its own, then it cedes control of governance to the DHHS.

The NAIC exchange enabling model provides for state discretion on decisions relating to governance. In the drafting notes related to governance, the NAIC model outlines the pros and cons of different governance approaches:

States have different options to consider when establishing the Exchange...The Exchange could be located at a new or existing State agency. Some possible advantages to having the Exchange within a State agency include having a direct link to the State administration and a more direct ability to coordinate with other key State agencies, such as the State Medicaid agency and the State insurance department. Some possible disadvantages include the risk of the Exchange's decision-making and operations being politicized and the possible difficulty for the Exchange to be nimble in hiring and contracting practices, given most States' personnel and procurement rules. The Exchange could also be established as an independent public agency, or a quasi-governmental agency, with an appointed board or commission responsible for decision-making and day-to-day operations. Some possible advantages to establishing the Exchange as an independent public agency, or a quasi-governmental agency, include possible exemption from State personnel and procurement laws and more independence from existing State agencies, which could result in less of a possibility of the Exchange being politicized. The Exchange's enabling legislation would specify how the Board members would be appointed, including its size, composition and terms. The Board would also select the Exchange's Executive Director. Some possible disadvantages include the possible difficulty for the Exchange to coordinate health care purchasing strategies and initiatives with key State agencies, such as the State Medicaid agency and the State insurance department and their employees because the Exchange would not be located at a State agency (unless those decisions are subject to the approval of a State official, such as the State insurance commissioner or the Governor). The

Exchange also could be established by creating a non-profit entity. This means that most likely it would not be directly accountable to State government or subject to State government oversight nor would it most likely be subject to State personnel and procurement laws. Some possible advantages of establishing the Exchange as a non-profit include flexibility in decision making and less of a chance for those decisions being politicized and some possible disadvantages include isolation from State policymakers and key State agency staff and the potential for decreased public accountability. In addition, States can establish an Exchange using a combination of the options described above.

OIC Recommendation and Alternatives for Exchange Governance

After careful review of the exchange governance options, for the following reasons, the OIC recommends governance of the WV exchange be developed with an independent Exchange Board and administratively exist as part of the OIC. The Exchange Board should also be given the authority to develop contractual arrangements with other state agencies to maximize public sector efficiency, minimize exchange costs, and streamline State government operations.

Unique in State government, the OIC is the agency tasked with regulating the health insurance market in West Virginia. As such, the OIC and its staff has years of experience in the central subject matter of the exchange, including existing infrastructure which could provide crucial regulatory and administrative support to the exchange. This infrastructure includes, but is not limited to: Rates and Forms; Consumer Services; Agent Licensing; Financial Conditions and Market Conduct. Other State agencies do not perform these functions but such tasks will be necessary for the exchange.

Beyond the regulatory and consumer assistance infrastructure, the OIC provides administrative functions that are necessary for the operation of any governmental or nonprofit entity. This includes but is not limited to: financial accounting; human resources; secretarial services; mailroom services; computer support; etc. The OIC also recognizes the importance that the exchange operate in a fiscally efficient manner so as to not drive up consumer premiums through exchange fees. Additionally, the OIC also recognizes the importance of maintaining a clear distinction between the OIC's primary role as insurance regulator and the exchange's narrower service role. To achieve this end, the exchange governing board should have autonomy to make policy decisions independent of the OIC.

This governance structure would ensure administrative efficiency by availing the resources of the OIC to the exchange, but also ensure that no conflict of interest arises between the OIC's regulatory functions and the exchange's policy objectives.

Models like this currently exist within the OIC. On a similar subject matter to the exchange (health insurance), West Virginia's health insurance high risk pool, Access West Virginia, is operated by an autonomous board which is within the OIC and receives administrative support from the OIC (see W. Va. Code §33-48-1 et seq.).

In addition to the OIC recommended model set forth above, other options for governance models would be to create a completely autonomous governing board or non-profit entity for the exchange (i.e., not under any other state agency); place exchange under another state agency (DHHR, Administration); create a new state agency; or to defer control of the exchange to the federal government. As set forth in the “pro” and “con” list below, these are less desirable than the “agency-board” model recommended by the OIC.

Pros and Cons of Governance Models

- West Virginia Offices of the Insurance Commissioner (with governing board):
 - Pro- Builds off existing infrastructure thus curbing infrastructure costs
 - Pro- Accountable to state policymakers/public
 - Pro- Positioned to work with constituent State agencies
 - Pro- Best positioned to carry out public policies of Governor’s Office
 - Pro- Best positioned to work with appropriate WV stakeholders
 - Pro- Better positioned to work with federal regulatory agencies
 - Pro- Eliminates duplication of health insurance regulatory functions
 - Pro- Best positioned to mitigate risk of adverse selection, which is the number one threat to exchange success
 - Con- Civil service and procurement rules could pose challenges (can be addressed through legislation)
 - Con- Conflict of interest argument (OIC feels that governance within OIC can be structured so as to address any concerns of regulatory conflicts)
 - Con- Susceptible to changes in political environment

- Other Existing West Virginia State Agency
 - Pro- Accountable to state policymakers/ public
 - Pro- Positioned to work with Constituent State agencies
 - Pro- Positioned to carry out public policies of Governor’s Office
 - Pro- Mitigates conflict of interest argument
 - Con- Does not have capacity to administer insurance market functions
 - Con- Creates duplicative health insurance regulatory functions in State government
 - Con- Not positioned to mitigate risk of adverse selection.
 - Con- Civil service and procurement rules could pose challenges
 - Con- Susceptible to changes in political environment
 - Con- Would have to create some new infrastructure and cover resulting costs

- New State Agency
 - Pro- Less impacted by arguments of conflict of interest
 - Pro- Positioned to carry out policies of Governor’s Office
 - Pro- Accountable to State policymakers
 - Con- Grows the size of State government
 - Con- Creates duplicative health insurance regulatory functions in State government

Con- Not positioned to mitigate risk of adverse selection
Con- Civil service and procurement rules could pose challenges
Con- Susceptible to changes in political environment
Con- Would have to create completely new infrastructure and cover resulting costs

■ **Nonprofit Created by the State (Completely Autonomous):**

Pro- Most flexibility with hiring and procurement (state agency governance could be addressed through legislation)

Pro- Better positioned to insulate exchange from political environment

Pro- Not impacted by arguments of conflict of interest in facilitating purchase of coverage and regulating market (conversely, risks of burdensome regulatory duplication results with number of negative outcomes)

Con- Least accountable to state policymakers/public

Con- Would have to create completely new infrastructure and cover resulting costs

Con- Potential for duplicative regulatory functions for licensure, certification, market conduct, and enforcement

Con- Not positioned to work with essential state agencies

Con- Least positioned to address adverse selection, which is the number one threat to exchange success

Con- Most challenged to work with federal agencies

■ **Federally Operated:**

Pro- Less work at state level

Pro- Takes consistent approach to exchange from national perspective

Con- Challenges working with state agencies

Con- Not positioned to engage community stakeholders in planning phase
Con- Not positioned to make state level policy decisions based on unique WV demographic and market considerations

Con- Defers state regulatory authority to federal government

Con- Not responsive to state policymakers/ public

Con- Concern about stakeholder engagement

Con- Not positioned to address adverse selection outside of the exchange

Market

Con- Not responsive to policies of WV Executive/Legislative branch

Con- Not positioned to modify exchange based on changes in WV market

Con- Susceptible to political changes at federal level

Con- Challenges to working with WV insurance carriers, producers, and consumer organizations

Necessity to Act Soon

There are three core reasons why a governance structure needs to be developed for the health insurance exchange in West Virginia as soon as possible. First, the ACA requires that each State-operated Exchange be certified by HHS no later than January 1, 2013. To achieve certification, exchange must demonstrate that the State's Exchange will be operation and provide access to health insurance coverage by mid 2013. If HHS

does not certify a State's exchange plans then the federal government will develop, make policy for, and operate the health insurance exchange.

Second, the U.S. Department of Health and Human Services recently released the Cooperative Agreement to Support Establishment of State-Operate Health Insurance Exchanges. This grant lays out two levels of grant funding for states. Level One grants are available for a one year period at a lesser amount. Level Two grants are available through 2014 and will cover 100% of the cost of exchange infrastructure development. One prequalification to apply for Level Two grant funding is passage of enabling legislation. This funding is part of the mandatory spending authority prescribed under the ACA and would require repeal of the entire legislation to withhold. As stated by HHS, a state must have the necessary legal authority to establish and operate an Exchange that complies with Federal requirements available at the time of the application. A letter of intent is due February 22, 2011 and the first application due date is March 2011.

Third, time is short to develop West Virginia's health insurance exchange in an effective and cost efficient manner. In order for policymakers, the proposed Exchange Board, and stakeholders to have time to thoroughly research the various policy options a formal infrastructure and decision-making process needs to be defined. Even more pressing, time is already short to research, develop, and test the exchange information technology components to ensure that the State is moving forward as efficiently and effectively as possible for West Virginia consumers. It is critical that a governance structure be created as soon as possible that has authority to enter into contracts for the development of the IT and business operations of the exchange. If not, the State may find itself in a position where there is not enough time to meet all the legal and technical requirements called for by HHS, ultimately resulting in West Virginia having to cede authority over the health insurance exchange, and the coinciding policy decisions, to the federal government.

Governance Board

The exchange governing board will have to comply with both federal and state laws establishing the exchange. The structure of the Board should be as such that it represents the stakeholders having a relationship with the exchange. These stakeholder interests should be represented on the board so as to not give any one perspective domination over Board proceedings. These stakeholder board members will come together as one body, leveraging the expertise and experience of appropriate professionals; input from consumers; and guidance from policymakers, to carry out the operational functions and determining the respective policies of the health insurance exchange. It is strongly recommended that the Board come to decisions by consensus and avoid decisions based on a mere plurality of votes.

It is important that the governing board be given substantial discretion to deal with the issues that arise over time in structuring the exchange. These actions could be carried out through legislative rule making, ultimately being reviewed by the Legislature in a transparent and open public process. While utilizing the administrative functions

of the Offices of the Insurance Commissioner, the Board should be given autonomy on exchange policy so that a firewall exists between the regulation of health insurance and the setting of insurance exchange policy. This Board will be the responsible entity for health insurance exchange policies.

The following is a breakdown of recommended Exchange Governance Board membership:

Chair- OIC Commissioner:

Given the relationship with the Governor; constituent State agencies; State legislators; consumers; carriers; and producers, the OIC Commissioner is best positioned to set agendas, mediate disagreements between stakeholder interests, and provide guidance on market solvency and how the market outside of the exchange is being regulated, so as to prevent adverse selection.

Ex Officio Member- Medicaid Commissioner:

Medicaid is an essential partner in exchange policy and operations. Beyond eligibility and enrollment, there are a number of issues with continuity of care; quality initiatives; and population health analytics that this Board member will bring to the table.

Ex Officio Member- CHIP Chair:

CHIP is an essential partner in exchange policy and operations. Beyond eligibility and enrollment, there are a number of issues with continuity of care; quality initiatives; and population health analytics that this Board member will bring to the table. CHIP also brings nationally recognized experience in education and outreach for health insurance promotion that will be vital to the Exchange's success.

Ex Officio Member- Health Care Authority:

The Health Care Authority has the duty of constraining the rising cost of health care and to assure reasonable access to necessary health services. The HCA has also been tasked with developing State Health Plans, outlining the State's strategy to improve the health care system. Given the Exchange's role as a vital component of the State's health system, the HCA's expertise and position will be of great use to the Board.

Governor Appointee- Small Business:

To ensure the success of the exchange as a product, it is essential that the business community be fully engaged in both the development and policies of the health insurance exchange.

Governor Appointee- Labor:

To ensure the success of the exchange as a product, it is essential that the interests of employees be considered and represented in both the development and policies of the health insurance exchange.

Governor Appointee- Consumer Advocacy Organization:

The interests of the individual consumer are fundamentally important to the success of the health insurance exchange. This Board position should represent the best interests

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of all individual consumers and not one constituency group.

Governor Appointee- Producer/Navigator:

The producer/navigator will be a crucial public resource in the health insurance exchange.

The role of the producer is expressly protected in the language of the Affordable Care Act. The framework of the navigator is laid out in the Affordable Care Act. While it is not yet clear what the specific functions; reimbursement methodologies; or licensure requirements of producers/navigators in the exchange will be, it is clear that there will be a role. The perspective of this stakeholder is essential in developing the exchange and creation of exchange policy.

Constituent Group Appointee- Exchange Plan Technical Advisory Committee:

Insurance plans are an essential stakeholder in the exchange. To avoid conflict of interest issues amongst plans and to ensure plan representation on the board and technical input into exchange operations, it is proposed that a technical advisory committee be created, with membership consisting of all private plans selling on the exchange. This committee will select a board representative that is not a direct employee of any specific plan. This Board position is representative of an essential stakeholder perspective and ensures input on issues ranging from exchange plan compliance; fairness in presentation of insurance plans; market solvency; etc.

Constituent Group Appointee- Provider Technical Advisory Committee:

The role of providers is essential in the success of the health insurance exchange. Given the plethora of provider groups serving crucial roles in the health care system, it is proposed

that a provider committee be developed with representation from the following organizations: Hospital Association; Medical Association; Primary Care Association; Nurses Association; Free Clinics; Behavioral Health Care Provider Association; and the Academy of Family Physicians. This list may need to be expanded at a later date. This group will come to consensus and select a representative on the Exchange Board. This technical advisory group will also provide expertise as benefit designs, quality initiatives, exchange plan reimbursement methodology, and consumer outreach efforts are developed.

Governance Breakdown:

State Agencies-	4	Ex Officio Officers	4
Consumers	3	Governor Appointed	4
Providers	1	Constituent Group Appointed	2
Payers	1		
Producer/Navigator	1		

It is important to note that other stakeholder groups are encouraged to both engage the Exchange Board and, conversely, the Board is expected to engage stakeholder groups

that are not represented on the Board. Furthermore, the OIC strongly considered including a large group representative as another consumer stakeholder. Also, it is important to note that large groups are not eligible for the exchange until January 2017. It is also currently unclear whether or not the exchange will be a viable resource to self-insured groups or how large groups will functionally utilize the exchange. This topic will continue to be researched.

Pursuant to the recommendation that the OIC maintain regulatory oversight and provide administrative support for the governance of the exchange and that the exchange Board maintain a sufficient degree of policy autonomy that will enable the exchange to operate without a conflict of interest, a number of critical questions must be addressed, including the structure of the governance and operational laws; the makeup and selection of the exchange board; and the manner by which decisions will be carried out.

Conclusion

While a large number of critical public policy questions have yet to be thoroughly researched at the state level, for the reasons set forth above, the OIC recommends that a governance structure be established as soon as possible, through legislation, so as to provide a governing framework for policy recommendations and decisions. As part of this governance, the OIC recommends a consumer driven, yet perspective balanced, and autonomous board. Once the governing framework is established, much of the planning and policy-making will take place within the framework created.