



To: Virginia Health Reform Initiative

From: John McInerney, Health Policy Director, The Commonwealth Institute for Fiscal Analysis
Jill Hanken, Staff Attorney, Virginia Poverty Law Center

Re: Comments on Exchange White Paper #1 - Key Governance Questions for Health Benefit Exchange in Virginia:

Summary of Governance Issue Recommendations

Virginia must decide the governance structure for a Health Benefit Exchange early in the design process. Under the Affordable Care Act (ACA), states have been given broad discretion and several structural options. To create the best structure for the state, Virginia must decide on a home for the Exchange, the composition and authority of a governance board and conflict-of-interest language.

Creating an Exchange that is consumer-friendly, transparent and easily accessible to Virginians who need health coverage and access to care is essential. The structure of an Exchange, if carefully designed to protect the consumer, will improve Virginia's health care system by providing affordable and accessible insurance options to significantly reduce the uninsured population in the state.

To achieve these goals, we urge the VHRI to adopt the following principles and recommendations:

- Create a Virginia-designed Exchange by ACA deadlines to avoid the federal fall-back option.
- Develop the Exchange within a new, freestanding, quasi-governmental agency.
- Exempt the Exchange from certain state hiring and procurement rules, but maintain administrative procedures, open meetings and

We believe the option that makes the most sense for Virginia is to create a new independent, quasi-governmental entity.

other transparency protections provided in Virginia law.

- Appoint a diverse governance board with a variety of expertise. The board should contain at least two consumer representatives and one small business representative.
- Prohibit health insurers and health insurance brokers from serving on the governance board.
- Establish a broader "advisory committee" for other stakeholders.

Virginia Should Develop Its Own Exchange

Both the Virginia Legislature and the VHRI support a Virginia-designed Exchange. We agree. A federal exchange creates the risk that the design will not receive stakeholder buy-in and may be a bad fit for Virginia.

Virginia's Exchange Should be Housed in a New, Freestanding, Quasi-Governmental Agency

After considering placement of the Exchange within an existing Virginia agency, we have concluded that no existing Virginia agency would be an ideal agency to house the new Exchange. As noted in the VHRI White Paper (p.10), no existing

agency has experience with all the functions that an Exchange will have to perform and attempting to do so may "overwhelm" the agency.

For example, the Bureau of Insurance is the chief regulator of the health insurance industry in the state, and it is already taking on new responsibilities to enforce insurance regulations and consumer protections called for under the ACA. Adding the Exchange as part of the BOI authority would present potentially conflicting roles. The Bureau would have to simultaneously regulate an industry, negotiate for better rates and higher quality, and offer products for sale to the public.

Similarly, the Department of Medical Assistance Services (DMAS) is not the appropriate home for the Exchange. DMAS already has responsibility for running Virginia's Medicaid and FAMIS programs. This role will grow in 2014, as the state greatly expands Medicaid eligibility to 133 percent of the federal poverty level. While DMAS has a great deal of experience working with Medicaid managed care insurers, it has no experience in operating a private insurance market. Adding responsibility to run the Exchange would potentially compromise the primary role of the agency.

Likewise, the Departments of Health, Social Services, and Human Resources Management, while certainly playing important roles in the success of the Exchange, are not suited to run it.

Thus, we believe the option that makes the most sense for Virginia is to create a new independent, quasi-governmental

entity. More than half of all states that have approved or are considering health benefit Exchange authorizing legislation have embraced the new agency approach. A new separate entity would:

- Help reduce political influence in Virginia, the only state that elects a new Governor every four years.
- Bypass some processes, such as state procurement and hiring rules that could be too restrictive and cause undue delay. For example, the Exchange must hire qualified experts to operate and run the Exchange. It will be critical for the Exchange to have staff with expertise and experience, especially during development in the early years of operation. With the ability to hire people more quickly and offer competitive employment packages, Virginia will ensure that it does not waste time in getting started. Being fully ready for operation on Jan. 1, 2014 is essential.
- Focus entirely on the Exchange, ensuring accountability and success, without competing responsibilities.
- Appeal to the public by emphasizing and marketing new opportunities for health coverage without a connection to current agency reputations or limitations on scope and expertise.

Transparency Must be Protected

Yet, it will be critical for a quasi-governmental Exchange to follow other important state rules and protections. For instance, the Exchange must be subject to:

- The Administrative Process Act, Va. Code § 2.2-4000 *et seq.* regarding regulatory issues and rulemaking, to ensure full

disclosure of program operations and eligibility rules and to promote public input.

- Open meeting and open record provisions of the Freedom of Information Act, Va. Code § 2.2-3700, *et seq.* to guarantee public access to information and meaningful public input.
- Broad conflict of interest provisions, including the State and Local Government Conflict of Interests Act, Va. Code

Authentic consumer presence on the board also adds credibility to the process and the ultimate product.

§2.2-3100 *et seq.*

Other State Agencies Must be Actively Engaged

While a quasi-governmental entity would actually govern and run the Exchange, it must work in collaboration with a number of other agencies. Authorizing legislation must mandate and provide the authority for the Exchange to share information and databases and communicate and work with the Department of Medical Assistance Services, the Bureau of Insurance and the Department of Social Services. Each of these agencies plays a critical role in Exchange development and operation, ranging from making Medicaid/FAMIS eligibility decisions and coordinating shifts between public, subsidized and private insurance, to gathering necessary information from and determining qualifications of insurance plans. The leadership of these three agencies should serve as ex-officio members of the governing board. Moreover, these agencies must designate staff to work directly with the Exchange on an ongoing basis, perhaps onsite. (This could be similar to the

relationship between the FAMIS Central Processing Unit, Medicaid eligibility staff, and DMAS oversight.)

The Governing Board Should be Diverse, Expert and Include Consumer Representation

Choosing a quasi-governmental structure will require the creation of a governance board to hire an executive director and make key policy decisions. The decisions of the board will help determine the ultimate success of the Exchange.

Although many parties have an interest in the competitive insurance market that Exchanges create, it must be remembered that the primary goal of the Exchange is to serve health insurance consumers. Thus, the governing board must ultimately represent health consumers and employers, not insurers.

The Exchange Board should be relatively small and nimble, with 12 members, similar to another state quasi-governmental agency, the Virginia Housing Development Authority (VHDA). Created in 1972, the VHDA has 11 members on its governance board (8 direct appointees, three ex-officio), appointed by the Governor.

We support a 12-member Exchange Board with staggered terms to ensure continuity as people rotate on and off of the board. The Governor would appoint five members, the House of Delegates and Senate would each choose an at-large member, and the rest would be heads of state agencies.

The Board would include:

- Five ex-officio members – The Secretary of Health and Human Resources, The Commissioner of the Bureau of Insurance, the Commissioner of the Department of Social Services, the Director of the Department of Medical Assistance Services and the Director of the Department for

Human Resource Management

- Two consumer representatives with expertise in public health insurance programs and the needs of low income, disabled, and uninsured populations
- One small business representative
- One member with expertise in health care financing and economics
- One member with expertise as an insurance actuary
- Two at-large members with expertise in any of the above areas

The Exchange legislation should also require board appointments to take into consideration the racial, ethnic and geographic diversity of the state.

We emphasize the necessity of consumer representation on the Governing Board. Consumers will bring a unique and critical perspective to the board, as they will experience the direct impact of health plan participation standards. Consumers are also best able to judge the accessibility of the Exchange's online operations and protect the interests of the underserved populations who will be disproportionately reliant on the Exchange for finding health coverage. These populations include those with limited English proficiency, low health literacy, low income and disabilities.

Authentic consumer presence on the board also adds credibility to the process and the ultimate product, which will encourage participation by others. Overall,

the Exchange is intended to ensure that consumers have meaningful access to high quality, affordable health insurance. This goal cannot be achieved without proportionate consumer representation and meaningful involvement in its governing body.

The governing board must avoid all conflicts of interest

Confidence in the impartiality of the Exchange will build public trust. The Exchange must avoid financial conflicts-of-interest in its governance. A governance board member employed (or with a financial affiliation) with an entity that will profit from enrollment in the Exchange will have a conflict. For example:

- A primary purpose of the Exchange is to open up competition in insurance markets to bring down prices and improve quality. A Virginia insurer sitting on the Exchange governing board would have a conflict between protecting its own market share and enhancing competition.
- The Exchange will have to certify which plans can participate, and it will review company quality, pricing and performance. Again, a direct conflict exists.
- The Exchange will have to determine how it will be financially supported, and it will probably consider assessments on insurance companies. This is another direct conflict.
- An important goal of the ACA

and the Exchange is to bring down administrative costs, such as agent commissions. Agents and brokers who are paid by insurance companies for selling their products are clearly identified with the interests of insurers, and they will have a direct financial interest in selling products in the Exchange. This is a clear conflict that must be avoided on the governing board.

To prevent these conflicts, and even the appearance of such conflicts, Virginia's legislation concerning governance must specify that no employees or affiliates of insurers or insurance brokers can serve as members of the governing board for the Virginia Exchange.

However, consultation with representatives of the insurance industry and insurance brokers is appropriate and necessary in discussions regarding the design and planning for the Exchange. An advisory committee should be established to formally include their advice and perspectives. But governance board members must be absolutely free from any financial incentives that could present conflicts and hinder the effectiveness of the Exchange for Virginia's consumers.

Conclusion

We thank you for the opportunity to offer comments on the important structure and governance issues for Virginia's Exchange. We look forward to future opportunities to comment as the process moves forward.