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## Implementing Exchanges

*Part of a Families USA series on  
implementing state health insurance  
exchanges*

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# OPTIONS FOR GOVERNANCE AND OVERSIGHT

This brief highlights key issues to consider in the creation of a successful, consumer-friendly exchange governance structure that will lead to a user-friendly, transparent state exchange.

Families USA

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## **Implementing Health Insurance Exchanges: Options for Governance and Oversight**

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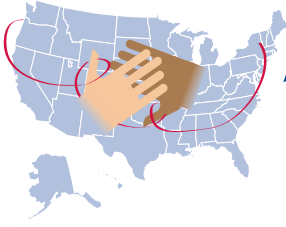
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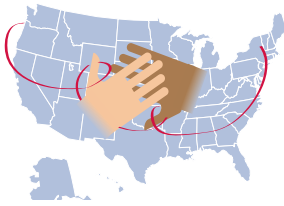


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## INTRODUCTION

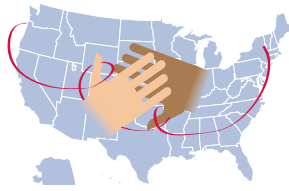
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The Patient Protection and Affordable Care Act (Affordable Care Act) creates new health insurance marketplaces, or “exchanges,” that will give all Americans, including low- and middle-income Americans and small business workers, access to high-quality, affordable health coverage. Establishing these exchanges is one of the most crucial aspects of implementing the law, as they will be the means for Americans to find health coverage that is appropriate for them.

The law requires that each state have a health insurance exchange up and running by January 1, 2014. The Affordable Care Act envisions that states will develop and run their own exchanges (or join a regional exchange). If a state does not implement its own exchange, or if it becomes apparent by January 2013 that the state will not be ready to operate an exchange by 2014, the Secretary of the U.S. Department of Health and Human Services (HHS) will set one up for residents of that state. Therefore, states need to begin planning for the implementation of exchanges now.

States have a lot of flexibility in how they go about designing their exchanges, and there are many important governance and oversight issues for them to consider. States will be faced with different opportunities and challenges as they implement their exchanges, based on the differences in political climates, state laws, budgets, and demographics. There is no “one-size-fits-all” model for exchange governance.

This brief will highlight key issues to consider in the creation of a successful, consumer-friendly exchange governance structure that will lead to a user-friendly, transparent state exchange.



## DETERMINE WHERE THE EXCHANGE SHOULD BE HOUSED

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This section includes the following:

- Creating an Exchange in an Existing or New State Agency
  - Establishing an Exchange in a Quasi-Governmental Agency
  - Creating an Exchange in a Nonprofit Entity
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According to the Affordable Care Act, “An Exchange shall be a governmental agency or nonprofit entity that is established by the State.”<sup>1</sup> This has been interpreted by the National Association of Insurance Commissioners (NAIC)<sup>2</sup> to mean that the state can a) house the exchange in an existing or newly created state agency, b) create a quasi-governmental agency to run the exchange, or c) establish a nonprofit entity to run the exchange. HHS reiterates these three options for housing the exchange in the *Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges*, the exchange establishment grant opportunities announcement issued on January 20, 2011.<sup>3</sup> Any of the three options could potentially yield a successful, transparent, consumer-friendly exchange, but there are important issues to consider with respect to each of these approaches.

### Creating an Exchange in an Existing or New State Agency

- **An Existing State Agency**

States may choose to establish their exchange in an existing state agency, such as the Medicaid agency, the department of insurance, or the department of health. Below we list some of the possible advantages and disadvantages to building the exchange within an existing government agency.

#### Possible Advantages

- If housed in an existing state agency, the exchange could take advantage of the agency’s existing resources, such as the agency’s management structure and staff (although additional staff and management would still be needed).
- An existing state agency may already have access to information databases that will be necessary for streamlining enrollment in health coverage programs.
- An existing state agency may already have the necessary authority to procure plans and negotiate with third parties.
- An existing state agency has the same public interest mission as any other government agency; it works to ensure that the government serves the best interests of state residents.
- In an existing state agency, the exchange would be subject to state hiring, worker protection, and occupational safety laws. Such laws would ensure that exchange staff

members have good benefits and that they cannot be hired and fired unfairly. (However, it is important to acknowledge that there are also disadvantages to subjecting an exchange to certain state laws. See below for further discussion.)

### Possible Disadvantages

- Placing the exchange in an existing state agency may overwhelm the agency and its staff if adequate new hiring does not take place.
- Placing the exchange in an existing state agency may not draw sufficient attention to the importance of the exchange as a new, critical mechanism for providing health coverage. Such attention may be necessary to ensure that the exchange is recognized by state residents, officials, and policy makers as an innovative system for obtaining coverage.
- Placing the exchange in certain state agencies could create conflicts of interest. For example, a state's department of insurance is responsible for regulating insurers that offer coverage in that state. The department of insurance must make sure that insurers are financially sound and that they abide by state laws and regulations.<sup>4</sup> If the exchange were housed in the department of insurance, the department would also be responsible for negotiating more affordable, higher-quality plans for the exchange. The roles of monitoring and protecting the financial integrity of insurers while simultaneously trying to negotiate lower rates from them could result in a conflict of interest.
- If housed in an existing state agency, the exchange would need to conform to government rules and procedures, such as possibly cumbersome hiring procedures or government freezes on new hires, limits on compensation that may or may not attract qualified candidates for key positions, and procurement laws and procedures. State procurement procedures may complicate and slow the procurement of health plans, health information technology, and contracts that are necessary to fulfill the duties of the exchange. (Of course, state hiring and procurement laws also provide important protections for fairness and equity.)
- Positioning an exchange within an existing state agency may hinder the ability of the exchange to directly communicate with other state agencies to make sure the exchange's multiple functions operate cohesively. For example, if placed in the department of insurance, it is important to consider whether the exchange will have the needed authority to ensure that Medicaid eligibility determinations and enrollment are properly coordinated with premium tax credit eligibility and exchange enrollment.
- In an existing agency, the exchange director may be appointed by the governor, so exchange leadership may turn over when there is a change in state governance.

- **A New State Agency**

States also have the option to create a new state agency to run the exchange. Below we list some of the possible advantages and disadvantages of placing the exchange in a newly created agency.

**Possible Advantages**

- A new state agency would have direct communication with the governor without having to go through other agency directors.
- The whole agency would be focused on the exchange; the agency would not have other competing roles and responsibilities.
- The exchange director would be paid similarly to other state agency directors, which would likely be an appropriate salary to attract qualified leadership.
- A new agency would experience the same benefits of the application of state laws as an existing state agency (see pages 2 and 3).
- Because of its equal footing with other state agencies and its relationship with the governor, a new state agency may be more easily able to secure needed cooperation of other state agencies.
- A new state agency would be something “new” in the state, potentially drawing more attention to the exchange as an innovative way to obtain coverage, and creating energy among its staff.

**Possible Disadvantages:**

- If a state chooses to create a new state agency, it would have to start from scratch to build communicative relationships between the exchange agency and other state agencies. (Developing these new relationships may be work-intensive, but placing the exchange in a new agency could also present an opportunity to establish strong interagency communication regarding the exchange from the start.)
- A new state agency would need to hire an extensive staff, secure office space, and make other investments in infrastructure that may not be needed if the exchange is housed in an existing agency.
- The issues regarding state laws and procedures that may apply to an exchange in an existing state agency may also apply to a new state agency (see page 3).
- In a new state agency, the exchange director will probably be appointed by the governor, so exchange leadership may turn over when there is a change in state governance.



## Establishing an Exchange in a Quasi-Governmental Agency

A second option for states is to create a quasi-governmental agency to house their exchange. According to HHS, a quasi-governmental agency is an agency that “has been created or established by the State (through legislation or other law), and has State oversight (i.e. the governing body is established, appointed, and overseen by the State and the entity is subject to specific limitations on its authority to act established by the State).”<sup>5</sup> While there is not a very precise definition or single model of a quasi-governmental agency, it is basically an agency that is created and overseen by government, but it is not directly under the control of the governor and it differs from traditional state agencies in some other important ways. For instance, a quasi-governmental agency would not necessarily fall under the jurisdiction of certain state laws, such as those pertaining to hiring and procurement. The Commonwealth Health Insurance Connector Authority in Massachusetts (the state’s existing exchange, created by Chapter 58 of the Acts of 2006) and the California Health Benefit Exchange (created in 2010 by Chapters 655 and 659 of the California Statutes) are both quasi-governmental agencies.<sup>6</sup>

In considering whether a quasi-governmental exchange is an appropriate model for your state, a good way to gather information is to review existing state quasi-governmental agencies. Questions to consider regarding existing quasi-governmental agencies in your state include: Have existing quasi-governmental agencies been consumer-friendly and open to public input? Have they run efficiently and effectively? Have they had good communication with relevant government agencies?

Just as there are possible advantages and disadvantages to housing an exchange in a state agency, there are also possible advantages and disadvantages to housing the exchange in a quasi-governmental agency.

### Possible Advantages

- If housed in a quasi-governmental agency, the exchange may have more flexibility to design its own processes, such as hiring and procurement, than if it were housed in a state agency. However, it would still have the advantages of being affiliated with the government.
- Like a state agency, a quasi-governmental agency may have access to the information databases that are necessary for streamlining enrollment in health coverage programs.
- Due to its alignment with government, a quasi-governmental agency may be able to easily secure the authority to procure health plans and information technology and negotiate with third parties.
- A quasi-governmental agency would be something “new” in the state, potentially drawing more attention to the exchange as an innovative way to obtain coverage, and creating energy among its staff.

### Possible Disadvantages

- If a state chooses to create a quasi-governmental agency, it would have to start from scratch to build communicative relationships between the exchange agency and other state agencies. (Developing these new relationships may be work-intensive, but placing the exchange in a quasi-governmental agency could also present an opportunity to establish strong communication with government agencies regarding the exchange from the start.)
- If the exchange in a quasi-governmental agency is exempt from state salary scales, leadership and staff salaries could become excessive. Top exchange staff could be paid more than other state government workers. The risks of this include potential tension when exchange staff interact with other government workers, and the potential for talented health care workers to be drawn out of other state agencies and into the exchange.
- A quasi-governmental agency would need to hire an extensive staff, secure office space, and make other investments in infrastructure.

If your state opts to create a quasi-governmental agency to house the exchange, and if that agency is not subject to state laws pertaining to hiring and procurement, the state should create fair hiring processes and worker protections for the exchange. The state could design a hiring process for the exchange that is quick and that offers competitive salaries *within reason*. California's exchange law, California Statutes, Chapter 655, creates a robust process for hiring and determining appropriate salaries for exchange staff.<sup>7</sup> A state can also create expedited or separate procurement processes for the exchange while still including important protections drawn from the state's procurement laws. In order to ensure transparency and public accountability, the exchange must be required to adhere to the state's open meeting and open record laws.

### Creating an Exchange in a Nonprofit Entity

A third option is for the state to establish an independent nonprofit entity to house the exchange. Below we list the possible advantages and disadvantages of housing the exchange in a nonprofit entity.

#### Possible Advantages

- A nonprofit could have significant flexibility, as it would not be directly linked to any government agency. This could be an advantage if the nonprofit has a good, efficient management structure and the ability to implement timely processes for fulfilling exchange duties. However, this would be an advantage only if the nonprofit has a strong, consumer-focused mission.
- A nonprofit may be less affected by political change (such as when a new governor is elected or control of the state legislature changes) and influence. However, if a nonprofit model is built on the expectation of obtaining state funding, this may be less true.

- A nonprofit would be something “new” in the state, potentially drawing more attention to the exchange as an innovative way to obtain coverage and creating energy among its staff.

**Possible Disadvantages**

- If the exchange is housed in a nonprofit entity, it may lack public accountability and transparency. It may not be required to abide by government laws, such as open meeting and open record laws. If a state does opt to house the exchange in a nonprofit entity, it can partially address the problem by applying such state laws to the exchange in order to enhance public accountability. However, oversight of the nonprofit exchange and its compliance with state laws may prove challenging if there is not an adequate structure in your state for enforcing the laws as they apply to the nonprofit.

Senate Bill 38, the exchange bill that was passed by New Mexico’s legislature and was vetoed on April 8, 2011 by the governor, would have established the New Mexico health insurance exchange as a “nonprofit public corporation.” This proposed nonprofit exchange had to comply with many government rules, including the state’s open meetings law.<sup>8</sup>

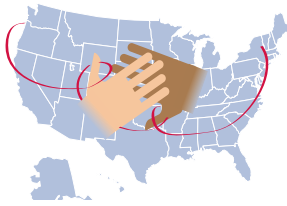
- A nonprofit entity would not necessarily have the same public interest mission as a state government. While the government is responsible for supporting all state programs, ensuring that they run smoothly and benefit state residents, a nonprofit entity would receive funding only to run the exchange and possibly only certain elements of the exchange. An agency with government oversight (an existing or newly created state agency or a quasi-governmental agency) may have a greater focus on the system as a whole, ensuring coordination and continuity for the exchange and for consumers.
- A nonprofit would not have pre-established relationships or natural communication paths with state agencies, making necessary coordination between the exchange and state agencies potentially more difficult. If a state chooses to set up a nonprofit exchange, it is important to have language in the exchange legislation that establishes and requires coordination with other agencies. The National Academy of Social Insurance (NASI) recommends language for coordinating the “policy and operations of the Exchange with those of other state agencies whose policies and operations relate to those of the Exchange” in their publication, *Designing an Exchange: A Toolkit for State Policymakers* (a very useful tool that builds on the exchange model law drafted by the National Association of Insurance Commissioners to help policy makers address further issues related to exchanges).<sup>9</sup>

New Mexico’s exchange bill, Senate Bill 38, stated that state agencies, such as the insurance division and the medical assistance division of the human services department, had to cooperate with the exchange in order to fulfill the duties of the exchange.<sup>10</sup>

- A nonprofit may have difficulty accessing state and federal databases (such as tax data, income data, and Social Security Administration data) that are necessary for streamlining enrollment and eligibility in public and private health coverage and subsidies.<sup>11</sup> If a state opts to establish a nonprofit exchange, it would be necessary to have language in the exchange bill that addresses how the exchange will gain access to state and federal data.
- A nonprofit would need to hire an extensive staff, secure office space, and make other investments in infrastructure that may not be needed if the exchange is housed in an existing state agency.
- A nonprofit entity may not have the authority to carry out some of the necessary functions of the exchange. In some states, many of the functions of the exchange must be done through the government, including charging fees and taxes.<sup>13</sup> Before creating a nonprofit entity, it would be important to explore whether a nonprofit is legally allowed to perform the functions of an exchange in your state or whether your state would need to establish a separate system of coordination with the government for certain functions.

New Mexico's Senate Bill 38 stated that the exchange could "enter into information-sharing agreements" with both federal and state government in order to fulfill the duties of the exchange and collect the data necessary to enroll state residents in appropriate coverage."<sup>12</sup>

Because a nonprofit exchange has the potential to have less public accountability and transparency and may not have natural coordination with government agencies, a nonprofit exchange may be a less consumer-friendly model than an exchange that is housed in a state agency or a quasi-governmental agency. But if you are in a state that is unlikely to have a consumer-friendly exchange within government, you may want to consider whether a nonprofit exchange could be more consumer-friendly and viable.



## IMPORTANT ISSUES FOR GOOD GOVERNANCE

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This section includes the following:

- Board Structure
  - Expertise
  - Representation of the Interests of Consumers
  - Cultural, Ethnic, Racial, and Geographic Diversity
  - Coordination between the Exchange and Government Agencies
  - Protecting against Conflicts of Interest
  - Transparency and Consumer Input
- 

While the previous section outlined where an exchange may be housed in accordance with the Affordable Care Act, the following section addresses key issues for the creation of an effective, consumer-friendly exchange governance structure. The recommendations in this section are not requirements of the Affordable Care Act, but rather suggestions for good governance.

One important way to ensure that there is adequate consumer input in exchange implementation and operations is through the establishment of an exchange governing board (and possibly advisory committees to the board). Even if the exchange is housed in an existing agency, it could have an exchange board that sets policy parameters and provides other direction that the agency must take into account. The exchange board can also provide a vehicle for public accountability and consumer input.

Prior to establishing the governing body of the exchange, it is important to consider factors such as the structure of the board, the expertise of board members, how consumer interests will be represented, the diversity of the board, coordination between the exchange and government agencies, protection against conflicts of interest, and the need for transparency and consumer input.

## Board Structure

Many states will likely be setting up a governing board for their exchanges. There are several issues to take into account in order to create a consumer-friendly governing board. The exchange governing board should have an odd number of voting members to facilitate decision-making. The board should be small enough to encourage participation and facilitate discussion, but large enough to have sufficient and diverse expertise. For example, California's exchange law creates a governing board with five members, while Massachusetts' Connector Authority board has 11 members.<sup>14</sup>

Members should serve on the board for staggered terms so that the majority of the board is not stepping down at the same time.<sup>15</sup> Ideally, board members should not all be appointed by just one official, such as the governor, in order to enforce some form of "checks and balances" and further remove the board from the influence of politics.

In California's exchange law, California Statutes, Chapter 659, two board members are appointed by the governor, one is appointed by the Senate Committee on Rules, and one is appointed by the speaker of the assembly (in addition to a spot reserved for the Secretary of California's HHS department or the Secretary's designee).<sup>16</sup> In the Massachusetts exchange, four board members are appointed by the governor, three members are appointed by the attorney general, and the remaining four spots are designated for the directors of state agencies and the executive Director of the Group Insurance Commission (the agency that provides state employees and retirees and their dependents with health, disability, dental, and vision coverage).<sup>17</sup>

## Expertise

The governing board of the exchange should represent a wide range of expertise. When deciding who will serve on the exchange governing board, states should consider the range of duties that the exchange is required to undertake. (For a list of exchange duties, see "Duties of the Governing Board" on page 17.) The board must have the knowledge to make important decisions regarding the implementation and administration of the exchange. The exchange will need to address issues relating to health plans, premium credits and cost-sharing subsidies, public coverage programs, streamlining eligibility and enrollment, exchange funding and payment issues, claims, appeals, consumer assistance, small businesses, and low- and middle-income individuals and families. And the board should be able to provide adequate guidance on these issues.

The NASI exchange toolkit (described on page 7) suggests that each board member have "demonstrated and acknowledged expertise" in one or more of the following specialties: "Individual health care coverage," "small employer health care coverage," "health benefits plan administration," "health care finance and economics," "actuarial science," "administering public or private health care services delivery," or "purchasing health plan coverage."<sup>18</sup> California's

exchange law, California Statutes, Chapter 659, has similar language relating to board member expertise, except that the Secretary of the California HHS department or his or her designee has an ex-officio reserved spot on the board. The other four California exchange board members must have “demonstrated and acknowledged expertise” in *two* or more of the following areas: “individual health care coverage,” “small employer health care coverage,” “health benefits plan administration,” “health care finance,” “administering a public or private health care delivery system,” or “purchasing health plan coverage.”<sup>19</sup> The NASI model states that the board must also include people who represent the interests of “health care consumers,” “small business owners,” and “other organizations eligible to purchase coverage in the Exchange.”<sup>20</sup>

While the NASI model and the California exchange law list the expertise that board members must have in order to be appointed to the board, the language in the Massachusetts exchange law is more prescriptive as to who can serve on the board. The Massachusetts Connector Authority board has designated spots for the secretary of the Executive Office of Administration and Finance (the secretary of the state’s budget agency) or his or her designee, the director of Medicaid (or designee), the commissioner of insurance (or designee), and the executive director of the Group Insurance Commission. In addition, there are designated spots for each of the following people on the governing board: one actuary, one health economist, one representative of small business interests, one broker,<sup>21</sup> one employee health benefits plan specialist, one representative of a health consumer organization, and one representative of organized labor.<sup>22</sup>

Having an array of specified experts on the Massachusetts Connector Authority’s governing board has proven to be very valuable. Due to their extensive expertise, the director of Medicaid and the commissioner of insurance have provided important perspectives, as has the executive director of the Group Insurance Commission. It has also been crucial to have the voice of a representative of the interests of small businesses, who are eligible to purchase coverage in the exchange. Finally, the three representatives of consumer interests (including the employee health benefits plan specialist, the representative of a health consumer organization, and the representative of organized labor) are essential to protecting the well-being of consumers who purchase insurance through the exchange.<sup>23</sup> On the other hand, Chapter 58 of the Acts of 2006, the Massachusetts exchange law, was amended in 2010 to add an insurance broker to the board, effective July 1, 2011. Advocates have concerns that this position may present a conflict of interest. (For further discussion of conflicts of interest, see page 14.)

## Representation of the Interests of Consumers

In order to create an exchange that serves the best interests of health care consumers, it is crucial that representatives of consumer interests have designated spots on the exchange's governing board. In order to create prescriptive language in your state's exchange legislation that requires at least one representative of consumer interests on the exchange governing board, it may be helpful to look at Massachusetts's exchange law, Chapter 58 of the Acts of 2006, and Maryland's proposed Senate Bill 182.

In Massachusetts, the Connector Authority board has found it very valuable (in both discussions and voting) to have a block of three representatives of consumer interests instead of just one representative of consumer interests.<sup>24</sup> Maryland's proposed legislation, Senate Bill 182, requires that three of the exchange's nine board members represent "the interests of employers and individual consumers of products offered by the Exchange."<sup>25</sup> The NASI exchange toolkit (which includes a model exchange law) also recommends including consumer representatives on state exchange boards.<sup>26</sup> Regardless of the specific language that is used to create the process for selecting board members, representatives of consumer interests *must* have official seats on the governing board of the exchange.

To truly be consumer-friendly, it is essential to have representatives of consumer interests on the governing board of the exchange who are familiar with the health coverage issues of low-income residents. The inclusion of such consumer representatives can ensure that the exchange board is equipped to address the difficult issues of coordination between the exchange and public coverage programs and is operating in the best interests of the consumers who use the exchange. In 2014, the exchange must be able to enroll people in the correct coverage program (whether it be private insurance or public coverage) through the use of one standard application,<sup>27</sup> and it must be able to accommodate individuals whose fluctuating incomes cause them to frequently move between subsidized exchange coverage and Medicaid. Therefore, it is necessary to have representatives of low-income consumers on the governing board of the exchange to offer expertise on these complex matters.

In order to ensure that the consumer representatives who are selected for the exchange board are well-qualified and truly consumer-focused, the state should put significant thought into the agency, organization, or government official who will appoint the consumer representatives. It may be the role of state advocates to suggest (or even officially appoint) organizations that could represent consumer interests on the exchange board. If your state chooses to have a spot on the board for an actual consumer who would purchase coverage through the exchange, that consumer may need staff assistance or assistance from a consumer advocacy organization in order to best represent the interests of all consumers who would be purchasing coverage through the exchange.



## Cultural, Ethnic, Racial, and Geographic Diversity

Just as it is essential to have representatives of consumer interests on the exchange board to voice the needs of low-income consumers who will be purchasing coverage through the exchange, it is important to have a governing board with sufficient cultural, racial, ethnic, and geographic diversity in order to truly represent the diversity of the state and understand the challenges that different groups of people will face when applying for, maintaining, and understanding health coverage.

Maryland's pending exchange bill states that the exchange board must reflect "the gender, racial, and ethnic diversity of the State" and requires that "the geographic areas of the State are represented."<sup>28</sup> California's exchange law has a requirement to "take into consideration the cultural, ethnic, and geographical diversity of the state so that the board's composition reflects the communities of California."<sup>29</sup> Such requirements recognize that, for example, many exchange enrollment strategies (such as a web portal and an online application) that work for those in urban communities or those who speak English with fluency will not be ideal for those in rural communities or those who primarily speak another language. States should require cultural, ethnic, racial, and geographic diversity on the exchange governing board so that the exchange works well for different populations and communities.

## Coordination between the Exchange and Government Agencies

Operating an effective exchange will require intensive coordination and communication between the exchange governance and staff, the department of insurance, the Medicaid agency, the Children's Health Insurance Program (CHIP) agency, the department of revenue, and other agencies, such as the department of health and the department of human services. (The exchange may be housed in one of these existing agencies, which may facilitate such coordination.) The exchange will also need to interact with state- and federal-level agencies to obtain identity, citizenship, and income data in order to minimize the paper verification that is required when state residents apply for Medicaid, CHIP, premium credits, and cost-sharing subsidies.

To help ensure that the necessary coordination and communication occur between agencies, some states have explicitly stated in their exchange bills that relevant state agencies must cooperate fully when performing exchange-related duties.<sup>30</sup> The NASI model legislation encourages inter-agency coordination through the following language: "The Exchange shall ... Coordinate the policy and operations of the Exchange with those of other state agencies whose policies and operations relate to those of the Exchange, including but not limited to the state agency that administers title XIX of the Social

Security Act, the state agency that administers title XXI of the Social Security Act, and other [insert names of other relevant agencies].” In addition to suggesting that the exchange board coordinate with the Medicaid and CHIP agencies, the NASI model legislation also suggests in a drafting note that the exchange may need to coordinate with other agencies such as the department of corrections.<sup>31</sup> In Massachusetts, the directors of the relevant state agencies are actually granted seats on the exchange board, which facilitates coordination.<sup>32</sup>

It is particularly important to specify in the exchange legislation that coordination must occur between the exchange and the entities that oversee state public coverage programs, such as the state Medicaid and CHIP agencies. This is essential because Medicaid and CHIP enrollment will be integrated with the exchange. Thus, it is important to have eligibility, enrollment, and outreach experts involved in the establishment of the exchange. Whether states decide to have various agency representatives hold positions on the exchange governing board or not, states should include language requiring interagency coordination in their exchange legislation in order to ensure that the exchange functions seamlessly for residents, in accordance with the Affordable Care Act.

## Protecting against Conflicts of Interest

- **Preventing Conflicts on the Board**

To ensure that a state exchange functions in the best interests of the public and that board members are not serving on the governing board for financial or other unethical reasons, there needs to be specific language in the exchange legislation to protect the governing body of the exchange from conflicts of interest. It is not required by the Affordable Care Act, but to create a consumer-friendly exchange, conflict of interest language should prohibit individuals who are employed by, or affiliated with, carriers or insurers, agents or brokers, information technology or other vendors who may seek business from the exchange, active health professionals, or health care facilities or clinics from serving on the governing board.

For example, it is critical that insurers and carriers or their representatives not be on the board, as the exchange is required to determine which health plans to make available based on whether offering each plan that seeks to participate in the exchange is “in the interests of qualified individuals and qualified employers” who will obtain coverage through the exchange.<sup>33</sup> The involvement of insurers in this decision-making process would present a clear conflict of interest, as they could be biased toward certifying their own plans as acceptable for the exchange.

The NASI model legislation,<sup>34</sup> the District of Columbia’s proposed exchange legislation,<sup>35</sup> California’s exchange law,<sup>36</sup> and Maryland’s proposed exchange legislation<sup>37</sup> all offer good model language for ensuring that exchange board members do not have inherent conflicts of interest. Your state may want to refer to the NASI model and these state laws when creating its own exchange legislation.

- **Preventing Board Members with Conflicts from Voting and Decision-Making**

Regardless of who is on the exchange board, protections are necessary to ensure that those with conflicts of interest (including conflicts due to relationships with potential contractors) disclose those conflicts and abstain from relevant board discussions, votes, and duties. Such conflict of interest language can be seen in Texas's exchange bill, House Bill 636, as filed on January 13, 2011, which reads: "(a) A board member, or a member of a committee formed by the board, with a direct interest in a matter before the board, personally or through an employer, shall abstain from deliberations and actions on the matter in which the conflict of interest arises, shall abstain from any vote on the matter, and may not in any manner participate in a decision on the matter. (b) Each board member shall file a conflict of interest statement and a statement of ownership interests with the board to ensure disclosure of all existing and potential personal interests related to board business."<sup>38</sup>

It is possible that your state's existing laws regarding conflicts of interest on boards will also provide some protection against board member involvement in processes for which they have a conflict of interest. However, you should not assume that your state's existing laws will provide full protection, particularly without reviewing them.

To best protect consumers, a state exchange law will pair broader conflict of interest language, such as the language used in the Texas bill, with the type of language from the NASI model legislation (and other previously mentioned states) to prohibit those with an inherent conflict of interest from serving on the exchange board at all. This is particularly important to ensure that the board does not have so many members with conflicts of interest that it is impossible to achieve a quorum of members who can vote on each issue.

## Transparency and Consumer Input

In order to have a successful, consumer-focused exchange, it is crucial to have a transparent governing structure that solicits and incorporates consumer input. Regardless of where the exchange is housed, the exchange board should abide by state open meeting laws and open record laws and hold public hearings on its activities. Many states have written into their legislation the need for transparency. In Massachusetts, the meetings of the Connector Authority are subject to the state open meeting law,<sup>39</sup> which allows anyone to attend most of the meetings. In New Mexico's exchange bill, Senate Bill 38, the governing board of the nonprofit exchange was required to comply with several state laws, including the state open meetings law, in order to promote transparency.<sup>40</sup> (It is

important to note that some meetings of a state exchange's governing board will likely need to occur behind closed doors in order to make decisions that involve truly proprietary information or other information that, for other legitimate reasons, cannot be discussed publicly.)

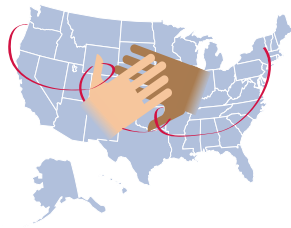
In addition to stating that the governing board will abide by open meeting and open record laws, it is important that the governing board put out advance notice for public meetings and public hearings, as well as timely meeting minutes afterwards. In addition, some of the public meetings should be held during non-business hours so that consumers with full-time employment can attend.

States may also choose to establish an advisory board, or multiple advisory boards, in their exchange legislation in order to formally allow further input from consumers and other groups—such as providers, brokers, agents, and insurers—regarding the exchange and the exchange board's operations. An advisory board would offer input but would not be allowed to make exchange decisions; thus, conflicts of interest would not be an issue.

Some states are considering the development of one advisory board with a mix of consumer, insurer, broker, and provider representation, whereas other states are creating separate advisory committees for separate interest groups. The proposed District of Columbia exchange legislation, Bill 19-2, as introduced on January 4, 2011, would create an advisory board with six members. The members of the advisory board can be “Health professionals; Health insurance consumers; Disease-specific advocacy groups; Commercial and public sector health plans; Public sector health plans; Health insurance brokers; Health care foundations; and Exchange consumers.”<sup>41</sup>

It should be noted that representatives of consumer interests on an advisory board should be in addition to, not instead of, representatives of consumer interests on the official governing board of the exchange.

Open meeting laws, open record laws, public hearings, advanced notice of meetings, timely publishing of minutes, meetings during non-business hours, and advisory boards can all serve to increase the transparency of the exchange and ensure that there are multiple pathways for public input.



## DUTIES OF THE GOVERNING BOARD

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This section includes the following:

- Administration of the Exchange
  - Financing of the Exchange
  - Selling Affordable, Quality Coverage in the Exchange
  - Procuring Information Technology and Streamlining Enrollment Coordination
  - Addressing Small Business Insurance Needs
  - Evaluating Exemption Requests
  - Providing Consumer Assistance
- 

Once states have determined where the exchange will be housed and how the governing board will be structured, they will need to assign the duties of the board. Depending on where the exchange is housed, boards may be given the power to hire an executive director for the exchange, as is stated in the NASI model legislation,<sup>42</sup> the proposed District of Columbia legislation, and the Massachusetts and California exchange laws.<sup>43</sup> Whether the exchange is housed in a government agency, a quasi-governmental agency, or a nonprofit, a board may be used to make a number of decisions about the operations of an exchange.

There are many duties that an exchange board will have to undertake, delegate, or oversee in order to implement and operate the exchange in accordance with the Affordable Care Act. The board could delegate some of these duties to the executive director of the exchange, the exchange staff, or contractors (including through contracts with state agencies). The duties outlined below are based on both the exchange requirements that were listed in the recent grant announcement for the exchange establishment grants provided by HHS<sup>44</sup> and the board duties that have led to a successful exchange in Massachusetts.<sup>45</sup> It is important to consider these duties when deciding what types of expertise the exchange board members should possess.

The duties that the governing board of the exchange should undertake, delegate, or oversee could include, but are not limited to, the following:

## Administration of the Exchange

- Applying for federal exchange planning and establishment grants and ensuring that they are appropriately used.
- Establishing a process for communicating with the executive director of the exchange.
- Reporting information to the IRS and to exchange enrollees about their exchange coverage; this information may be reused to facilitate the renewal of coverage.

## Financing of the Exchange

- Determining how the exchange will be funded and hiring the necessary financial management staff to ensure financial stability.
- Ensuring that there is no waste, fraud, and abuse of exchange funds by enacting fraud detection procedures and requiring external audits of the exchange.

## Selling Affordable, Quality Coverage in the Exchange

- Establishing a process for the certification, recertification, and decertification of health plans that meet or exceed the minimum benefit and other requirements for offering coverage through the exchange.
- Implementing the quality rating system for plans that have been certified to participate in the exchange.

## Procuring Information Technology and Streamlining Enrollment

- Procuring or developing the information technology necessary to determine eligibility and enroll eligible consumers in the appropriate private exchange plans and public programs.
- Integrating all necessary programs and subsidies, such as Medicaid, CHIP, premium credits, and cost-sharing reductions, to fulfill the “no wrong door” requirement of the Affordable Care Act.<sup>46</sup>
- Entering into interdepartmental and interagency agreements (with agencies and departments such as the Medicaid agency, the department of revenue, and the department of insurance) in order to fulfill the duties of the exchange.
- Implementing one standard application to apply for all types of health coverage.
- Creating an exchange web portal and online calculator where consumers can compare plans and benefits, calculate premiums and subsidies, and enroll in appropriate coverage.
- Providing seamless eligibility and enrollment into exchange health plans and public programs, including determining and redetermining eligibility for cost-sharing subsidies and premium credits.
- Sending notices to consumers, including notices of eligibility for health coverage or notices of changes in eligibility.

## Addressing Small Business Insurance Needs

- Conducting eligibility determinations for workers seeking premium tax credits for exchange coverage due to their employer-sponsored coverage being unaffordable (consuming more than 9.5 percent of their income) and for Free Choice Vouchers (available to employees whose required contribution for employer-sponsored coverage consumes between 8 and 9.8 percent of their incomes).
- If the Small Business Health Options Program (SHOP) exchange is separate from the individual market exchange, developing SHOP exchange-specific systems and programs.

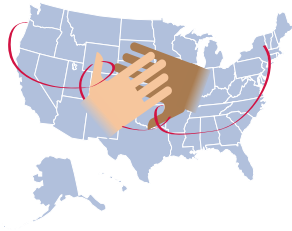
## Evaluating Exemption Requests

- Creating a system of evaluating requests for exemption from the individual responsibility requirement, the Affordable Care Act provision that requires all eligible Americans to maintain health coverage.

## Providing Consumer Assistance

- Implementing an appeals process for consumers who want to contest their eligibility determinations for exchange coverage, premium credits, and other subsidies.
- Implementing a process for telling employers that their employees are eligible for exchange plans because their employer-sponsored insurance is unaffordable or does not meet actuarial standards.
- Implementing an appeals process for employers who want to contest the determination that their employees are eligible for exchange coverage and premium credits.
- Creating a call center where consumers can seek information about health plans, enrollment, and eligibility and learn more about the functions of the exchange.
- Establishing a navigator program in which individuals and entities offer application and enrollment assistance in order to facilitate enrollment into exchange health plans.
- Providing individuals and small businesses with assistance regarding coverage appeals and complaints.
- Educating consumers about insurance coverage and the subsidies that are available through the exchange.

It may be the governing board's responsibility to see that each of these tasks is carried out by the exchange staff, government agencies, and third-party contractors.



## CONCLUDING THOUGHTS

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Regardless of whether your state chooses to establish the exchange in an existing or newly created state agency, quasi-governmental agency, or nonprofit entity, the goal of establishing a governance structure should be to facilitate the implementation of a consumer-friendly, stable marketplace that makes quality, affordable health coverage easy to obtain.

### Additional Resources

- The National Association of Insurance Commissioners' *American Health Benefit Exchange Model Act*, available online at [http://www.naic.org/documents/committees\\_b\\_exchanges\\_adopted\\_health\\_benefit\\_exchanges.pdf](http://www.naic.org/documents/committees_b_exchanges_adopted_health_benefit_exchanges.pdf).
- The National Academy of Social Insurance toolkit and model exchange language, *Designing an Exchange: A Toolkit for State Policymakers*, available online at [http://www.nasi.org/sites/default/files/research/Designing%20an%20Exchange\\_A%20Toolkit%20for%20State%20Policymakers.pdf](http://www.nasi.org/sites/default/files/research/Designing%20an%20Exchange_A%20Toolkit%20for%20State%20Policymakers.pdf).
- The National Academy of Social Insurance issue brief, written by Paul N. Van de Water and Richard P. Nathan, *Governance Issues for Health Insurance Exchanges*, available online at <http://www.nasi.org/sites/default/files/research/Health%20Policy%20Brief%20No%201.pdf>.
- The National Academy for State Health Policy's website for following the state implementation of health reform, including exchange implementation, [staterforum.org](http://staterforum.org).



## Endnotes

<sup>1</sup> *Patient Protection and Affordable Care Act*, Public Law 111-148 (March 23, 2010), as modified by the *Health Care and Education Reconciliation Act of 2010*, Public Law 111-152 (March 30, 2010), Title 1, Subtitle D, Section 1311(d)(1).

<sup>2</sup> National Association of Insurance Commissioners, *American Health Benefit Exchange Model Act* (Washington: NAIC, November 22, 2010). See Section 4.A. Drafting Note.

<sup>3</sup> U.S. Department of Health and Human Services, CFDA 93.525, *Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges* (Washington: Center for Consumer Information and Insurance Oversight, January 20, 2011), available online at <http://www07.grants.gov/search/search.do?sessionid=Pp2fNL0P3PTzK2ZnTrFShwm9Grs9qLNzrVcJShCmYBLfN1B9BgZKl-1340247554?oppld=65693&mode=VIEW>.

<sup>4</sup> National Academy of Social Insurance, *Designing an Exchange: A Toolkit for State Policymakers* (Washington: NASI, January 2011).

<sup>5</sup> U.S. Department of Health and Human Services, *Exchange Establishment Cooperative Agreement Funding FAQ* (Washington: The Center for Consumer Information and Insurance Oversight, 2011).

<sup>6</sup> Massachusetts General Laws, Chapter 58 of the Acts of 2006, *An Act Providing Access to Affordable, Quality, Accountable Health Care, April 12, 2006*, available online at <http://www.malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter58>; California Statutes, Chapter 659 (introduced as Senate Bill 900), *California Health Benefit Exchange*, September 30, 2010, available online at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0851-0900/sb\\_900\\_bill\\_20100930\\_chaptered.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0851-0900/sb_900_bill_20100930_chaptered.html).

<sup>7</sup> California Statutes, Chapter 655 (introduced as Assembly Bill 1602), *California Health Benefit Exchange*, September 30, 2010, available online at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1601-1650/ab\\_1602\\_bill\\_20100930\\_chaptered.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1601-1650/ab_1602_bill_20100930_chaptered.html).

<sup>8</sup> State of New Mexico, Senate Bill 38, *New Mexico Health Insurance Exchange Act*, as passed by the legislature on March 19, 2011, and vetoed by the governor on April 8, 2011, available online at [http://www.nmlegis.gov/lcs/\\_session.aspx?Chamber=S&LegType=B&LegNo=38&year=11](http://www.nmlegis.gov/lcs/_session.aspx?Chamber=S&LegType=B&LegNo=38&year=11).

<sup>9</sup> National Academy of Social Insurance, op. cit.

<sup>10</sup> State of New Mexico, op. cit.

<sup>11</sup> Paul N. Van de Water and Richard P. Nathan, *Governance Issues for Health Insurance Exchanges* (Washington: National Academy of Social Insurance, January 2011).

<sup>12</sup> State of New Mexico, op. cit.

<sup>13</sup> Paul N. Van de Water and Richard P. Nathan, op. cit.

<sup>14</sup> California Statutes, Chapter 659, op. cit.; Massachusetts General Laws, op. cit.

<sup>15</sup> National Academy of Social Insurance, op. cit.

<sup>16</sup> California Statutes, Chapter 659, op. cit.

<sup>17</sup> Massachusetts General Laws, op. cit.

<sup>18</sup> National Academy of Social Insurance, op. cit.

<sup>19</sup> California Statutes, Chapter 659, op. cit.

<sup>20</sup> National Academy of Social Insurance, op. cit.

<sup>21</sup> Specifically, the Massachusetts Connector Authority exchange law, Chapter 58 of the Acts of 2006, states that the insurance broker serving on the Connector Authority governing board must “be a member of the Massachusetts chapter of the National Association of Health Underwriters.”

<sup>22</sup> Massachusetts General Laws, op. cit.

<sup>23</sup> Telephone conversation between Cheryl Fish-Parcham, Claire McAndrew, and Elisabeth Rodman, Families USA, and Nancy Turnbull, Commonwealth Health Insurance Connector Authority Board member, Senior Lecturer on Health Policy, and Associate Dean for Educational Programs, Harvard School of Public Health, on February 22, 2011.

<sup>24</sup> Ibid.

<sup>25</sup> Maryland General Assembly, Senate Bill 182, *Maryland Health Benefit Exchange Act of 2011*, accessed on March 31, 2011, available online at <http://mlis.state.md.us/2011rs/billfile/SB0182.htm>.

<sup>26</sup> National Academy of Social Insurance, op. cit.

<sup>27</sup> *Patient Protection and Affordable Care Act*, Public Law 111-148 (March 23, 2010), as modified by the *Health Care and Education Reconciliation Act of 2010*, Public Law 111-152 (March 30, 2010), Title 1, Subtitle E, Section 1413.

<sup>28</sup> Maryland General Assembly, op. cit.

<sup>29</sup> California Statutes, Chapter 659, op. cit.

<sup>30</sup> Texas Legislature, House Bill 636, as filed on January 13, 2011, available online at <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB006361.pdf#navpanes=0>.

<sup>31</sup> National Academy of Social Insurance, op. cit.

<sup>32</sup> Massachusetts General Laws, op. cit., Drafting Note 14.

<sup>33</sup> *Patient Protection and Affordable Care Act*, Public Law 111-148 (March 23, 2010), as modified by the *Health Care and Education Reconciliation Act of 2010*, Public Law 111-152 (March 30, 2010), Title 1, Subtitle D, 1311(e)(1)(B).

<sup>34</sup> National Academy of Social Insurance, op. cit.

<sup>35</sup> Council of the District of Columbia, Bill 19-2, *Department of Health Care Finance District of Columbia Health Care Exchange Authorizing Act of 2011*, as introduced on January 4, 2011, available online at <http://www.dccouncil.washington.dc.us/lms/legislation.aspx?LegNo=B19-0002&Description=DEPARTMENTOFHEALTHCAREFINANCEDISTRICTOFCOLUMBIAHEALTHCAREEXCHANGEAUTHORIZINGACTOF2011&ID=25519>.

<sup>36</sup> California Statutes, Chapter 659, op. cit.

<sup>37</sup> Maryland General Assembly, op. cit.

<sup>38</sup> Texas Legislature, op. cit.

<sup>39</sup> Massachusetts General Laws, op. cit.

<sup>40</sup> State of New Mexico, op. cit.

<sup>41</sup> Council of the District of Columbia, op. cit.

<sup>42</sup> National Academy of Social Insurance, op. cit.

<sup>43</sup> Council of the District of Columbia, op. cit.; Massachusetts General Laws, op. cit.; California Statutes, Chapter 659, op. cit.

<sup>44</sup> U.S. Department of Health and Human Services, CFDA 93.525, op. cit.

<sup>45</sup> Massachusetts General Laws, op. cit.

<sup>46</sup> The Affordable Care Act envisions a “no wrong door” approach to enrollment in which consumers complete a single application and receive an automatic determination of their eligibility for coverage (including Medicaid, CHIP, and premium credits for health coverage through the exchange).

## Acknowledgments

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