



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON HEALTH CARE REFORM IMPLEMENTATION

FROM: Laura Rose, Deputy Director, and Heidi Frechette and Margit Kelley, Staff Attorneys

RE: Options for Wisconsin Exchange and Governing Body

DATE: October 15, 2010

This Memo presents threshold questions relating to establishing a Wisconsin health insurance exchange under the federal Patient Protection and Affordable Care Act (PPACA). It also presents options for establishing the governing body of the exchange. These options are provided for consideration by the members of the Special Committee on Health Care Reform Implementation, and are based on suggestions submitted by committee members and other individuals and organizations. Information from other states that has been reviewed by the committee is also included.

The purpose of this Memo is to assist the committee in developing legislation on the governing structure of a Wisconsin health insurance exchange, if the committee determines that Wisconsin should elect to operate its own exchange. At the committee's direction, staff will prepare draft legislation on governing body structure for its review.

It should be noted that this Memo is limited to addressing the type of governing body that would operate a Wisconsin health insurance exchange, if one is to be established. In addition, it discusses what the membership of that body would look like. Additional memos will be prepared at the committee's direction for review at subsequent meetings regarding the proposed powers and duties of an exchange and other issues.

This Memo is organized as follows:

- A. Threshold Questions**
- B. Governing Body Options**
 - 1. Existing State Agency**
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 - 3. Creation of a Quasi-Public Authority**

A. THRESHOLD QUESTIONS

1. Should Wisconsin establish a state exchange, or should it opt to have the federal government operate its exchange? PPACA provides that the federal government will operate a state's exchange if a state does not establish its exchange by 2014 (which the Secretary will determine by January 1, 2013), or if that state elects for the federal government to operate its exchange.

Of the comments submitted by committee members and outside organizations, none recommended that Wisconsin opt out of operating its own health insurance exchange. However, there was variation in the comments about what type of governing structure should be established for a Wisconsin health insurance exchange, and how the health insurance exchange should function.

2. If Wisconsin operates an exchange, should it consider a multi-state, or interstate exchange? The federal law allows an exchange to operate in more than one state, if each state where the exchange will operate permits such operation, and the Secretary of the Department of Health and Human Services (DHHS) approves the regional or interstate exchange.

None of the comments submitted recommended that Wisconsin operate a multi-state or interstate exchange. Those that commented on this issue specifically stated that exchanges should be operated under the laws of a single state, for various reasons. Reasons cited were: insurance regulations that vary by state (United Health group); Wisconsin's unique health care environment; (Public Member Tim Bartholow); and the unique interests of each state's constituents (National Association of Health Underwriters (NAHU)).

3. If Wisconsin operates an exchange, should there be regional or other types of subexchanges within the state? The federal law permits a state to establish one or more subsidiary exchanges if each exchange serves a geographically distinct area, and the area served by each such exchange is at least as large as a rating area designated in the Public Health Service Act.

The following comments were submitted regarding subexchanges within the state:

- The exchange should operate statewide, but health plans should be allowed to participate regionally. Health plans with limited service areas should not be forced to expand geographically in order to participate in the exchange. (Public Member Robert Palmer)
- In order to maximize choices for citizens, it may not make sense to carve out sub-regions within the state. (Public Member Tim Bartholow)

B. GOVERNING BODY OPTIONS

1. Existing State Agency

An existing state agency such as the Department of Employee Trust Funds (ETF), Department of Health Services (DHS), or the Office of Commissioner of Insurance (OCI) could be designated to operate the exchange. Each of these existing agencies would offer some immediate expertise, but may not be wholly equipped to immediately operate the exchange. If the exchange is housed in an existing state agency, an attached board could be created to function as a policy-making entity for the exchange.

Some of the issues to address when creating a new state agency board include the number of members; which constituencies the membership will represent; who will appoint the members; and whether the board director shall be inside or outside the classified service.

The following discussion offers some preliminary considerations for housing the exchange with ETF, DHS, or OCI.

Background

The PPACA requires that either a governmental agency or a nonprofit entity, established by a state, run the exchange in a state that elects to operate its own exchange.

Utah is an example of a state with an exchange operated by an existing state agency, with an attached board that provides policy direction. Utah's legislation created the Utah Defined Contribution Risk Adjuster, an entity within the Utah Insurance Department. The risk adjuster is under the direction of a board of directors. The role of the risk adjuster is to create a risk adjustment mechanism to apportion risk among the insurers who participate in the exchange.

The Risk Adjuster Governing Board is comprised of up to nine members, appointed by the Governor with the consent of the Senate, as follows:

- At least three, but up to five, directors with actuarial experience who represent insurance carriers that are participating or have committed to participate in the “defined contribution arrangement” (DCA) market, and including at least one and up to two directors who represent a carrier that has a small percentage of lives in the DCA market.
- One director who represents either an individual employee or employer participant in the DCA market.
- One director appointed by the Governor to represent the Office of Consumer Health Services within the Governor's Office of Economic Development.
- One director representing the Public Employee's Health Benefit Program with actuarial experience, chosen by the director of the Public Employee's Health Benefit Program, who serves as an ex officio member.
- The Insurance Commissioner or a representative from the Insurance Department with actuarial experience appointed by the commissioner. This member has voting privileges only in the event of a tie vote.

Utah legislation also created the Office of Consumer Health Services within the Governor's Office of Economic Development. The office is cooperating with the Insurance Department, the Department of Health, and the Department of Workforce Services, to create the exchange that is capable of providing access to private and governmental insurance websites, and their electronic application forms and submission procedures.

Options

- House the exchange in ETF. ETF could offer in-depth knowledge of commercial insurance and experience operating an insurance program but may not have expertise in the individual and small group markets.

ETF uses a managed competition model for offering insurance plans to state and local employees, with an established basic benefit plan, and allocation among “tiers” for each plan offered. ETF incorporates quality measurements in its insurance program, and provides comparative information for the plan choices. According to ETF, its tiering system has effectively provided strong incentives for plans to attain Tier 1 status and attract enrollees, and for enrollees to select the Tier 1 plans with lower premiums. According to ETF, its risk adjustment methodologies level the playing field, and in its insurance program, the benefit levels have been maintained and high quality and safety have been encouraged and rewarded.

ETF is governed by the ETF Board, which has general oversight over the department. The ETF Board has 13 members and appoints the ETF Secretary; approves tables used for computing benefits, contribution rates and actuarial assumptions; authorizes all annuities except for disability; approves or rejects ETF administrative rules; and generally oversees the benefit programs, except group insurance and deferred compensation. Membership criteria are set by state law, with some members appointed by the Teachers Retirement Board and the Wisconsin Retirement Board. Two seats on the board are elected positions; one elected by retirees and the other by non-teaching employees of public school districts and technical colleges. The other five boards advising ETF are the: Wisconsin Retirement Board; Teachers Retirement Board; Group Insurance Board; Deferred Compensation Board; and the Private Employer Health Care Coverage Board.

Comments

ETF has a fiduciary duty to state and local employees for governance of their benefits, which is a distinct legal duty that would require complete separation of its tasks if it were to house the exchange. All ETF administrative costs are paid from the trust funds. Trust funds cannot be used for any other purpose than providing benefits to ETF users and reasonable administrative expenses.

The population using the public exchange would be different from current ETF users, and would require an integration of the Medicaid, BadgerCare, and general public populations.

Operating an exchange could be similar to ETF’s work in operating its state and local employee insurance program, but because of the differences, it would not be possible to use a simple duplication of the program.

From a technology perspective, ETF would require substantial additional IT resources to create and manage a publicly accessible, user-friendly web portal and data management system for the exchange.

- House the exchange in DHS. DHS has experience operating publicly subsidized programs and conducting outreach, eligibility determinations, enrollment, plan contracting, and other functions, but may not have expertise regarding commercial insurance.

DHS has knowledge and experience in the insurance industry, as well as the Medicaid and BadgerCare programs. DHS determines eligibility under federal Social Security disability insurance programs. DHS analyzes insurance rates; tracks and analyzes national data; and follows health care reform initiatives in other states. DHS administers risk adjustment methodologies in the Medicaid program.

DHS is governed under the direction and supervision of the Secretary of Health Services. The Secretary is nominated by the Governor, with the advice and consent of the Senate, and serves at the pleasure of the Governor. By statute, the Emergency Medical Services Board is attached to DHS, as are seven councils for particular public health issues.

Comments

The population using the public exchange would be different from current DHS users, and would require an integration beyond Medicaid and BadgerCare program populations.

From a technology perspective, DHS benefits from having a publicly accessible web portal and data management system, and could leverage these systems in the design of an integrated exchange model. Using these systems as a base, the exchange could build off of the current structure in order to minimize administrative costs.

In the exchange planning grant application, DHS and the Wisconsin Office of Health Care Reform (OHCR) recommend that a separate quasi-governmental authority be used to house the exchange, which would function cooperatively with, but independently from, state government. It also recommends that such an authority would contract with DHS. Under this structure, DHS and OHCR envision a board of directors chaired by a non-political executive director with members including small business representatives, representatives of the self-employed community, and other individuals with applicable expertise, as well as ex-officio members such as the Insurance Commissioner, the Medicaid Director, and the Secretary of ETF. DHS currently maintains the technology systems that the exchange will be built upon, and stated it is well-positioned to continue to run these functions for the exchange if chosen to house the operations for the exchange. Within this model, DHS says that the board of directors could maintain oversight of all DHS activities associated with operation of the exchange.

- House the exchange in OCI. OCI would offer expertise in commercial insurance.

OCI is governed under the direction and supervision of the Commissioner of Insurance. The Commissioner is nominated by the Governor, appointed with the advice and consent of the Senate, and serves at the pleasure of the Governor. The Commissioner may create advisory councils and committees to assist in dealing with regulatory problems. The Commissioner provides rules for the creation, governance, duties, and termination of any council or committee that is established.

Comments

OCI may lack familiarity with Medicare and Medicaid programs. Additionally, operation of the exchange would shift OCI's focus and expertise from being an independent regulatory agency, to being both a regulatory and administrative service agency.

From a technology perspective, OCI would require substantial additional IT resources to create and manage a publicly accessible user-friendly web portal and data management system for the exchange.

OCI could offer oversight and regulation of the health plans in the exchange, whether or not it houses the exchange.

- House the exchange in a new state agency. Another possibility is that each agency could be used as a model in creation of a dedicated agency for the exchange.

A new agency could draw upon the expertise offered by ETF, DHS, and OCI, and would be able to contract out for actuarial services such as the insurance risk-adjustment methodologies, and for pieces of the administration of the exchange.

Comments

While creating a new state agency would allow access to other state agencies and their resources, it would face the same challenges that state agencies face in their governance, operations, and funding structure. In addition, executive branch agencies could face changes in their continuity of operations and mission with each election cycle for the executive branch.

The National Association of Insurance Commissioners' *American Health Benefit Exchange Model Act* draft, dated September 27, 2010, gives a summary of the pros and cons of housing the exchange in an existing or new 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.

2. Existing Quasi-Public Authority: HIRSP

Background

The Health Insurance Risk-Sharing Plan (HIRSP) Authority is a quasi-public body that manages the state's high-risk insurance pool for individuals who would otherwise be uninsured. HIRSP has been operational since 1980. Originally administered by the DHS, HIRSP was transferred to the newly created HIRSP Authority in 2006. The Authority is also responsible for operating the temporary high-risk pool created by the federal PPACA from July 1, 2010 to December 31, 2013.

As a quasi-public authority, the HIRSP Authority is accountable to but also independent of state government. For example, the Office of the Commissioner of Insurance has regulatory oversight over HIRSP plans.

Option

- Designate the HIRSP Authority as the governing board to run a state health insurance exchange. The following comments were submitted in support of this option:
 - Use the HIRSP Authority model as a starting point for discussion regarding the health insurance exchange governing body. (Senator Alberta Darling and Representative Pat Strachota)
 - Use the HIRSP Authority as a model for governing the state health insurance exchange. The board should have equal representation from all stakeholders including consumers, the government, insurers, employers, and providers. The board should consist of no more than 10 to 12 members so that it can take action and make decisions in an efficient and timely manner. (Public Member Barbara Zabawa)
 - The HIRSP Authority is a model that has worked well in the state. The 13-member board, with eight assigned seats for members representing providers and insurers and the remaining five members representing consumers and other purchasers, is a model that has worked well and is able to weigh competing interests and needs in order to make a funding pool work for consumers and payers. (Public Member William Petasnick and the Wisconsin Hospital Association (WHA))
 - The HIRSP Authority could serve as a platform for the development and implementation of creating the state health insurance exchange due to the Authority's existing infrastructure, personnel, board expertise, and administrative capability. (Public Member Robert Palmer)

The HIRSP Authority's letter, enclosed, highlights the core competencies of the Authority and how these skills are important to the operation of health insurance exchange. Specifically, the Authority believes it would be able to successfully implement all the administrative components of a health insurance exchange and points to its specific experience with the following functions:

- Determining and coordinating eligibility;
- Creating standardized benefit plan options at specified actuarial values;
- Maintaining a call center;
- Establishing a website for comparative quality and cost information;
- Informing individuals about the existence of and their eligibility for public programs such as Medicaid and BadgerCare;
- Administering premium payment calculation and collection;
- Paying brokers/agents;

- Conducting risk adjustment; and
- Determining qualifications for low-income subsidies and waivers from mandate.

The HIRSP Authority indicates that it would have to develop the following additional required core competencies if it were to operate the exchange: certify qualified health plans; assign quality ratings and reward quality; set up and administer and oversee the Navigator program; manage small employer interface; and communicate with the Department of Treasury regarding individual mandate exemptions and small employer opt out.

The letter also explains the Authority's experience working with insurers, third-party administrators, providers, federal and state agencies, agents, consumers, advocates, and the business community. The Authority believes that since it is an existing quasi-public body with relevant skills and experience, it could begin work almost immediately with some adjustments to its board structure and staffing.

Comments

As a quasi-public authority, the HIRSP Authority offers the advantages and challenges discussed in Part B. 3. of this Memo.

Utilizing the HIRSP Authority as the governing board for the state health insurance exchange may help insulate it from political influence and provide access to the Authority's expertise in state insurance law and the Wisconsin health care marketplace, as well as its efficient administrative structure.

If the HIRSP Authority is selected as the governing board of a state health insurance exchange, the committee may want to consider what additional staffing and funding would be necessary. Furthermore, it may want to look at how the governing board would be structured at the Authority, and examine the membership on the board.

The HIRSP Authority suggests that the existing board could be the foundation for the state health insurance exchange governing board since there appears to be overlap between HIRSP stakeholders and health exchange stakeholders. For example, the existing HIRSP board includes a small business that purchases health insurance, a consumer advocate, and the Commissioner of Insurance. Health care providers and insurers also serve on the HIRSP Authority board. Additionally, the HIRSP Authority points out in its letter that with the elimination of the high-risk pools and the creation of an exchange, it will be essential that the HIRSP board and the health exchange governing board work closely together.

The HIRSP Authority suggests that there are several possible arrangements and proposes the following two options: (1) a single board with two components: (a) a HIRSP committee; and (b) a health exchange committee, where the members of each committee would have voting rights on administrative issues and with voting rights limited to issues affecting their substantive matters; or (2) two separate boards with the HIRSP board reporting to the health exchange board and with some members serving on both boards. The Authority envisions that members appointed by the Governor to the HIRSP board would have their terms sunset in 2014 with the end of the high-risk pool.

3. Creation of a Quasi-Public Authority

Background

Wisconsin law provides for the creation of authorities to perform certain functions. The Legislative Reference Bureau drafting manual provides background on the legal authorization for creation of authorities:

A state authority is a body corporate, created by the Legislature, that is not “the state.” Therefore a state authority is not a state agency but is totally state-owned and state-controlled. Some of the functions of some state authorities, such as issuance of bonds for certain purposes and making loan guarantees, may not be constitutionally performed by the state directly. However, the Wisconsin Supreme Court has approved the use of authorities to carry out such functions. See *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391 (1973).” [State of Wisconsin Legislative Reference Bureau, Wisconsin Bill Drafting Manual 2011-2012, Section 23.045 (1), page 279.]

A quasi-public authority would be independent of, but accountable to, state government. Authorities that have been established in Wisconsin are the HIRSP Authority; the Wisconsin Aerospace Authority; the Quality Home Care Authority; the Wisconsin Health and Educational Facilities Authority; the Bradley Center Sports and Entertainment Corporation; the University of Wisconsin (UW) Hospitals and Clinics Authority; the Wisconsin Housing and Economic Development Authority (WHEDA); the World Dairy Center Authority; the Fox River Navigational System Authority; and the Lower Fox River Remediation Authority.

The committee has reviewed information from several other states that have created authority-like bodies for operations of health insurance exchange. (Memo No. 1, *Health Benefits Exchanges in Selected States and Under Federal Health Care Reform*, dated September 14, 2010). The states mentioned in this Memo are:

Massachusetts: The Massachusetts health exchange, known as the Connector, has been described as a semi-independent public authority. It is a self-governing entity separate from the State of Massachusetts and has features of both a public agency and a private organization.

California: The California Health Benefits Exchange is governed by a five-member California Health Benefit Exchange Board consisting of five residents of California. The board is an independent public entity not affiliated with any state agency. Statutory language creating each of these bodies is enclosed.

Option

- Create a new, independent, quasi-public authority that would operate a Wisconsin health insurance exchange.

The following suggestions were offered regarding the composition of the governing board that would operate the Authority. The suggestions that specified the appointment process recommended appointment by the Governor, with Senate confirmation.

- Create a 15-member Wisconsin Health Insurance Exchange Authority. There would be six ex-officio members (a member serves by virtue of the office that member holds, such as a department secretary) and nine public members representing various consumer, labor, employer, provider, and insurance interests. (Bill draft submitted to the committee by Public Members David Riemer, Robert Kraig, and Joseph Leean, prior to September 21, 2010 meeting)
- Create an authority, modeled after HIRSP, with a governance board comprised predominantly of individuals with expertise needed to operate the exchange. (Public Members Ed Harding and William Petasnik)
- Create an authority, modeled after HIRSP, with equal representation of all stakeholders, with a board of no more than 10 to 12 members. (Public Member Barbara Zabawa)
- Create a quasi-public, independent authority with eight members, including three ex officio members and five public members representing various business, labor, and insurance interests. (Public Member Joseph Leean)
- Create an authority, using the HIRSP Authority model as the starting point for discussion, and ensure fair representation of major stakeholders. Limit term lengths and provide for Senate confirmation of appointees. (Representative Pat Strachota and Senator Alberta Darling)
- The exchange should be governed by an independent, transparent, and non-politicized entity with a board consisting of broad constituent representation. (Public Member Wendy Arnone)
- A quasi-governmental authority, that is non-partisan and insulated from political decision-making, should serve as the governance and operational structure of the Wisconsin health benefit exchange. The board of directors should be comprised of non-governmental stakeholders with representation from physician, hospital, and health plan representatives. The HIRSP Authority should be considered as a model for creating the authority. (Public Member Robert Palmer)
- Create a governing board with strong consumer stakeholder involvement, with industry representation on the governing board and in leadership only to get essential expertise, and governed by strong conflict of interest rules. (Public Member Robert Kraig)
- Create a governing board that is small and apolitical. Individuals appointed should have necessary expertise, but avoid “camps” that can result from appointment by profession. Possibly requires various interest groups to agree on appointees, such as requiring endorsement by three statewide health groups; endorsement by two for-profit and two nonprofit insurers, or some similar mechanism. Candidates should apply for and be

interviewed and vetted for these positions, assessing their qualifications and experience against established criteria. (Public Member Cheryl DeMars)

- The exchange should be administered by a private-public partnership authority, with oversight by the Insurance Commissioner and Governor, and Senate confirmation of appointees. (Dan Schwartzer, Wisconsin Association of Health Underwriters (WAHU))
- One option for the exchange would be to be located in an independent public agency or a quasi-governmental agency. The enabling legislation would specify how board members would be appointed, including board size, composition, and terms. (National Association of Insurance Commissioners (NAIC), American Health Benefits Exchange Model Act, page 4)

Comments

Creation of a quasi-public authority would provide some insulation from day-to-day political considerations, and would provide more independence in operations than being housed in a state agency. However, there may be challenges in coordinating its efforts with state agencies such as the DHS, with its Medicaid and BadgerCare initiatives, and with OCI, since an authority is not a state agency.

If the committee decides to pursue the creation of an authority, key preliminary decisions to be made include the powers and duties of the authority, and what the overarching goals of the authority will be. The numerous suggestions on this issue submitted by committee members and others could be compiled for committee review at subsequent meetings.

If a new authority is created, it could be authorized to hire a director, who could hire the additional staff needed for operations. The authority would need to acquire the physical space and necessary equipment for its operations, and procure necessary technical services such as information technology and actuarial services.

If the authority model is chosen as the governing body structure for the exchange, a bill draft that establishes the new authority could use existing authority statutes as a model for the application or exemption of certain state laws to the authority, such as:

- Authorizing financial audits of the authority by the Legislative Audit Bureau.
- Authorizing access by the Department of Administration to the authority's books and accounts.
- Whether provisions in ch. 16, Stats., relating to state purchasing and procurement, apply to the authority.
- Application of state records and open meetings laws.

LR:HJF:MSK:jal

Enclosures