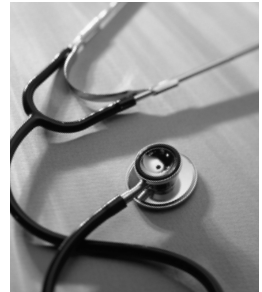
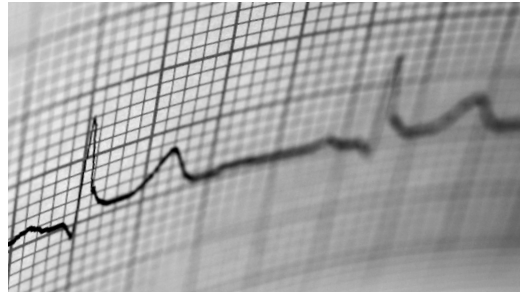


Building the Infrastructure for a New York Health Benefit Exchange: Key Decisions for State Policymakers



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Building the Infrastructure for a New York Health Benefit Exchange: Key Decisions for State Policymakers

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Foreword

Supported by analysts from differing ideological perspectives and buoyed by the favorable reaction to the Massachusetts Connector, health insurance exchanges emerged as the centerpiece of health insurance reforms adopted in the Patient Protection and Affordable Care Act (ACA). With significant responsibilities in both private and public markets — implementing a seamless system for determining eligibility both for new tax credits for individuals and businesses and for existing public programs, administering individual and business mandates for coverage, and using technology to create a user-friendly shopping experience and improve value — the new Health Benefit Exchange will touch most aspects of the way health insurance coverage is delivered to individuals and small groups in New York.

With the support of the New York State Health Foundation, the Fund is preparing a series of reports on Exchange implementation. In this first report, we focus on the first wave of key decisions about designing the Exchange that states are required to make under the ACA: establishing a state Exchange, or ceding that authority to federal regulators; joining with other states to establish a multistate Exchange or establishing a statewide or regional Exchanges; and whether to house this transformative entity in a state agency, a public authority, or a new nonprofit organization.

These critical decisions will be made in a time of considerable political turmoil and economic uncertainty. New York faces multibillion dollar budget gaps in the years ahead, and a new Administration takes office in Albany in January at the same time that a new majority assumes power in the U.S. House of Representatives. And while states have wide latitude in how to establish an Exchange, important policy decisions await federal guidance on a series of critical issues.

Future reports by the Fund will consider questions related to the coordination of Medicaid and the Exchange, whether to merge the individual and small group markets, and the role the Exchange will play in the commercial market. In this report, Fund Health Insurance Project Co-Director Peter Newell and co-author Robert Carey, a key architect of Massachusetts's Connector, examine the foundational decisions New York must make — while under considerable pressure to get the new system up and running in 2013 — through analyses of the ACA requirements, existing New York State law and regulations, and the experience in Massachusetts and other states.

JAMES R. TALLON, JR.
President
United Hospital Fund

Executive Summary

American Health Benefit Exchanges are the centerpiece of health insurance reforms in the Affordable Care Act (ACA). Under tight timeframes, all states are required to establish these entities, or cede that authority to the federal Department of Health and Human Services (HHS). Modeled on Massachusetts's Connector, the Exchange will straddle public and private health insurance markets, and is charged with a broad range of duties. Some obligations — determining eligibility for tax subsidies to make coverage more affordable, facilitating enrollment in public coverage, and overseeing compliance with individual responsibility provisions — resemble traditional governmental activities. Others — creating an electronic marketplace for insurance shopping — have a more commercial flavor.

This paper highlights the design choices New York policymakers face through analyses of the ACA provisions, the existing statutory and regulatory framework in New York State, and the experience in other states, particularly Massachusetts and California. These decisions must be made under ambitious timetables set by HHS: the agency will make grants to states in 2011 based on the attainment of certain milestones, state progress will be formally evaluated beginning in January 2013, and HHS has communicated expectations that states be prepared for a “dry run” of their Exchange in July 2013. Economic duress, political uncertainty, ongoing litigation seeking to overturn key components of the ACA, and important guidance from federal regulators still to come all complicate these decisions.

The ACA grants states broad latitude in establishing an Exchange, starting with the option to allow HHS to run a New York

Exchange. While this choice might reduce financial exposure for New York, it would come at the cost of surrendering self-determination on a range of regulatory issues, including the role the Exchange plays in markets, oversight of the interplay between the Exchange and non-Exchange markets, coordination of the Exchange with the Medicaid program, and consumer protections unique to New York.

If New York chooses self-determination, it must then choose from three core options: a multistate Exchange in partnership with other states, a statewide exchange, or subsidiary, regional exchanges. The multistate option has some appeal in terms of efficiencies and spreading risks among broader insurance pools, but it is better suited for regions with smaller populations and markets and less sophisticated regulatory structures than New York and its neighbors share. It would require extensive cooperation with multiple governors, regulatory agencies, and legislatures, and perhaps reconciling market differences among states.

Subsidiary exchanges offer the opportunity to tap local expertise to create smaller exchanges that are responsive to unique local market conditions, but they would be less efficient than a single statewide exchange, would require a more complicated governance structure, and could hamper regulation of the commercial market and coordination with Medicaid.

A third option, a statewide Exchange, when coupled with a strong regional service component, would be more efficient and agile, and could be designed to achieve some of the same benefits as a local entity by organizing services with a regional focus. Through this

option, for example, an Exchange could establish coherent regional networks for Navigator, consumer assistance, and Facilitated Enrollment programs, centers for walk-in counseling at state and local offices, and special services for small businesses, such as payroll and COBRA administration, tax credit counseling, and benefit advice from insurance professionals.

A final set of decisions involves the corporate form of the Exchange and its governance and administration. States may choose from three models: housing the entity in an existing state agency or a new one; establishing a public benefit corporation; or creating a new nonprofit corporation. All but the option of a new nonprofit corporation would require the enactment of state legislation.

Locating the Exchange in a state agency such as the department of Insurance, Health, or Civil Service, would provide the Exchange with a built-in management, governance, and accountability structure and in-house expertise, but it could create conflicts with other duties, and would involve significant operational challenges. The applicability of state civil service, procurement, and finance laws, as well spending restraints adopted in the current fiscal crisis, would interject delays and uncertainty into Exchange operations. Creating a new public benefit corporation would establish an entity with a single mission, and provide for more flexibility than a state agency; it would require careful attention to criteria for board appointments and governance, and setting parameters for the proper degree of discretion and independence the Exchange should enjoy. Finally, a new nonprofit corporation offers by far the most flexibility of all the models, but it would require the delegation of governmental functions to an entity lacking traditional accountability, transparency, and governance standards.

Faced with many of the same decisions,

Massachusetts and California established independent public authorities, statewide in scope, with some flexibility on civil service and procurement matters, and streamlined board structures that include *ex officio* members, and members representing various interests, or with expertise in matters likely to come before the organization.

In addition to choosing among these models, New York policymakers have the option of shaping them more to their liking. A state agency could be relieved of certain restrictions so that it would function more like a public authority, and a nonprofit corporation could be established that looks more like a state agency in terms of its governance and accountability. While policymakers enjoy a great deal of flexibility in crafting an Exchange infrastructure, decisions on financing and the method of appointing board members could be dispositive on certain issues. The overarching consideration is to devise an infrastructure that is transparent, receptive to public input, and efficient and accountable — yet nimble enough to act quickly to meet ACA implementation milestones and adjust to new federal rules or sudden market developments.

Legal and political uncertainties, a long list of federal rules yet to be promulgated, and a number of major Exchange-related policy decisions entrusted to states all suggest careful attention to the timing and scope of Exchange implementation. A “wait-and-see” approach would provide greater clarity but could put federal funding at risk and set overall implementation behind schedule. A comprehensive approach that seeks to pin down all outstanding issues in omnibus legislation may overreach, given the political and legal uncertainties, federal rulemaking yet to come, the complexity of interconnected policy issues, and the difficulty in crafting the desired analytical work to support decision-making. Another approach would move to create the infrastructure for a state Exchange, leaving some decisions to future legislation

or the discretion of a newly established governing board. This avenue would create a place for a New York conversation on an Exchange, and allow the Exchange to marshal available resources, undertake an

inventory of assets and needs, shape the analytical work needed to support policy decisions, begin work on a business plan, and recommend future actions.

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and the New York State Department of Civil Service. Mark F. Glaser, Esq., and Alex Paradiso of Greenberg Traurig, LLP, provided legal analysis that supported this report, summarized in the Appendix. Andrew Detty, United Hospital Fund research assistant, analyzed U.S. Census Bureau data to determine New York-area commuting patterns.

Introduction

While the final passage of the Patient Protection and Affordable Care Act (the ACA) was a cliffhanger, the central role a Health Insurance Exchange (the Exchange) would play in federal reform was never in doubt. Embraced by analysts and observers from both ends of the ideological spectrum, the concept of an Exchange drew support from conservatives, who saw value in the ability of an exchange as a free market tool to better organize offers of coverage; and from more progressive observers, who highlighted the ability of an Exchange to increase the purchasing power of individual and small businesses, simplify and standardize product offerings, and act as an engine for broader market reforms.¹ Building off the momentum from the successful implementation of Massachusetts's Commonwealth Health Insurance Connector Authority (the Connector), the Exchange emerged as a central building block in national health insurance reform.

The ACA resolved several key design questions from competing House and Senate

versions — embracing a system of state Exchanges rather than a single national entity, and preserving a non-Exchange market for individuals and small groups — but also left much to the discretion of states, on questions of day-to-day operations and governance as well as larger policy issues.

While more federal guidance on Exchange issues is expected in 2011, officials from the Department of Health and Human Services (HHS) have consistently communicated expectations² for fast-paced Exchange implementation plans, including an open enrollment period in 2013, and achievement of certain as yet unnamed milestones in 2011 as a condition of continued federal funding eligibility.³ So the countdown begins: T minus 30 months and counting for New York to establish an Exchange capable of administering subsidies for up to one million uninsured, facilitating the purchase of coverage for tens of thousands of small businesses, some of them eligible for tax subsidies, and assisting in eligibility and enrollment determinations for millions of

¹ See, for example, Fronstin P and MN Ross. June 2009. *Addressing Health Care Market Reform Through an Insurance Exchange: Essential Policy Components, the Public Plan Option, and Other Issues to Consider*. EBRI Issue Brief, no. 330. Available online at http://www.ebri.org/pdf/briefspdf/EBRI_IB_6-2009_HlthExchg.pdf; Moffit RE. October 5, 2006. *The Rationale for a Statewide Health Insurance Exchange*. The Heritage Foundation, WebMemo #1230. Available online at <http://www.heritage.org/Research/HealthCare/wm1230.cfm>; Blumberg L and K Pollitz. April 2009. *Health Insurance Exchanges: Organizing Health Insurance Marketplaces to Promote Health Reform Goals*. Princeton, NJ, and Washington, DC: Robert Wood Johnson Foundation and Urban Institute; Haislmaier EF and N Owcharenko. November/December 2006. *The Massachusetts approach: A new way to restructure state health insurance markets and public programs*. *Health Affairs* 25(6): 1580-1590; and Kingsdale J and P Bertko. July 20, 2009. *Health Insurance Exchanges: A Typology and Guide to Key Design Issues*. Background Paper, The Health Industry Forum.

² State officials, at meetings of Governor Paterson's Health Care Advisory Committee in September and October 2010 communicated verbal comments from HHS officials on the expectation, for example, of a "soft launch" of state Exchanges in July 2013.

³ "The opportunity to apply for [implementation] grants will be announced in February 2011 and will become available on a rolling basis throughout the next three years. States will have to meet certain milestones in order to be awarded grants in 2011, and the size of State awards may be related to the number of milestones met." November 18, 2010, Department of Health and Human Services, Office of Consumer Information and Insurance Oversight, *Initial Guidance to States On Exchanges*. Available online at http://www.hhs.gov/ociio/regulations/guidance_to_states_on_exchanges.html.

New Yorkers eligible for public health coverage programs.

New York faces a series of fundamental decisions relating to Exchanges. First, it must decide whether to establish a state Exchange or to allow the HHS Secretary to establish an Exchange for New Yorkers “directly or through agreement with a not-for-profit entity.”⁴ If New York elects to establish a state Exchange, it must then decide whether to pursue establishing a “regional or other interstate Exchange” through agreements with one or more states.⁵ If New York policymakers decide to go it alone, they have the options of establishing a New York-only statewide Exchange, or setting up one or more “subsidiary” Exchanges within the state.⁶ Finally, with regard to day-to-day management and operations, the state must decide whether the Exchange will be administered by a government agency, a quasi-public authority, or a nonprofit entity established by the state.⁷

In this paper, we review specific legal issues and policy challenges unique to New York that arise from these options, and provide illustrations from other states, particularly Massachusetts and California. Interviews were conducted with officials at several state agencies, insurance industry representatives, and consumers. The appendix presents a detailed matrix highlighting the numerous legal and legislative issues involved, with citations of specific sections of law and regulation. Since developing the most appropriate governance and administrative

structure for the Exchange requires a solid understanding of its responsibilities,⁸ key operational components, and general business plan, we begin the analysis with a review of the pivotal role the Exchange plays in implementing health reform.

Duties of a Health Benefit Exchange

At its core, the Exchange must attract and retain customers by offering “qualified” health plans; establish a streamlined eligibility and enrollment system for all medical assistance programs; process transactions effectively and efficiently; provide members with information to make informed choices; and enable individuals to apply for waivers that exempt them from the health insurance mandate.

The table on the following two pages lays out, as we see them, the specific responsibilities within the Exchange’s four main functional areas: (1) eligibility; (2) outreach, enrollment, and customer service; (3) health plan selection, evaluation, and management; and (4) enforcement of the individual mandate and reporting. As the state considers the appropriate governance and administration for the Exchange, developing a full understanding of the functions and responsibilities of the Exchange will be critical to establishing an organizational and operational structure that can effectively execute these responsibilities and best meet the needs of New Yorkers.

⁴ Affordable Care Act, Section 1321(b).

⁵ Affordable Care Act, Section 1311(f)(1).

⁶ Affordable Care Act, Section 1311(f)(2).

⁷ Affordable Care Act, Section 1311(d).

⁸ The Affordable Care Act, Section 1311(b)(2), allows states the option of establishing two Exchanges — one for individuals, and one a Small Business Health Options (SHOP) Exchange — or the option of combining the two mechanisms within a single Exchange. For the purposes of this paper, we treat both of these mechanisms as a single entity, and call it the Exchange.

HEALTH EXCHANGE RESPONSIBILITIES, BY CATEGORY

Eligibility

1. Certify that prospective enrollees for coverage in the Exchange's individual market are citizens or nationals of the United States or are lawfully present aliens;
2. Determine if individuals qualify for Medicaid, Children's Health Insurance Program (CHIP), other public health coverage programs, or premium subsidies and health plans with reduced cost sharing through the Exchange; and
3. Determine if employees offered employer-sponsored insurance are eligible for the "Free Choice Vouchers" program, which allows employees who are offered employer-sponsored insurance but whose share of the premium exceeds eight percent of their income to use their employer's premium contribution to offset the cost of insurance purchased through the Exchange.

Outreach, Enrollment, and Customer Service

1. Establish a website that provides individuals with information on health plans available through the Exchange;
2. Utilize a standard format for presenting health plans' benefit information;
3. Operate a toll-free number and customer service unit to respond to inquiries from consumers;
4. Make available an electronic calculator that allows individuals to determine the net cost of coverage after premium tax credits and reduced cost sharing have been applied;
5. Establish an outreach and enrollment program, including a grants program for "Navigators" that will be responsible for apprising people of their health coverage options and helping individuals enroll in a health plan through the Exchange or in other publicly subsidized health coverage programs available in the state;
6. Establish a standardized enrollment form for health plans offered through the Exchange;
7. Provide enrollees and prospective enrollees with information on the availability of in-network and out-of-network providers;
8. Facilitate enrollment of individuals, families, and employer groups in commercial health plans, and enroll individuals in Medicaid, Child Health Plus (CHP), or other public programs if found eligible during the screening of an application;
9. Develop policies pertaining to the payment of premiums and the application of premium subsidies from the federal government; and
10. For individuals eligible for the "Free Choice Vouchers" program, coordinate their enrollment and set up a process to transfer their employer's premium contribution to the health plan in which the employees are enrolled.

continued

HEALTH EXCHANGE RESPONSIBILITIES, BY CATEGORY *(continued)*

Health Plan Selection, Evaluation, and Management

1. Establish criteria, consistent with any requirements to be issued by the federal government, to offer “qualified health plans” from health carriers;
2. Implement procedures for certification, recertification, and decertification of qualified health plans;
3. Evaluate premium levels and premium increases in determining whether to allow a health plan to be offered through the Exchange;
4. Require health carriers to publicly disclose information, including, but not limited to, enrollment and disenrollment, claims payment practices, claims denial rates, rating practices, out-of-network coverage, and customer satisfaction;
5. Require plans to meet marketing standards and not use marketing practices or benefit designs that discourage enrollment of high-risk individuals and groups;
6. Ensure that health plans offer a sufficient choice of providers;
7. Require that health plans include essential community providers, where available, that serve predominantly low-income, medically underserved populations;
8. Rate each health plan offered through the Exchange on the basis of price and quality criteria to be established by the federal government;
9. Require plans to implement a quality improvement strategy designed to improve health outcomes;
10. For all eligible applicants, make available four levels of “qualified health plans”—Platinum, Gold, Silver, and Bronze — based on their actuarial values, which range from 90 percent (Platinum) to 60 percent (Bronze); and for individuals under 30 years of age and for those exempt from the individual mandate, make available a “catastrophic” (high-deductible) health plan; and
11. Allow issuers of stand-alone dental plans, which may be sold separately or in conjunction with qualified health plans, to offer the products through the Exchange.

Enforcement of Individual Mandate and Reporting

1. Determine whether an individual is exempt from the individual mandate to maintain health coverage based on affordability, religious beliefs, or hardship;
2. Provide the federal government with information on individuals who have been granted a certification of exemption from the individual mandate;
3. Provide the federal government with information on employers who are subject to a penalty for not offering minimum essential coverage, offering coverage that was determined to be unaffordable to employees, or offering coverage that did not meet the required minimum actuarial value; and whose employees received a premium subsidy for coverage through the Exchange;
4. Report to employers the name of each employee of employers who cease coverage under a qualified health plan purchased through the Exchange;
5. Publish costs of licensing, regulatory fees, and any other payments required by the Exchange, and the administrative costs of the Exchange; and
6. Collect information from insurers that offer qualified health plans through the Exchange on their claims payment policies and practices, periodic financial disclosures, enrollment, disenrollment, number of denied claims, cost-sharing and payments for out-of-network coverage, enrollee and participant rights, and other information as determined by the U.S. Secretary of Health and Human Services.

Source: Authors' analysis of Affordable Care Act.

This broad range of tasks under the Exchange's purview does not lend itself to a familiar organizational structure, either public or private. On the one hand, the Exchange has governmental responsibilities, such as determining eligibility for publicly subsidized coverage, verifying citizenship of enrollees, certifying exemptions under the individual mandate, and exchanging information with the federal government. On the other hand, the Exchange will need to operate like a private enterprise, serving as a distribution channel for commercial health insurance, working with small employers (and potentially with large employers) to provide their employees with commercial coverage, generating revenues to support operations, and competing against or partnering with existing distribution channels for customers. Former Connector Executive Director Jon Kingsdale frequently describes the entity as an "insurance store" with a duty to improve the shopping experience of its customers.⁹ Achieving the proper balance between public accountability and transparency with the need to be agile and responsive to consumer demands will require an entity that is subject to government oversight but also has sufficient flexibility to achieve its commercial objectives.

Federal or State Exchange

The first question New York needs to answer is whether it should establish its own Exchange or cede this power to the federal government. The chief benefit of federal administration of an Exchange is for hard-pressed states to escape responsibility for the costs of building and supporting the operations of an Exchange. With grim fiscal forecasts for the years ahead of multibillion dollar annual budget shortfalls,¹⁰ deferring to the federal government to operate the Exchange is not without appeal; New York officials stressed the critical importance of federal financial support in their comments to HHS.¹¹ An initial \$1 million grant to New York,¹² the same amount awarded to nearly all states regardless of size, provides some seed money; the promise of a second year's funding based more on need has alleviated some concerns.¹³

While a federal Exchange would free New York from this financial obligation now, it would come at a cost, given New York's long tradition of consumer-oriented insurance regulation and the practical problems that arise from joint federal/state regulation of insurance markets. For example, the New

⁹ Transcript, *The Role of the Exchange in California's Implementation of National Health Reform*, p. 6-7, October 21, 2010. California HealthCare Foundation.

¹⁰ *New York State 2010-11 Enacted Budget Financial Plan, Outyear Financial Plan Projections*, David A. Paterson, Governor, Robert L. Megna, Director of the Budget, August 20, 2010.

¹¹ *New York State Comments Regarding Exchange-Related Provisions in Title I of the PPACA*, November 2010, Governor David A. Paterson and Wendy Saunders, Deputy Secretary for Health, Medicaid & Oversight, available online at http://www.healthcarereform.ny.gov/docs/nys_comments_title_i_ppaca.pdf.

¹² Press release, U.S. Department of Health and Human Services, *Forty-eight states receive new resources to build competitive health insurance marketplaces*, September 30, 2010, available online at <http://www.hhs.gov/news/press/2010pres/09/20100930b.html>.

¹³ See note 3. HHS also announced funding for Exchange-related IT efforts by states (press release, October 29, 2010, available online at <http://www.hhs.gov/news/press/2010pres/10/20101029a.htm>) and new federal support to develop and upgrade state Medicaid IT systems (HHS press release, November 3, 2010, available online at <http://www.hhs.gov/news/press/2010pres/11/20101103a.html>).

York page on the HHS web portal¹⁴ queries respondents on their age and pre-existing conditions — questions not permitted in New York since the adoption of the Community Rating/Open Enrollment law in 1992. Federal administration of an Exchange would present a long list of practical difficulties in addition to the risk of relaxing important New York consumer protections. New York’s commercial insurance markets would have a federal regulatory component (the Exchange) and a state component (the non-Exchange market). Managing the intermarket dynamic and guarding against adverse selection within the Exchange, which many observers believe is critical,¹⁵ would be challenging; questions of merging markets and integrating segments of the large group market would present difficulties too. A federal Exchange would similarly complicate coordination with the state Medicaid program, a key duty of an Exchange. When New York recently faced a similar decision with regard to starting the high-risk pool called for under the ACA, the Paterson Administration chose self-determination and opted for a state-based approach.¹⁶

Multistate, Regional, or Statewide Exchange

Multistate Exchange

The decision to establish multistate, stand-alone regional, or statewide Exchanges is a gating issue for all other Exchange-related

work that the state will need to undertake. A multistate Exchange, which requires the approval of the HHS Secretary and the permission of each participating state, may be of limited utility and attractiveness to New York State and its neighbors in the mid-Atlantic region, given these states’ higher population density, active insurance markets, well-developed regulatory frameworks, and complex political institutions.

Many observers agree¹⁷ that one appeal of a multistate Exchange option is increased efficiency gained from combining the Exchange operations and assembling an enrollment base large enough to sustain the Exchange’s operations and spread risk. North and South Dakota, for example, constitute a total market of less than 900,000 enrollees in commercial health insurance and Medicaid combined. Similarly, Vermont and New Hampshire’s combined privately insured and public markets are smaller than New York’s small group market.¹⁸

There are many regions in New York State where “cross-border” transactions are lively, including the New York Southern Tier/Northern Pennsylvania area, the Capital District/Western Massachusetts/Vermont area, and certainly the New York metropolitan area. And many New York licensed or domiciled insurers operate in more than one state. But the complexity of getting such an operation off the ground and running — at a minimum requiring the initial and ongoing cooperation of multiple governors, legislatures,

¹⁴ HealthCare.gov, Find Insurance Options, New York State selected, available online at http://finder.healthcare.gov/about_me/page2?state=NY&audience=fam&x=57&y=12, accessed December 6, 2010.

¹⁵ See, for example, Jost TS. July 2010. *Health Insurance Exchanges and the Affordable Care Act: Eight Difficult Issues*. The Commonwealth Fund, New York, NY, available online at <http://www.commonwealthfund.org/Content/Publications/Fund-Reports/2010/Sep/Health-Insurance-Exchanges-and-the-Affordable-Care-Act.aspx>.

¹⁶ Press release, Governor David A. Paterson, April 30, 2010, available online at <http://www.ins.state.ny.us/press/2010/p1004302.htm>.

¹⁷ Carey, R. *Health Insurance Exchanges: Key Issues for State Implementation*, September 2010. State Coverage Initiatives, Robert Wood Johnson Foundation, available online at <http://www.statecoverage.org/files/Carey-ExchangesKeyIssues.pdf>.

¹⁸ Kaiser Family Foundation, statehealthfacts.org, North Dakota: Health Insurance Coverage of the Total Population, states (2008-2009), U.S. (2009), available online at <http://www.statehealthfacts.org/profileind.jsp?cmprgn=43&cat=3&rgn=36&ind=125&sub=39>, accessed December 7, 2010; and Vermont: Health Insurance Coverage of the Total Population, states (2008-2009), Compare Vermont to New Hampshire, available online at <http://www.statehealthfacts.org/profileind.jsp?cmprgn=31&cat=3&rgn=47&ind=125&sub=39>, accessed December 7, 2010.

and state health and insurance regulators — is daunting.

Subsidiary Exchanges

Another option in the ACA is “subsidiary” or regional Exchanges. Again, commentators uniformly note the main appeal — sensitivity and responsiveness to local market conditions¹⁹ — but the benefits would need to be weighed against the increased difficulty of implementing and financing such a system, duplication of Exchange operations, and complicating relations between regional Exchanges and state regulators at the Department of Health (DOH) and State Insurance Department (SID).

Regulators at these agencies and special commissions have divided the state into six to nine regions depending on the regulatory purpose²⁰ containing different mixes of counties, particularly downstate. A regional Exchange structure reflecting current insurance regulation would, at a minimum, suggest seven to nine regional Exchanges (NYC and its suburbs, Mid-Hudson Valley, Albany, Syracuse, Rochester, Buffalo, Utica-Watertown). State-enabling legislation or regulations would then require a mechanism to arrange for the appointment of a board

for each Exchange, perhaps with members appointed by governing bodies within the affected region, such as county executives, local legislators, or mayors, as is the case with the Metropolitan Transportation Authority and the Olympic Regional Development Authority,²¹ and perhaps a statewide supervisory panel. In this scenario, the regional Exchange system would resemble the Berger Commission, the panel that examined health facility capacity, with its six regional boards, each with three to six members, and an 18-member statewide board, which exercised overall responsibility.²² The complications from such a structure quickly multiply:

- Health plans participating in a regional Exchange with service areas that extend beyond the region’s boundaries would need to be certified by numerous Exchanges, and product offerings and networks would require separate review by the regional Exchanges;
- Exchanges seeking to be responsive to local market conditions might establish different certification requirements for health plans;
- Enrollment and subsidy eligibility, web portals, toll-free call-centers, consumer assistance services, and Navigator²³ services

¹⁹ *Implementing Health Insurance Exchanges: A Guide to State Activities and Choices*, October 2010. Families USA, available online at <http://familiesusa2.org/assets/pdfs/health-reform/Guide-to-Exchanges.pdf>

²⁰ The risk adjustment mechanism established by the state Insurance Department’s Regulation 146 (New York Codes Rules Regulations, Insurance Department, Part 361) establishes seven regions; rates for health plans participating in the Medicaid Managed Care Program are established on the basis of nine regions; the Department of Health uses six regions in its managed care consumer guide (available online at http://www.nyhealth.gov/health_care/managed_care/consumer_guides/); the Department of Health uses eight regions to calculate covered lives assessments under HCRA in 2010, available online at http://www.nyhealth.gov/nysdoh/hcra/gme/docs/2010_surcharges_and_assessments.pdf; the Commission on Health Care Facilities for the 21st Century used six regions, available online at <http://www.nyhealthcarecommission.org/regions/index.htm>.

²¹ The Metropolitan Transportation Authority, NYS Public Authorities Law, Section 1263, provides for a 17-member board, with appointments by the Governor, some directly, and others upon the recommendations of the Mayor of the City of New York, county executives in the MTA region, union leaders, and system user councils, and all upon the advice and consent of the Senate. The New York State Olympic Regional Development Authority, NYS Public Authorities, Section 2608, includes a board member recommended by a local town board, and a member residing in a particular county.

²² A description of the board structure of the Commission on Health Care Facilities for the 21st Century is available online at <http://www.nyhealthcarecommission.org/organization/>.

²³ Section 1311(i) of the ACA requires Exchanges to establish Navigator programs to provide public education and consumer assistance for individuals and businesses, and HHS provides financial support for these activities.

- would have to be duplicated or administered centrally;
- Subsidy-eligible consumers who move beyond the boundaries of an Exchange would likely need to re-register;
 - Unless regional Exchanges develop in-house capacity for undertaking traditional functions of state regulators (such as actuarial review of premiums and network adequacy), state regulators would have to respond to requests from multiple Exchanges on these matters; and
 - The establishment of multiple Exchanges may constrain or limit the options state regulators have in carrying out their responsibilities to establish rating areas for health plans²⁴ and implement required risk adjustment mechanisms,²⁵ and runs counter to legislation adopted in 2010 that would centralize Medicaid administration.²⁶

Upstate/Downstate or New York City/ Rest of State Exchanges

Establishing two regional Exchanges is another possible option for New York. One health plan official mused about drawing a dividing line “from Orange County on down,” and the City of New York has expressed an interest in operating its own Exchange, citing the size of the New York City public and private insurance markets, the city’s investments in enrollment and eligibility determinations and other functions through its local administration of the Medicaid program,²⁷ and its efforts to inform consumers and ease health insurance purchases through its Office of Citywide Health Insurance Access.²⁸ Such an approach would no doubt raise hackles in other regions of the state, which can make a case for their own worthiness to administer an Exchange,²⁹ and it would reduce (but not eliminate) the inefficiencies and complications in the seven-region scenario described above. Further complications may result from the fact that the geographical boundaries of New York City are an artificial overlay on the workings of the insurance market.

Nearly 450,000 workers from New York City’s suburban counties making up the

²⁴ Section 2701 of the ACA requires states to establish one or more rating areas in which geographic variation in premiums is permitted, and for the Secretary of HHS to approve those rating areas. Subsidiary or regional exchanges must cover an entire rating area.

²⁵ Section 1343 of the ACA requires states to implement risk adjustment mechanisms in conjunction with HHS which will assess health plans with lower-risk enrollees, and make payments to health plans with higher-risk enrollees. These mechanisms could include a regional component.

²⁶ Chapter 58 of the Laws of 2010, Section 47b.

²⁷ For a description of New York City’s duties in the Medicaid program, see Appendix D of *A Time for Change — Administering Medicaid in New York State: The County Perspective*, New York State Association of Counties, September 2010, available online at <http://www.nysac.org/documents/NYSACTimeforChangeReportWEB.pdf>.

²⁸ For a description of OCHIA’s activities to facilitate consumer information and health insurance enrollment by individuals and small businesses, visit NYC Health Insurance Link, available online at <https://a069-webapps7.nyc.gov/healthinslink/home.aspx>.

²⁹ The Rochester region, for example, has a long tradition of collaborating on health insurance access, affordability and planning, and an active health planning agency, the Finger Lakes Health Systems Agency. Information on the agency’s activities is available online at <http://www.flhsa.org/>. In the Buffalo/Western New York region, a coalition of health care providers, consumers, business, civic and religious leaders, and health plans is actively involved in an effort to improve the health of western New York through a wide range of activities; the area is also home to several demonstration projects on technology and payment reforms. Information on the collaborative activities is available online at <http://www.p2wny.org/>.

Metropolitan Transportation Authority (MTA) region commute each day to work in New York City;³⁰ when the tri-state area is considered, the number swells to almost 800,000. At the same time, over 157,000 New York City residents are traveling to jobs each day in the suburban counties of New York, and another 85,000 to jobs in Connecticut and New Jersey. These “inflow” and “outflow” patterns suggest the wisdom of a single, statewide exchange, particularly since other complications may arise from decisions yet to be made on how small businesses and workers will actually select coverage options.

While federal rules may permit small businesses to continue purchasing coverage the way they do now (through the selection of a plan by the employer and the designation of an employee contribution to the premium), small business workers may have the opportunity under the ACA to purchase coverage from any insurer offering a qualified health plan through the Exchange, although the employees’ choice of coverage may be restricted to a particular actuarial value tier (Platinum, Gold, Silver, or Bronze).³¹ In addition, some lower-income workers, under a provision known as the “free choice voucher,”³² may have the opportunity to use their employer contribution towards the purchase of any policy offered through the Exchange. In all of these scenarios, the establishment of separate Exchanges that isolate different residences and workplaces

would complicate purchases and administration, and add a layer of complexity in enforcing one or more geographic boundaries on the operations of an Exchange.

Creating a New York metropolitan area Exchange would reflect the steady flow of commuters across municipal, county, and state lines for jobs — and job-based health insurance. But even this more limited multistate arrangement would face significant hurdles. Even with the leveling effect of the ACA³³ on state rating and underwriting rules, New York, New Jersey, and Connecticut still have a number of differences regarding mandated health benefits, rating rules, and risk-adjustment mechanisms. Carving out the most populous areas of each of the three states would leave each state with smaller in-state Exchanges that would have fewer customers to support their operations, undermining opportunities to achieve administrative efficiencies and lower administrative costs.

Statewide Exchange with Regional Services

Casting a shadow over the discussion of statewide or regional Exchange is the wide latitude given states in determining “rating areas” under the ACA,³⁴ which could alter the way health plans today establish community-rated pools, adjust for regional cost variations, and, for some licensees,

³⁰ United Hospital Fund analysis of U.S. Census Bureau 2000 Residence County to Workplace County Flows for New York, New Jersey, Connecticut, and Pennsylvania, Sorted by Residence State and County and by Workplace State and County, available online at <http://www.census.gov/population/www/cen2000/commuting/index.html>, November 2010. MTA region counties: Nassau, Suffolk, Westchester, Putnam, Dutchess, Orange and Rockland; New Jersey counties: Bergen, Hudson, Middlesex, Essex, Monmouth, Union, Morris, Passaic, Somerset, Mercer, Ocean Sussex, Hunterdon; Connecticut counties: Fairfield, New Haven, and Litchfield; and Pike County, Pennsylvania.

³¹ Section 1312 of the ACA.

³² Section 10108 of the ACA.

³³ Although the ACA prohibits underwriting based on group size and occupation, for example, it allows for age rating within a 3:1 ratio. Age rating is permitted in Massachusetts and New Jersey, but is not permitted currently in New York.

³⁴ Section 2701 of the ACA, relating to “Fair Health Insurance Premiums,” requires states to establish one or more rating areas, which are to be reviewed by the HHS Secretary, and will be the basis of geographic variations in premiums, and an important component of premium subsidy calculations.

service areas in which they operate, which must be approved by the Health Department.³⁵ But unless state policymakers radically transform the current system, it is likely that a statewide Exchange would have a strong regional component. Prospective purchasers would plug in a zip code and see what health plans and products are available to them where they live or where their businesses are located. A statewide Exchange could build on this structure to organize regional service networks to serve these customers' needs, whether they are individuals or small employers. Services could include consumer assistance, Navigators, and language services that Exchanges are required to provide, and regional agency offices where consumers could go for in-person assistance. For small businesses, perhaps these could even include the services of brokers, agents, or third-party administrators who could advise on purchases or provide deeper levels of service — such as organizing payroll deductions, COBRA administration, tax credit assistance, and other services — to reach the statute's goal of simplified and streamlined coverage purchases.

From a statewide perspective, the Exchange could promote promising initiatives developed in one region³⁶ throughout the state; organize the services of private businesses, state- and locally-funded nonprofit organizations, and state and local government agencies to provide services; and at the same time avoid the duplication and inefficiencies of multiple Exchanges.

Faced with similar decisions in markets that include both rural and densely populated urban areas, Massachusetts and California both opted for a single statewide Exchange.

Administration and Governance of the Exchange

A successful Exchange will need to develop a technology-based product, market it, and win over five groups of customers: individuals eligible for subsidies, individuals not eligible for subsidies, small groups eligible for tax credits, small groups not eligible for tax credits, and the health plans that must choose to participate in an Exchange. While the broad range of tasks under the Exchange's purview does not lend itself to a common or typical organizational structure, either public or private, the ACA provides three design options for states to administer an Exchange: an existing or new state agency, a public benefit corporation, or a new nonprofit organization. In this section, we analyze each of these options, highlighting particularly important operational or policy issues particular to each model.

State Agency

The state agency option is attractive because it supplies a pre-existing management structure and staff, built-in accountability standards through the operation of state laws governing agency operations, and well-established paths for coordination with other agencies that might have duties in an Exchange.

Three state agencies come to mind as the possible new home of a New York Exchange: the State Insurance Department (SID), the Department of Health (DOH), and the Department of Civil Service (DCS). Each of these agencies would bring both formidable strengths and shortcomings to the task of operating a state Exchange, but key provisions

³⁵ For a description of how health plans establish community pools, rating territories and service areas, see Newell P and A Baumgarten. 2009. *The Big Picture: Private and Public Health Insurance Markets in New York*. New York: United Hospital Fund.

³⁶ Cavanaugh S and G Burke. November 2010. *A Multipayer Approach to Health Care Reform*. New York: United Hospital Fund.

affecting their operations as state agencies — civil service requirements, procurement requirements, and ongoing deficit reduction actions — represent significant matters for consideration.

The **State Insurance Department**³⁷ and its 800-member workforce supervise and regulate the business of insurance, reviewing the formation of insurers and company mergers, licensing insurers, agents, and brokers, approving products and rates, and monitoring the financial condition of companies in order to prevent an insolvency that would prevent an insurer from meeting its contractual obligations.

In addition to regulating nonprofit and commercial health insurers, as well as **HMOs** (with the Health Commissioner), the Department administers one subsidized insurance program, two reinsurance programs, and a commercial market risk adjustment mechanism. It also responds to consumer complaints, provides consumer-oriented websites, develops guides and insurer scorecards, reviews commercial premium rate increase requests and products, licenses insurance brokers and agents, and collects extensive annual data on premiums, enrollment, surplus, and medical expenses of commercial insurers.

But the department's mission includes monitoring the activities of insurers in all lines of insurance — not just health — including life insurance, workers' compensation, automotive insurance, homeowners' insurance, and financial guaranty or bond insurance, which thrust the agency into the center of the effort to halt the nation's financial meltdown in 2008. The agency's health bureau makes up only about 10 percent of the total employees³⁸ and has more limited experience with the

lower-income populations expected to be served through the Exchange. Given the duties of an Exchange, the SID may face difficult conflicts in examining, regulating, and disciplining insurers or other licensees while simultaneously negotiating contracts with some of these entities, or promoting them through the Exchange.

Within its mission of ensuring that "high quality appropriate health services are available to all New York State residents at a reasonable cost,"³⁹ the 5,400-employee **Department of Health** promotes and organizes state and local public health activities, works to ensure high-quality medical care and reduce infectious disease, operates and regulates a broad range of health care facilities, directs emergency responses to epidemics like the 2009 swine flu outbreak, and serves as the lead agency for the State's Medicaid program, which serves 4.8 million recipients.

In this last role, the DOH's Office of Health Insurance Programs is a major purchaser of health care services, actively promoting enrollment directly and through contracts with vendors and community-based organizations, determining eligibility with local governments for public coverage, contracting with health plans, ensuring network adequacy, certifying managed care organizations and reviewing provider contracts, assisting consumers, collecting encounter data and reporting on quality, setting rates, and implementing a risk-adjustment mechanism.

But as a regulator of HMOs, prepaid health service plans (including provider-sponsored plans), and health care facilities, DOH may face some of the same conflicts that the SID would in fulfilling Exchange functions. DOH figures prominently in the prepaid health

³⁷ New York State Division of the Budget, Agency Presentations, FY 2010-2011 Executive Budget, Insurance Department, available online at <http://publications.budget.state.ny.us/eBudget1011/agencyPresentations/pdf/insurance.pdf>.

³⁸ New York State Insurance Department, *151st Annual Report of the Superintendent, Calendar Year 2009*, James J. Wrynn, Superintendent.

³⁹ New York State Division of the Budget, Agency Presentations, FY 2010-2011 Executive Budget, Department of Health, available online at <http://publications.budget.state.ny.us/eBudget1011/agencyPresentations/pdf/doh.pdf>.

service plan/comprehensive benefit plan arena, which has shrunk dramatically in recent years in non-public markets. It also has less day-to-day experience with the broker-driven, commercial group market, with its range of benefits and complex cost-sharing devices, often sold in conjunction with health savings account products, and from an insurer, rather than an HMO platform.

The 500-member workforce of the **Department of Civil Service**⁴⁰ provides human resource management services to state and local governments, and administers the merit system for state employees; its downtown Albany headquarters in the Alfred E. Smith Building is graced with a mural highlighting the milestones in the enactment of the civil service law. The 110-member Employee Benefits Division administers health, dental, life, vision, disability, and accident benefit programs for state and local governments, based on collective bargaining agreements with public employee unions. As part of these responsibilities, the agency purchases coverage for over 1.2 million enrollees, managing an accounting and eligibility system that pays out over \$6 billion in premiums annually. Its administration of the New York State Health Insurance Program (NYSHIP) requires high-level negotiations with its major vendors, Empire Blue Cross Blue Shield and United Healthcare, as well as the state's HMOs.

But the responsibilities associated with administering employee health benefits are materially different from those of the Exchange, which will serve individuals from all income levels and small groups, with an unknown risk profile, and coordinate enrollment in public programs. The agency lacks experience with the lower-income populations that would be served through an Exchange with subsidy administration.

Lastly, the Employee Benefits Division is a smaller unit in a larger organization devoted to administering the merit system.

Each of these three agencies, then, would bring valuable knowledge and experience to the process of creating an Exchange. However, each agency on its own, due both to its breadth of responsibilities and to its particular focus, might face conflicts or lack the focus or resources necessary to run an Exchange.

In Massachusetts, the House version of the state's 2006 health reform legislation designated the state's Group Insurance Commission (GIC) — the public agency that manages health benefits for over 300,000 state and municipal employees, retirees, and their dependents — as the “connector.” However, policymakers subsequently determined that the GIC's role as benefits administrator for a large employer did not mean that the agency could utilize existing resources and infrastructure to operate a health coverage program for individuals and small employers. In fact, had the GIC been selected to become the Massachusetts Connector, it likely would have needed to establish a separate “sub-agency” to administer the various health coverage programs under the Massachusetts health reform law.

The Utah Exchange, established in the Governor's Economic Development Office, is often raised as a model for a state-based Exchange, but it performs significantly fewer duties than an Exchange would under the ACA requirements. It is primarily an online health insurance brokerage operation that was established by the state to fill a niche in the Utah market by offering small employers a consumer-directed, defined contribution option for their employees. The Utah Exchange does not provide premium subsidies to individuals or small employers, and

⁴⁰ New York State Division of the Budget, Agency Presentations, FY 2010-2011 Executive Budget, Department of Civil Service, available online at <http://publications.budget.state.ny.us/eBudget1011/agencyPresentations/pdf/cs.pdf>.

individuals wishing to purchase health insurance through Utah's Exchange are directed to one of the carriers or to licensed brokers serving the Utah market. Therefore, it may not be an appropriate model for a New York Exchange.

While a constitutional amendment would be required to establish a full-blown department, a new "executive agency," board, or commission could be established to administer the Exchange. Examples of these entities include the State Office for the Aging and the Workers Compensation Board, the latter of which is operated through an appointed chair and a 13-member board appointed by the governor, a structure that might lend itself to managing an Exchange with public input.

Establishing an Exchange in a new agency would certainly provide a single-minded focus on Exchange activities and would eliminate the conflicts of interest noted earlier, but it would also run counter to the prevailing trend of consolidating agencies rather than creating new ones, and it would encounter many of the same logistical and operational challenges that come with the agency model: civil service requirements, procurement rules, state finance requirements and oversight, and ongoing state deficit reduction actions.

Civil Service Requirements

New York State's 132-year old civil service requirements,⁴¹ if applied to an Exchange's operations, would ensure that hiring and promotion for the Exchange would be based on competitive tests for most positions, and that employees would be compensated according to applicable state salary grades. Some current and qualified employees at state agencies might be deterred from working at the Exchange without the job protections

they currently enjoy under the system. It also would entitle Exchange employees to certain job rights and benefits (such as tenure, grievance procedures, and processes for termination) that are rare in the private sector but might be negotiated with management through a collective bargaining agreement and union representation under New York's Taylor Law.⁴² Depending on the ultimate decision by policymakers on the corporate form of the Exchange and the decisions it makes, workers there might be eligible for coverage through NYSHIP and state pension benefits.

Should civil service rules apply to a new Exchange, administrators would have to identify all of the duties and qualifications for each position they intended to fill and submit it to the DCS classification and compensation unit. That unit would then assign titles and salary grades to the proposed position based on the more than 3,700 existing titles, and create new titles if necessary. Based on that classification process, which can be time-consuming even for a single position, Exchange administrators would receive lists of state employees who would be eligible for hire for the positions, based on test scores for the lists. For new titles, tests would be developed, interested applicants would be tested and scored, and new lists would be created for the titles. Managers would also negotiate with the Civil Service Commission for exempt positions.

Overall, applying these rules would also limit the pool of prospective employees, restrict the flexibility of management to establish job duties and salaries, promote or terminate workers, and control the timing and pace of hiring, and would increase the time needed to staff the Exchange. While the laws and regulations provide some flexibility, they would present many operational challenges.

⁴¹ For background, see *Summary of New York State Civil Service Law*, New York State Department of Civil Service, available online at <http://www.cs.state.ny.us/pio/summaryofcslaw/index.cfm>; and *Merit System Guide for Managers*, New York State Department of Civil Service, available online at http://www.cs.state.ny.us/pdf/meritGuide_4_09.pdf.

⁴² NYS Civil Service Law, Article 14.

NEW YORK'S CIVIL SERVICE LAWS

Championed by Assemblyman Teddy Roosevelt, signed into law by Governor Grover Cleveland to replace “the spoils system” of political patronage, and enshrined in the state Constitution, New York’s civil service law was the first state regulation to establish a “merit system” for the hiring and promotion of workers at state and local government agencies, with provisions for tenure and due process requirements for terminations and employee grievances. Positions in the “unclassified service,” such as elected officials and their staff, are exempt from the rules of the Department of Civil Service (DCS). For the classified service, job titles are developed based on the type of work, education and experience required, and salary grades established in statute and based on the bargaining unit are applied. Candidates are tested for competence related to the title, and eligibility lists are established based on test scores. When vacancies occur, managers must hire one of the three top scorers to fill the position, or in some cases, from within a pool made up of the highest scoring applicants within a band or range of scores.

The law provides the Executive and managers with some flexibility: appointed agency commissioners or heads can be selected by the Governor, subject to confirmation by the Senate; agency heads can petition the three-member Civil Service Commission for additional exempt positions to fill outside the merit system requirements to name top deputies and confidential assistants (within appropriate salary grades, as provided in statute, under DCS regulations and in consultation with the Budget Division); and there are positions within the classified system that provide greater flexibility. Recently, New York adopted legislation that eased requirements for the hiring of technology-related positions within agencies.⁴³

Civil service officials express their willingness to work with agency managers, and some state agency officials reported success in working within the system to meet their personnel goals, for example, by reclassifying outdated job titles and revising tests to create a pool of prospective employees that better match needs.⁴⁴ But these efforts can be complex and time-consuming. A common experience among managers is so-called “blocked lists” in which the individuals at the top of a list are unsuitable for promotion, and managers are unable to reach down and promote more qualified candidates.

⁴³ Chapter 500 of the Laws of 2009. For additional background see http://www.budget.state.ny.us/guide/ITInsourcing/IT_insourcing.html.

⁴⁴ *Title Consolidation Provides Many Benefits for Agency Management, Staff*, HR Matters, NYS Department of Civil Service, August 2009.

In Massachusetts, the Connector Authority's ability to operate outside the confines of the state's civil service system allowed it to attract qualified staff and, when necessary, expedite hiring. Senior staff at the Connector were recruited largely from commercial insurers and other state agencies (e.g., the state's Medicaid agency, the Attorney General's Office, and the state's public employees health benefits agency). This allowed the Connector to assemble an experienced staff that could both navigate state government and interact comfortably with key staff working for the commercial health insurers and the Medicaid Managed Care Organizations (MCOs), which played critical roles in the Connector's subsidized and unsubsidized health coverage programs.

In addition, because the Connector did not have to seek authorization regarding the number or types of employees, it was able to determine how many and what types of positions it needed to fulfill its responsibilities as the program evolved. For example, the Connector initially did not anticipate the need for a public information unit. However, as health reform started to take shape, the Connector was inundated with requests for information from the general public, employers, human resources personnel, benefits consultants, legislators, consumer advocates, and a host of other groups. As a

result, the Connector established a public information unit to coordinate this function to respond to requests and proactively inform people of the various provisions of the state's health reform law. Had the Connector been required to seek approval for these types of staffing decisions, it is highly unlikely that it would have been able to do so in time to meet the needs of those affected by the law.

The recently enacted law establishing a California Exchange⁴⁵ occupies a middle ground, exempting senior managers and other key executives named in the legislation from the state's civil service laws, authorizing the board to exempt additional positions, and allowing it to set the salaries for these exempt positions, so long as they are posted publicly and based on compensation provided for comparable positions, but filling the remaining positions through the civil service system.

State Deficit Reduction Actions

Housing an Exchange in a state agency would also require managers to staff up in an extraordinarily grim fiscal environment. A series of actions taken to achieve budget savings through management of state agency spending on personnel and other services has thinned agencies' workforces, and constrained new hiring and spending of any kind.

⁴⁵ Assembly Bill No. 1602, Chapter 655, and Senate Bill No. 900, Chapter 659. Available online at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1601-1650/ab_1602_bill_20100930_chaptered.pdf and http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0851-0900/sb_900_bill_20100930_chaptered.pdf.

STATE DEFICIT REDUCTION ACTIONS

Implemented by the state Budget Division and at times approved by the Legislature, early retirement incentives, attrition directives, retirement severance pay plans, and hiring freezes have led to an extremely challenging operational environment.⁴⁶ With the prospect of future belt-tightening to come, a workforce reduction program announced in October 2010⁴⁷ will lead to an estimated 900 layoffs of existing state workers across all agencies.

Currently, agencies seeking to hire additional personnel must negotiate waivers of the hiring freeze with the Budget Division to allow new hiring or fill existing positions, even if federal funding, for example, will support the expenditure. Most agencies are operating with significantly reduced “fill levels,” the number of full-time or equivalent (FTEs) employee positions available to support the agency’s operations. Certain kinds of discretionary spending by agencies exceeding \$500 may also be subject to review by the Budget Division or State Operations Office. While decisions made on financing the Exchange also factor in, the applicability of state deficit reduction actions would make the state’s Budget Division an active partner of Exchange management, with the prospect of significant hurdles, as the Budget Division works to maintain equity in the treatment of all state agencies, regardless of their funding source or mission.

⁴⁶ NYS Division of Budget, Agency Guide, Budget Bulletins, including B-1180, B-1182, B-1186, B-1189, B-1190, D-1124, D-1125, and D-1127, available online at <http://www.budget.state.ny.us/guide/bprm/bulletins/bulletinindex.html>.

⁴⁷ Statement from Governor David A. Paterson, October 28, 2010, available online at <http://www.ny.gov/governor/press/102810statement.html>.

Procurement

State agencies are subject to complex requirements for the purchase of goods and services. These detailed rules apply to every aspect of a procurement, can require the purchases of some goods or services from selected providers, or through another state agency, but most importantly, make an agency’s selection of a winning bidder conditional — subject to review by the Office of the Attorney General (OAG) and the Office of the State Comptroller (OSC).

In addition, bid protests may be brought, challenging the award of bids by agencies. Application of these rules can be expected to increase the amount of time it takes for an Exchange to purchase goods and services, and interject significant uncertainty into its operations. It should be noted that all governmental entities, including public authorities, are subject to bid protests and court challenges of bid awards, a function of due process and the obligation to not act in an arbitrary and capricious manner.

PROCUREMENT REGULATIONS

The New York State Constitution⁴⁸ and Article 11 of New York's State Finance Law set out highly prescriptive guidelines for the purchase of services, technology, and commodities by state agencies, summarized in a 52-page guide published by the State Procurement Council.⁴⁹ The law provides for approval of an awarded contract by the Office of the Attorney General and by the Office of State Comptroller for contracts in excess of \$50,000. Certain items and services must be purchased from established "preferred sources"; centralized sources, such as the Office of General Services, the State Office of Technology; or in conjunction with another state agency. While the rules provide some flexibility to state agencies to enter into, for example "sole source" contracts for which competitive bidding is not required, or "mini-bids" when only a handful of possible vendors is solicited, processes for major purchases are quite complicated.

For major purchases, agencies issue invitations for bids (IFBs) or requests for proposals (RFPs) under detailed guidelines that provide for the development of the core documents and specifications, bidders' conferences, publication of solicitation documents in various print and electronic media, the method of evaluating the bid, a process for scoring the bids, notifying bidders of awards, and debriefing winning and losing bidders. Once an award has been made by an agency, it goes to the OAG and finally to the OSC for review. Mindful of this last step, agencies commonly discuss procurements with the OSC's contract unit along the way; the OSC actively encourages such dialogue and is wary of being presented with last-minute procurements that are flawed. Seasoned hands who know their way around state procurement rules are highly prized at the agencies in which they work.

OAG review is more limited in scope, focusing on the form of the contract and protecting New York's contractual rights and against potential liability; OSC review is much more sweeping, reflecting its constitutional responsibility to ensure wise and efficient spending by public agencies and to safeguard against rewarding bidders not deemed "responsible" due to their track record. OSC officials indicate that the average timeframe for contract review is 10 to 11 days.⁵⁰ More complex solicitations can take longer, however. While time limitations apply to these reviews, they can also be waived depending on the complexity of the procurement, the need for additional information, or political considerations, and would interject an element of uncertainty in Exchange operations. Procurements for consultants, for example, proceed in a somewhat charged political environment, as public employee unions challenge state

continued

⁴⁸ Section 1 of Article V of the New York State Constitution requires the comptroller to "audit all vouchers before payment and all official accounts," available online at <http://www.dos.state.ny.us/info/constitution.htm>.

⁴⁹ NYS Office of General Services, *NYS Procurement Guidelines*, State Procurement Council, July 2009, available online at <http://www.dos.state.ny.us/info/constitution.htm>.

⁵⁰ Personal communication, Charlotte Breear, Director of Contracts, Office of the State Comptroller, November 26, 2010.

PROCUREMENT REGULATIONS *(continued)*

officials on the propriety of paying consultants instead of public employees.⁵¹ Sensitivity on these issues led to the promulgation of an Executive Order by Governor Paterson⁵² requiring agencies to annually publish information on consultant contracts. The DOH's solicitation for an Enrollment Center to help determine eligibility and recertify Medicaid enrollees, for example, took nearly two years to complete from the date of the issue of the RFP to its approval by OSC.⁵³

The agency also supplements its own review with a formal process to protest an agency award,⁵⁴ available to interested parties, which includes losing bidders and those denied the opportunity to bid. This process can add another step to procurement, since agencies often respond to the protest to defend their decisions. OSC, for example, recently disapproved a \$7.2 billion technology contract advanced by the Office for Technology⁵⁵ in response to a protest by a losing bidder. The RFP had been issued in September 2009, an award made in January 2010, a protest filed in March 2010, and the final order issued by OSC nullifying the award in October 2010.

It is also important to envision an individual procurement in the broader context in which it occurs. A single agency procurement requires much preparation by policy and legal staff, and perhaps reviews by the Executive, before becoming part of a queue of procurements advanced by that agency. DOH, for example, lists more than 100 funding opportunities on its website,⁵⁶ including the type of procurements the Exchange might pursue. Awarded contracts by all agencies then become part of a larger queue of procurements awaiting OAG and OSC approval — over 34,000 contract transactions with a value of more than \$36 billion in FY 2009-2010.⁵⁷

⁵¹ NYS Public Employees Federation, *Beating New York State's Consultant Addiction, How The State Can Save \$730 million*, December 2008, available online at <http://www.pef.org/stop-privatization/>.

⁵² Executive Order No. 6: Ensuring the Cost Effectiveness of Contracts for Personal Services," Governor David A. Paterson, June 4, 2008, available online at http://www.state.ny.us/governor/printable/eo_6_printable.html.

⁵³ The RFP for the Statewide Enrollment Center, included in the FY 2008-09 budget, was issued by the Department of Health on October 14, 2008 (available online at the DOH website, at <http://www.nyhealth.gov/funding/rfp/0808040239/>) and approved by OSC on August 20, 2010 (see Open Book New York, Office of the State Comptroller, contract number C025147, available online at <http://www1.osc.state.ny.us/transparency/contracts/contractresults.cfm?sb=b&a=HHH0I&ac=&v=MAXIMUS&vo=B&c=-I&mI=0&yI=0&m2=0&y2=0&am=0&b=Search>).

⁵⁴ Office of the State Comptroller, Contract Award Protest Procedure, available online at <http://www.osc.state.ny.us/agencies/gbull/attachments/contractawardprotestprocedure.pdf>.

⁵⁵ Correspondence from OSC Director of Contracts, Charlotte Breeyear, to Cathy Durand, Deputy CIO for Shared Services, NYS CIO/Office for Technology, October 21, 2010, available online at http://www.osc.state.ny.us/press/releases/oct10/durand_of_t_comsys.pdf.

⁵⁶ See the DOH website at <http://www.health.state.ny.us/funding/#soi>, accessed November 16, 2010.

⁵⁷ See note 50, Breeyear, personal communication.

An Exchange operated as a public benefit corporation could be made subject to OSC and State Finance Law provisions in its enabling legislation,⁵⁸ but otherwise would be subject to recently adopted procurement rules adopted as part of a sweeping package of public authority reform provisions (See box on public authorities reform, page 21). Most public authority procurements occurred outside the scope of OSC review before the enactment of the law; the new rules require OSC approval of larger procurements that are not competitively bid and establish more detailed reporting requirements. A nonprofit agency would enjoy the most flexibility in terms of procurement, which could be governed exclusively through bylaws and board decisions, unless established in legislation or if state funds were involved.

Unlike the flexibility afforded the Connector with regard to hiring practices, the Massachusetts law did not exempt the Connector from the state's procurement rules, although the final sign-off by the authorities equivalent to New York's Comptroller or the Attorney General is not required under Massachusetts law. Subjecting the Connector to the public purchasing process may have limited the authority's ability to purchase goods and services as rapidly as some may have expected. However, the Connector was also keenly aware of the microscope under which it was working, and requiring goods and services to be procured in an open and transparent manner in some ways helped shield the Connector from possible charges of deal-making that might have resulted if the Connector had been allowed to operate like a purely private entity. In addition, the Connector Board established rules that required the executive director to receive approval from the Board

— which met in a public setting — for all purchases of \$250,000 or more. This public approval process heightened the Connector's need to conduct proper due diligence before bringing a recommendation to the Board.

Still, even within these constraints, over the course of the first two years of its existence the Connector conducted a number of major procurements, including the MCOs for Commonwealth Care, commercial insurers for Commonwealth Choice, comprehensive marketing and outreach services, enrollment brokerage and customer service for Commonwealth Choice, web design and maintenance, audit services, and premium billing and collection services. As noted above, procurements were subject to state procurement rules and Board approval for all purchases of \$250,000 or more.

Financing

The source of financing policymakers choose for an Exchange will have ramifications for the Exchange's governance and operations. Options include funding it through state general funds; building off of the current Insurance Department system of assessing all types of domestic insurers to support its operations;⁵⁹ charging health plans offering products through the Exchange an administrative fee (the approach identified in the ACA⁶⁰); or using the existing mechanisms in place under New York's Health Care Reform Act (HCRA) of financing public goods through surcharges on health care services and covered lives assessments on individuals and employer groups in fully insured or self-funded health benefit plans. Under the State Finance Law, the use of "state funds" triggers a number of statutory requirements, such as certification of spending by the Budget

⁵⁸ NYS Public Authorities Law, section 364.

⁵⁹ NYS Insurance Law, Section 332, Assessments to defray operating expenses of the department.

⁶⁰ Affordable Care Act, section 1311(d)(5)(A).

Director and approval of contracts by OSC. General Fund, HCRA, or Insurance Department assessments would trigger such levels of review. While federal grants to state agencies or fees collected by state agencies must be appropriated through the annual state budget in order to be spent, financing mechanisms to support ongoing Exchange operations, such as administrative fees charged to participating health plans, would put spending decisions “off-budget” for a public authority, and outside the purview of this structure. Many public authorities are supported through fees or charges related to their missions, which are outside the normal state appropriation process.

The Commonwealth Connector began operations with a \$25 million appropriation of state seed money. In 2009, its \$35 million annual operating budget came almost exclusively from fees charged to purchasers of the health plans, both subsidized and unsubsidized, sold through the Connector.⁶¹ California’s Exchange statute also provides some seed money, and authorizes the entity to assess participating health plans to support its operations, but caps the amount. Utah’s Exchange⁶² assesses health plans \$43 per subscriber, significantly more than the 3.5 percent of premium that the Massachusetts Connector charges.

Public Authority

A third option for an Exchange is to create a new public authority, also known as a public benefit corporation, the road taken in Massachusetts and about to be taken in California. With over 1,110 public authorities in existence by some counts,⁶³ there is ample precedent in New York; longstanding authorities like the Metropolitan Transportation Commuter Authority (MTA), New York State Thruway Authority, State of New York Mortgage Agency (SONYMA), and the New York State Dormitory Authority (DA) fulfill essential state and regional functions along with hundreds of local authorities devoted to managing parking, sewers, utilities, and other operations for local governments, and a variety of economic development activities. This option offers more flexibility than an agency-based Exchange, and may be a better fit for its quasi-public role; two major reform bills adopted in the previous six years have significantly strengthened accountability, transparency, and governance provisions for New York’s public benefit corporations (see accompanying box on public authorities reform).

⁶¹ Commonwealth Health Insurance Connector Authority, Financial Statements and Required supplementary information, June 20, 2009 and 2009 (With Independent Auditors’ report Thereon), November 4, 2009, available online at <https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/About%2520Us/Publications%2520and%2520Reports/Current/Connector%2520Board%2520Meeting%2520November%252012%252C%25202009/FY09%2520Audited%2520FS%2520with%2520Audit%2520Opinion%2520-%2520final.pdf>.

⁶² Presentation by Norm Thurston, Health Policy and Reform Initiative Coordinator, Utah Department of Health, western regional meeting of the National Governors’ Association, Seattle, Washington, September 20, 2010.

⁶³ *New York’s Public Authorities by the Numbers*, August 2010, Office of the State Comptroller, Thomas P. DiNapoli, available online at <http://www.osc.state.ny.us/pubauth/reports/pub-auth-num.pdf>.

PUBLIC AUTHORITIES REFORM

Aggressive oversight by legislative committees and the OSC brought to light a series of revelations about ethical lapses, excesses, questionable business practices, and unchecked public debt⁶⁴ at public authorities, leading to increasing calls to rein in what universally became known as New York’s “shadow government.” Two major reform statutes adopted in 2005 and 2009⁶⁵ impose a comprehensive accountability structure on the operations of authorities. A new agency created within the Department of State, the Authorities Budget Office (ABO),⁶⁶ now oversees the operations and finances of public authorities and is empowered to investigate complaints and regularly review the compliance of authorities’ boards with their respective missions, fiduciary duties, and applicable laws and regulations. The new laws require authorities to adopt ethics codes, submit mission statements with performance goals, establish audit and governance committees with independent members, and submit detailed annual reports on their activities, expenditures, and operations to the ABO and the OSC. Board members are reminded in training sessions that they owe a fiduciary duty to the organization, not their appointing authority. Further reforms provide first-time authority for the OSC to review and approve contracts in excess of \$1 million that are not competitively bid or are paid in whole or in part by state appropriations.

⁶⁴ *Public Authorities Reform. Reining in New York’s Secret Government*, Office of the State Comptroller, February 2004. Available online at <http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf>; and *Public Authorities in New York State. Accelerating Momentum to Achieve Reform*, Office of the State Comptroller, February 2005. Available online at <http://www.osc.state.ny.us/reports/pubauth/pubauthoritiesreform.pdf>.

⁶⁵ Chapter 766 of the laws of 2005, available online at <http://www.abo.state.ny.us/abo/Chapter766of2005.pdf>; and Chapter 506 of the laws of 2009, available online at <http://www.abo.state.ny.us/abo/Chapter506of2009.pdf>. For a description of the two laws and how they work together, see <http://www.abo.state.ny.us/abo/ProvisionsPARA2009.pdf>.

⁶⁶ Information about the Authorities Budget Office is available online at <http://www.abo.state.ny.us/>

Establishment and Governance

As opposed to an agency, with its built-in accountability standards and management structure, a newly created authority would require policymakers to devote considerable attention to determining how it is governed. New York public benefit corporations are established in legislation through the creation of a board and the assignment of powers and duties. The manner in which boards are appointed and their composition varies widely. Public authorities are quasi-governmental entities that are generally

“off-budget” and independent of the state governmental structure.

Policymakers must determine the size of the board, and how members are appointed — questions that include a number of particular decisions: whether the Governor is authorized to appoint a majority of voting members; whether key agency heads serve as ex-officio members; whether both voting and non-voting members are empanelled; whether members are appointed based on their expertise in particular areas, or as representatives of important interests, such

as consumers, labor, business; and whether a regional balance should be reflected in the board. In New York, where institutional tensions between the branches of state government (and between the state and local governments) simmer just below the surface, establishing governing boards — a process in which safeguarding institutional prerogatives usually becomes an issue — will require careful attention and the acceptance of a common objective.

The most common form of board appointment is by the Governor, with the “advice and consent” of the state Senate.⁶⁷ A second model provides for appointment of additional members by the Governor who are nominated based on recommendations by other officials, such as the Speaker of the Assembly, the temporary president or Majority Leader of the Senate, or minority leaders in each house, a frequent bone of contention. A third model provides for direct appointments by the Governor and the legislative leaders or other officials depending on the corporation’s duties.⁶⁸ Direct appointment provides a more expeditious means of convening the board of an Exchange, since Senate advice and consent can take some time; language establishing quorum requirements can avoid similar delays in the event of an appointing authority’s failure to actually make designated appointments, a second pitfall in board-governed state entities.

In terms of the day-to-day leadership of

the Exchange, options include the appointment of an executive director/CEO by the Governor, which may be made subject to Senate confirmation, as is typically the case with agency heads, or appointment by the board.

The size of the board is another key consideration, particularly given the Exchange’s need to act quickly in response to market conditions or federal guidance; once again, examples are abundant. New York’s Public Authorities Control Board, which reviews issuance of new debt by public authorities, features just three members, appointed by the Governor, the Speaker of the Assembly, and the Senate Majority Leader, and it cannot act without unanimous consent. At the other end of the spectrum, New York’s MTA has 17 voting members, alternate members, and a complicated appointments structure. New York’s Dormitory Authority’s 11-member board may serve as a model for a possible Exchange, since it includes *ex officio* agency heads, direct appointments by legislative leaders, and gubernatorial appointments with the advice and consent of the state Senate.

As important as the size of the board and the method of appointment is the qualification of members. The chart on the next page illustrates the decisions Massachusetts and California made in legislation creating an Exchange through new public benefit corporations.

⁶⁷ NYS Thruway Authority, Section 352 of the Public Authorities Law.

⁶⁸ Dormitory Authority of New York State, section 1677 of the Public Authorities Law.

	Massachusetts	California
Board composition	Eleven members Four ex officio Seven private members	Five members One ex officio Four others, may be public or private
Length of service	Three years	Four years
Board members' qualifications	<p><i>Four ex officio members:</i></p> <ul style="list-style-type: none"> • Secretary of Administration and Finance (chair) • Medicaid Director • Exec. Dir. of Group Insurance Commission (state employees and retirees health plan) • Commissioner of Division of Insurance <p><i>Seven private members:</i></p> <ul style="list-style-type: none"> • Actuary • Health economist • Small business representative • Employee health plan specialist • Health consumer organization representative • Representative from organized labor • Health insurance broker⁶⁹ 	<p><i>One ex officio member:</i></p> <ul style="list-style-type: none"> • Secretary of Health and Human Services <p><i>Four other members, with expertise in at least two of the following areas:</i></p> <ul style="list-style-type: none"> • Individual market • Small group market • Health benefits administration • Health care finance • Administering a public or private health care delivery system • Purchasing health plan coverage
Location within state government	Public authority, not under direct control of a state agency	Public authority, not under direct control of a state agency
Appointments	Three by Governor Three by Attorney General	Two by Governor One by Speaker of Assembly One by Senate Rules Committee

⁶⁹ Legislation passed in June 2010 added a broker representative to the Massachusetts Connector board, effective July 2011.

Because board composition and qualifications will be of critical importance to the success of an Exchange, policymakers face a number of key decision points. A board that is too large may prove unwieldy and incapable of acting nimbly. A board structured under interest group membership may lose focus on the success of the enterprise as a whole. A board without individuals with specific expertise may not know how to develop and execute a business plan. Achieving the right balance on board composition will also mean developing an understanding of the Exchange's relation to the Executive and Executive agencies. Unless the Exchange is envisioned as a "third regulator" with in-house capacity to regulate qualifying health plans, for example, the new entity will need close coordination with the departments of Insurance and Health, since it may delegate or even contract with these agencies to perform various functions. The DOH, for example, may have a role in developing or promulgating quality ratings for health plans, determining the adequacy of provider networks, or making eligibility determinations; the SID would prove useful in monitoring premium increases and minimum loss ratios, and reviewing product offerings and actuarial value certifications.

In Massachusetts, the Connector has relied heavily on a number of state agencies in implementing and operating health reform. The State's Medicaid agency, MassHealth, serves as a crucial partner in the subsidized insurance program, Commonwealth Care. MassHealth determines eligibility for almost all medical assistance programs in Massachusetts, including Commonwealth Care, and the Connector utilizes an interagency services agreement to pay MassHealth for its work in processing eligibility, notifying members of program changes, and conducting the redetermination process, among other functions. In addition, MassHealth serves as the conduit through

which the Connector obtains medical claims data on Commonwealth Care members, which the Connector uses for a number of purposes, including risk adjusting payments to Commonwealth Care MCOs.

With regard to the commercial insurance program, Commonwealth Choice, the Connector works closely with the Massachusetts Division of Insurance (DOI) to ensure the consistent application of rating rules and other commercial insurance regulations. The DOI and the Connector also collaborated on the development of regulations for the Young Adult Plans, which are offered solely through the Connector and allow for less comprehensive coverage than the minimum standards that apply to all other health plans. In addition, the Connector has relied on the DOI to interpret regulations pertaining to the commercial market on a number of occasions when there arose a disagreement between the Connector staff and the carriers. Having the state's Commissioner of Insurance on the board of the Connector was extremely important in both ensuring that the Connector abided by the state's insurance rules and regulations, as well as maintaining the active and willing participation of the insurance carriers.

Finally, a key question relates to whether the board will have a policy-making role, in effect legislating on particular discretionary issues. While this example may be less applicable to a New York Exchange under federal health care reform, key policy decisions made by the Connector included the minimum level of insurance coverage necessary to satisfy the individual mandate, affordability, and hardship criteria pertaining to exemptions under the individual mandate, as well as the levels of subsidies available to lower-income individuals. All of these decisions were made by the Connector. Under federal reform, such decisions are either set in statute or are the purview of the Secretary of Health and Human Services, and

many of the larger issues still facing the Exchange will require state legislation to be resolved. Still, issues such as whether to combine the individual and small business (SHOP) Exchanges and the criteria for selecting “qualified health plans,” for example, may well be left to the Exchange. Such authority mandates careful consideration of the Exchange’s governance structure, both as a delegation of power that the Governor and the Legislature may wish to retain, but also as an opportunity to isolate certain decision-making functions from political exigencies.

Accountability and Oversight

The ACA includes numerous requirements related to the accountability of Exchanges as an organization, such as audits by the General Accounting Office, and regular reporting on expenses and fees, which will be layered on top of state requirements arising from the operational structure chosen or decisions made in enabling legislation. For example, the process of gubernatorial or legislative appointments to an Exchange board or housing the Exchange in a state agency both trigger sweeping New York State Public Officers law provisions, including the Freedom of Information Law, the Open Meetings Law, Ethics Laws, Disclosure and so-called “Revolving Door” rules, and the State Administrative Procedure Act, which establishes a process for public input into the promulgation of regulations and a formal assessment of their impact. Special attention would need to be given to the conflict of interest standards that might apply to board members. There is precedent in New York for legislation that limits access to certain kinds of information.⁷⁰

Public Authority Law provisions also require, for example, the development of comprehensive procurement guidelines, and annual reports to the Authorities Budget Office and the Division of Budget. An Exchange board could also add to these requirements through resolutions and bylaws.

The Massachusetts Connector board faced similar statutory requirements pertaining to open meetings, disclosure, freedom of information, ethics, and conflict of interest. The application of these rules proved problematic, although not overly burdensome. Health insurers refused to provide certain types of information (e.g., rating formulas, membership by plan type, and claims data) to the Connector for fear it would be subject to public disclosure. With regard to board membership, the state’s conflict of interest rules made it particularly challenging to identify an actuary to serve on the Connector board. A practicing actuary not under contract to at least one of the Exchange’s carriers was extremely difficult to find.

Nonprofit Corporation

The ACA authorizes states to “establish” a nonprofit organization to fulfill the duties of an Exchange; existing nonprofit organizations would be excluded from assuming this role. The nonprofit organization offers by far the most flexibility in nearly every aspect of administration and governance, and could be formed without state legislation.⁷¹ The operations of a nonprofit organization would be governed by New York’s Not-for-Profit Corporation Law, which sets basic guidelines for the operation of these entities, along with Internal Revenue Service requirements, with oversight by the Attorney General. Such a

⁷⁰ Section 94 of the NYS Executive Law, Commission on Public Integrity.

⁷¹ November 18, 2010, Department of Health and Human Services, Office of Consumer Information and Insurance Oversight, *Initial Guidance to States On Exchanges*, notes that “Establishment of an Exchange requires a planning process leading to State action, by legislation or other means.” Available online at http://www.hhs.gov/ociio/regulations/guidance_to_states_on_exchanges.html.

corporation could be established by statute, or by the simple filing of a certificate of incorporation with the Department of State. A “Type C” corporation could be established under the law to “achieve a lawful public or quasi-public objective.” Nonprofit corporations are typically governed by boards of not less than three directors, with the initial group of subscribers that forms the corporation serving as directors and electing any additional directors.

There are many examples of state-established nonprofit organizations. Health Research, Inc., originally established by DOH in the 1950s to administer research grants for the Roswell Park Cancer Institute, now has a much larger role, contracting with DOH to provide technology transfer services, administer HIV uninsured programs, and develop public health emergency preparedness procedures.⁷² The Commissioner of Health and top agency officials serve on its board as officers, and the corporation is closely integrated in DOH’s operations. The Research Foundation of State University of New York and its subsidiary corporations serve a similar function.⁷³ The New York Independent System Operator (ISO), a private nonprofit corporation established under the auspices of the Federal Energy Regulatory Commission (FERC) by New York utility companies, operates New York’s power grid, managed by a board advised by distinct management committees. The New York Wine and Grape Foundation was established in statute,⁷⁴ as was the New York State Health Foundation,⁷⁵ which was created to receive the Empire Blue Cross Blue Shield charitable asset from its conversion to for-profit status.

While a nonprofit corporation has appeal due to ease of establishment and flexibility in

its operations, there are a number of problems such an effort might face. A nonprofit Exchange might serve well for a simple market organizer like e-health, but it seems less appropriate for a quasi-governmental entity that will have the authority to grant exemptions from personal responsibility requirements and require penalty payments by individuals and businesses. On its face, a nonprofit corporation would seem less well equipped to monitor developments in the non-Exchange market and work closely with state agencies. Unless the corporation is established through legislation, the Legislature may take the position that a nonprofit corporation usurps its prerogatives. While the development of internal bylaws and governance standards might assuage some concerns about accountability, there would be a substantial risk that the entity would lack credibility in the marketplace and the buy-in from key stakeholder groups that will be necessary for its success. An effort made through legislation to build in the accountability and governance standards that apply to state agencies or public benefit corporations may result in an entity much like a state agency or public benefit corporation.

Summary and Conclusion

This review of the role an Exchange will play under the ACA and an examination of four models available under the ACA to govern and administer an Exchange highlights the practical disadvantages and advantages of these models, the legal questions that may arise, and a range of policy and political questions. While this analysis helps clarify each model’s pros and cons, it is clear that

⁷² Health Research Inc., federal tax return Form 990 for tax year 2008.

⁷³ For more information, see the Research Foundation’s website at <https://portal.rfsuny.org/portal/page/portal/The%20Research%20Foundation%20of%20SUNY/home>.

⁷⁴ Chapter 80 of the Laws of 1985.

⁷⁵ NYS Insurance Law section 7317(k).

policymakers are faced with more choices than merely picking a model. Each has some degree of flexibility. Although certain decisions, such as the means of financing or method of appointment, may be dispositive on particular policy issues, state policymakers can adopt provisions through legislation or regulation so that, within certain limits, a state agency can be made to operate more like a public benefit corporation, and a nonprofit can be made to look more like a public authority or agency.

The challenge then for policymakers is crafting infrastructure, governance, and accountability standards so that a New York Exchange, wherever housed, is nimble and capable of not only developing a major new program, but modifying that program as circumstances change. The Exchange will need to respond to changing market conditions, evolving preferences of consumers, and ongoing development and issuance of federal regulations and guidelines regarding the administration and operation of the Exchange. Accommodating the mission and practical operating considerations of an Exchange requires close attention to a number of issues:

- What financing mechanism best supports the pressing need for an Exchange to hit the ground running in order to meet the ambitious timelines contained in the ACA?
- What is the corporate form that best accommodates an entity with governmental purposes, but also the need to establish a business plan for a technology-dependent new product, market it, and win over consumers, businesses, and health plans so that it is able to grow and support its expenditures?
- Given the Exchange's voluminous duties and tight time constraints, what is the structure that best promotes informed and transparent public input, prompt decision making, the ability to execute

decisions expeditiously, and sufficient agility to pivot quickly in the face of shifting market conditions and an evolving regulatory environment?

- With the likelihood that the Exchange will tap the strengths of existing regulatory agencies in assuming its responsibilities, what structure ensures close coordination and efficient allocation of resources between the Exchange and state agencies?
- Since the end users of Exchange services — individuals and small businesses — will likely support the Exchange's operations through the premium payments they make, and the Exchange will in effect compete against existing distribution systems in the non-Exchange markets, what is the most cost-effective method to administer the Exchange and provide for ongoing operations?
- And finally, what structure best enables New York and its new Exchange to navigate the many uncertainties that lie ahead?

Uncertainty, in fact, may be the one certainty in the environment in which Exchanges are to be implemented, and it derives from three sources: ongoing federal litigation seeking to have key portions of the ACA declared unconstitutional, the pledge by a new Republican majority in the House of Representatives to "repeal and replace" the ACA and block funding for ACA-related activities, and the significant discretion granted to HHS and the states on fundamental and interconnected policy questions that will impact the Exchange's operations.

On the federal side, further uncertainties include additional guidance and second-round funding for Exchange implementation grants for states, support for state IT needs, rules for how exactly small employer groups will purchase coverage from the Exchange, a system for rating health plans, guidelines for cooperative and multistate

plans which could join existing state health plans in offering coverage through the Exchange, regulations establishing “minimum essential benefits,” designation of open enrollment periods, and guidance on three separate and complex risk mitigation mechanisms.

On the state side, policymakers and regulators will grapple with whether to merge the individual and small group markets, whether to choose 50 employees or 100 as the limit for small group coverage, whether to receive Exchange subsidies for individuals earning between 133 and 200 percent of the FPL and instead provide coverage through a Basic Health Program, how to establish rating areas for all plans, and the degree to which the non-Exchange market should be linked to the Exchange market in order to protect both markets against adverse selection. Finally, several decisions remain about how best to implement the required coordination of Exchange functions with Medicaid and Child Health Plus eligibility and enrollment determinations. These questions will need to be addressed as New York begins to realign the roles of the state and social service districts in administering Medicaid,⁷⁶ confronts the need for the costly development of an IT platform for the Exchange, and overhauls the antiquated legacy systems that are currently in place for Medicaid and other public assistance programs.

One path through the uncertainty would

be simply to wait and see, buying more clarity with time, but at the significant risk of not meeting federal benchmarks, losing eligibility for federal funding, and falling behind on planning for federal health reform implementation. Even if a state elects to establish its own exchange, HHS can suspend state action and appoint its own Exchange administrator if it determines that insufficient progress has been made. A second route would be to face the challenges head-on and try to craft omnibus legislation that resolves all outstanding policy, legal, and implementation issues simultaneously. While this would be consistent with the Empire State’s “muscle memory,” as one observer called it, this ambitious approach might sink under its own weight, and may require decision-making on complex and interrelated policy issues without the desired level of analytical support during a time of extreme fiscal pressures.

A more modest approach would focus on establishing the administration and governance infrastructure for an Exchange, creating the place for a New York conversation on an Exchange and related policy issues. The new entity could organize and deploy state and federal resources to begin the development of a business plan, inventory needs and assets, make recommendations to policymakers on discrete issues, and craft the analytical work to support better-informed policy decisions to be addressed by the Governor, the Legislature, and regulators in the near future.

⁷⁶ *New York State Medicaid Administration, November Report*, NYS Department of Health, November 2010, available online at http://www.health.ny.gov/health_care/docs/2010-11_medicaid_admin_report.pdf.

Appendix: An Analysis of Alternative Governance Models of a New York State Health Benefit Exchange

	State Agency	Public Authority/ Public Benefit Corporation	State-Created Non-for-Profit Corporation (NFPC)
Establishment			
Enabling Legislation	<p>Enabling legislation is required to establish a state agency.^a</p> <p>It does not appear that any existing state agency has the authority to carry out all the functions of an exchange. Establishing or designating an entity to serve as an exchange without enabling legislation may be found to be outside the authority of a state agency.</p> <p>Enabling legislation may exempt entity from generally applicable laws. (Example: the Commission on Public Integrity is partially exempt from FOIL). Exec. §94(17)(a).</p>	<p>Enabling legislation is required to form a public authority (PA).^b</p> <p>Enabling legislation may exempt entity from generally applicable laws.</p>	<p>Generally formed by one or more persons over the age of 18 filing a certificate of incorporation with the Department of State. NFPCL §401, 403.</p> <p>May also be formed through enabling legislation. Examples: the NY Wine/Grape Foundation was formed through legislative enactment (Chapter 80, Laws of 1985); and the NYS Health Foundation (“NYSHF”) was formed under the state insurance law (Ins. §7317(k)(1)).</p>
Powers and Duties	<p>Powers and duties are set out in the statute creating the entity.</p> <p>Example: the Department of Health and its divisions and bureaus are given 21 enumerated powers and duties, such as: to supervise and control the registration of births, deaths, and marriages; to establish and maintain and state hospitals; to regulate the sanitation of public places; and to receive and expend funds made available for public health purposes. Pub. Health §201.</p>	<p>Powers and duties are set out in statute creating the PA.</p> <p>Example: The Dormitory Authority is granted specific powers (such as: to contract, borrow money, and issue negotiable bonds); and broad powers (such as: “to do all things necessary ... to carry out the purpose of the authority”). Pub. Auth. §1678.</p> <p>Example: Roswell Park Cancer Institute Corp. has the power to, among other things, buy and sell property; offer participation in the New York employee’s retirement system; promote, join, or manage other organizations; and adopt rules of governance. Pub. Auth. §3554.</p>	<p>A “Type C” NFPC can be formed for any lawful business purpose to achieve a lawful public or quasi-public objective. NFPCL §201(b).</p> <p>NFPCs have specific powers (such as to sue, to lend money, and to invest money); as well as the power to “exercise all powers necessary to effect any or all of the purposes for which the corporation is formed.” NFPCL §202(a). Specific powers consistent with NFPCL may be included in corporate charter filed with Department of State.</p> <p>If statutorily created, the powers and duties would be set out in the statute.</p>

^a Note that the number of State Departments (e. g., Law, Education, Labor) is capped by the NYS Constitution at 20, so no new one may be created without a constitutional amendment. The term “state agency” includes traditional state agencies, as well as those subdivisions within a state department (i.e., the Office of the Medicaid Inspector General within the Department of Health). A further subset of “state agencies” are boards and commissions, such as the Workers Compensation Board and the Commission on Public Integrity. These entities are free- standing, legislatively enacted bodies, and, except where specifically noted on this chart, are subject to the same general requirements as traditional state agencies.

^b “PA” refers to both Public Authorities and Public Benefit Corporations.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPC)****Governance****Management/
Board**

Authority is vested in entity head (e. g., commissioner), not in a board.

Boards/ commissions have a governing board and generally appoint an executive director or similar chief administrative officer. Exec. §94(9)(a).

Some agencies may have advisory boards or commissions to make recommendations to the agency head. This provides a method to allow for stakeholder input. See, for example, the former Temporary Statewide Health Advisory Board; which consisted of the commissioner of health, the commissioner of social services, the superintendent of insurance, and members appointed by the Governor and the legislature. Exec. §957 (expired).

PAs are governed by boards (Pub.Auth. §2824), with the composition and method of appointment varying depending on authorizing legislation.

NFPCs are governed by boards. NFPCL §701 (a).

NFPCs can have a joint management structure as well. For example, the New York Independent System Operator (NYISO) is governed by a board of directors with ultimate power over policy and operations, but it also has a separate management committee made up of interested stakeholders, which develops policies and makes recommendations regarding policies and other matters to the board. NYISO Bylaws, art II, sec I.

**Appointments
to Board**

A board/commission has members appointed pursuant to enabling legislation, and in accordance with the NYS Constitution, which provides that the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the Governor with the advice and consent of the Senate. NYS Constitution, art. 5, sec. 4.

Note that the legislature may also require that such appointments be made upon the nomination or recommendation of a legislative leader of other person (see next page).

Board composition is set in authorizing legislation (see next page).

Generally, the method of appointments is to be set in certificate of incorporation or bylaws (NFPCL §703(a), (b)), or as set in statute.

The number of directors must be three or more. NFPCL §701 (b).

Initial board may be made up of initial subscribers of the certificate of incorporation, who then elect or appoint the remaining directors. Example: Health Research, Inc. (HRI). HRI Bylaws, art II, sec 3.

Governance

1. Governor

In case of board or commission, the Governor appoints commissioners and usually has (or shares) appointment authority over board membership (as set in NYS Constitution and enabling legislation).

Example: The Governor appoints the 13 members of the Commission on Public Integrity (Exec. §94(2)), although some appointments are conditioned on prior nomination (see below).

Gubernatorial appointments are always set in authorizing legislation.

Example: The NYS Thruway Authority board consists of seven members appointed by the Governor with the advice and consent of Senate. Pub. Auth. §352(1).

The Governor usually does not appoint board members, but in the case of a statutorily created NFPC, the Governor may be given appointment authority.

Examples: NYSHF's board consists of nine members (three voting), and the Governor appoints three members (one voting). Ins. §7317(k)(2). The Public Asset Fund's board consists of five members, three of whom are appointed by the Governor. Ins. §4301(j)(4).

2. Legislature

In case of board/commission, the Governor's appointment may be required to be upon recommendation or nomination of legislative leaders.

Example: Four of the thirteen members of Commission on Public Integrity are appointed after being nominated by the Speaker of the Assembly, the temporary president of the Senate, the minority leader of the Assembly, and the minority leader of the Senate. Exec. §94(2).

Legislature may directly appoint board members (in addition to members appointed by the Governor), as set in authorizing legislation.

Example: The Dormitory Authority's board includes one member appointed by the temporary president of the Senate, one by the Speaker of the Assembly, and five by the Governor with the advice and consent of the Senate, as well as ex officio members (e.g., Commissioner of Health). Pub. Auth. §1677.

Usually not, but legislature can appoint board members if set in articles of incorporation, bylaws or authorizing legislation.

Example: Of the NY Wine/Grape Foundation's initial board members, three of the eleven directors were appointed by the temporary president of Senate, three by the Speaker of Assembly, one by the minority leader of the Senate, and one by the minority leader of Assembly. Subsequent board members were elected by the existing board members in a self-perpetuating fashion. Chapter 80, Laws of 1985.

Example: On NYSHF's board, three of nine board members (one voting) are appointed by the temporary president of the Senate, and three of nine (one voting) are appointed by the Speaker of the Assembly. Ins. §7317(k)(2).

3. Others

Enabling legislation may, in some instances, authorize other individuals or entities to appoint or nominate board/commission members.

Example: Two of the thirteen members of the Commission on Public Integrity are appointed after being nominated by the Comptroller and the Attorney General. Exec. §94(2).

Appointments by others can be set in authorizing legislation.

Example: On the NYS Archives Partnership Trust board, four of the eighteen members are appointed by the Chief Judge of the Court of Appeals; and three are appointed by the Commissioner of Education. Chap. 758, NY Sess. Laws of 1992.

As set in articles of incorporation or bylaws, the initial board often consists of the original incorporators (promoters) of the NFPC.

Example: HRI bylaws made the subscribers of the certificate of incorporation the initial directors, who then elected subsequent directors. HRI Bylaws, art. II, sec. 3. Example: NYISO's governance committee, assisted by the management committee, nominates candidates to fill vacancies on the board. See NYISO Bylaws, art III, sec 2.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPC)****Governance****4. Self-perpetuating**

Boards/commissions are generally not self-perpetuating.

Generally, PA boards are appointed and vacancies are filled by appointing authority.

Example: Vacancies on the board of the MTA are filled in the same way as the original appointments (by Governor) for the remainder of the unexpired term. NY Pub. Auth. §1263(1)(b).

NFPC boards may be self-perpetuating, as set in articles of incorporation. Other NFPCs may require vote of membership, if any.

Examples: HRI elects/replaces directors by majority vote of current directors (HRI Bylaws, art. 2, sec. 4). The NY Wine/ Grape Foundation has subsequent directors (after those appointed by Governor and legislature) elected by current board (Chap. 80, Laws of 1985). NYISO has vacancies filled and directors elected by majority vote of elected directors then in office (NYISO bylaws, art III, sec 3(b)).

5. Term

Commissioners serve at the pleasure of the Governor, although some have fixed terms (e.g., Public Service Commission).

Board members typically have specified terms. For example, members of the Commission on Public Integrity serve for five-year terms. Exec. §94(3).

Terms are set in authorizing legislation.

Example: The Dormitory Authority Provides for three-year terms (NY Pub. Auth. §1677), while the Thruway Authority's members serve for three-, six-, or nine-year terms, depending on order of appointment. Id. at §352(1).

Term is set in certificate of incorporation or bylaws, but cannot exceed five years, and the default term is one year. NFPCL §703(b).

Appointment of CEO/Commissioner

Governor appoints department heads and commissioners with advice and consent of Senate, unless otherwise provided in statute or the NYS Constitution. Pub. Off. §6.

Example: The Governor appoints, among many others, the director of the Authorities Budget Office (within the Department of State) with the advice and consent of the Senate (Pub. Auth. §5), and the Commissioner of Health with the advice and consent of the Senate (Pub. Health §204); while the Board of Regents appoints the Commissioner of Education and the electorate selects the Comptroller and the Attorney General (NYS Constitution art 5, sec 4).

Varies depending on authorizing legislation.

Example: in the Albany Convention Center Authority, the executive director is appointed by the board (Pub. Auth. § 2675-d(2)); while in the NYS Foundation for Science, Technology, and Innovation, the executive director is appointed by the Governor. Id. at §3151(3).

Generally, the board appoints officers, although the certificate of incorporation or bylaws can provide that the members instead of the board appoint officers, or that the chief executive appoint lower officers. NFPCL §713.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPCL)****Governance**

Senate Confirmation of CEO/ CAO

Generally required by art 5, sec 4 of the NYS Constitution, as well as §6 of the Public Officer's Law.

If the Governor appoints, then they are usually subject to confirmation. Pub. Auth. §2852.

Not required, unless set forth in enabling legislation.

However, in the Roswell Park Cancer Institute, the Governor appoints the chairperson of the board without Senate confirmation. Pub. Auth. §3553(3)(a).

Enabling legislation can also give the Senate confirmation power in situations where the appointing authority is vested in someone or something other than the Governor. See, for example, the Dormitory Authority, which appoints its own executive director, subject to Senate confirmation. Pub. Auth. §1678(5).

Removal of Board Members or Officers

The Governor may remove officers and board/commission members if the Governor appointed them. Pub. Off. §8; NYS Constitution, art. 5, sec. 4.

However, if the officer is appointed for a term, Governor's right to remove may be circumscribed. See, for example, the Commission on Public Integrity, in which the members can only be removed by the Governor for causes specified in the statute. Exec. 94(7).

Removal of board members is done by those with authority to appoint (i.e., the Governor, or the board itself). Pub. Auth. §2827.

Removal of officers is done by board. Pub. Auth. §2824.

Board members are removed by vote of other board members in a manner prescribed in bylaws, certificate of incorporation, or statute. NFPCL §706.

Officers are removed by vote of board. NFPCL §714.

Fiduciary Duty

Duty is owed to Governor, who appoints and can remove the commissioner.

Members of a board/commission within a state agency owe a duty to the agency.

Directors and officers owe a fiduciary duty to the PA, not to the appointing individual. Pub. Auth. §2824.

Directors and officers owe a fiduciary duty to the NFPCL. NFPCL §717.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPC)****Accountability****Freedom of
Information Law
(FOIL)**

FOIL allows the public to access the records of governmental agencies. In general, any State or municipal department, board, bureau, division, commission, public authority, or other governmental entity performing a governmental or proprietary function is considered an “agency” under FOIL. Pub. Off. §87.

Applies. Pub. Off. §87.

However, FOIL’s applicability can be narrowed in authorizing legislation. See, for example, the Roswell Park Cancer Institute, which broadens the definition of a privileged “trade secret” under FOIL, thereby exempting the entity from certain FOIL provisions.
Pub. Auth. §3553(8)(a).

Generally does not apply, unless enabling statute provides otherwise.

However, if NFPC is sufficiently similar to a government entity (i.e., performs a governmental function), FOIL may also apply. See *Siani v. Research Foundation*, 2007 N.Y. Misc. Lexis 9122 (2007).

**Open Meetings
Law (OML)**

OML gives the public the right to attend meetings of “public bodies,” which is defined to include entities consisting of two or more people that conduct public business and perform a governmental function for the State, for an agency of the State, or for public corporations; such as cities, counties, towns, villages, and school districts.
Pub. Off. §103.

Applies. Pub. Off. §103.

However, OML’s applicability can be narrowed in authorizing legislation. See, for example, the Roswell Park Cancer Institute, which expands the grounds for an “executive session,” which is exempted from OML. Pub. Auth. §3553(8)(b).

Does not apply, unless statute provides otherwise or unless found to be exercising a governmental function for the state. See *American S. P. C. A.*, 165 A.D.2d 561 (2d Dep’t 1991), which held that a committee of SUNY Stony Brook was not a “public body” within the meaning of OML.

Ethics Rules**1. Conflicts
of Interest and
Gift Rules**

Prohibitions/limitations on gifts apply to officers and employees of state agencies. Pub. Off. §73(5).

Prohibitions on conflicts of interest apply to officers and employees of state agencies (Pub. Off. §74(2)); and the Public Officers Law provides a framework for determining how to resolve potential conflicts (id. §74(3)).

Consideration should be given to the specific framework of the body that is created, and the solution to resolving a potential conflict within that framework will often be recusal.

Prohibitions/limitations on gifts apply to officers and employees of PAs. Pub. Off. §73(5).

Prohibitions on conflicts of interest apply to officers and employees of PAs (Pub. Off. §74(2)); and the Public Officers Law provides a framework for determining how to resolve potential conflicts (id. §74(3)).

Consideration should be given to the specific framework of the body that is created, and the solution to resolving a potential conflict within that framework will often be recusal.

State conflict laws do not apply, unless statute provides otherwise.

However, there are conflict rules applicable to officers and directors of NFPCs who may be interested in a contract or transaction with the NFPC. Potential conflicts may be resolved through disclosure, recusal, and independent board approval. NFPC §715.

**2. Post-
Government
Employment
Restriction
 (“Revolving Door”
Rule)**

Applies. Pub. Off. §73(8).

Applies. Pub. Off. §73(8).

Does not apply, unless statute provides otherwise.

State Agency

**Public Authority/
Public Benefit Corporation**

State-Created Non-for-Profit Corporation (NFPC)

Accountability

3. Financial Disclosure

Annual statements of financial disclosure must be filed by the heads of state departments and their deputies and assistants, as well as by other officers and employees with policy-making positions. Pub. Off. §73-a(c).

Annual statements of financial disclosure must be filed by members or directors of PAs, as well as by employees of PAs with policy-making positions. Pub. Off. §73- a(c).

Does not apply, unless statute provides otherwise.

Reporting and Audits

State agencies are subject to comptroller audit and subject to reporting.

PAs must conduct internal audits. NY Pub. Auth. §2932.

PAs must make annual reports to Governor, legislature, budget office, and comptroller. Pub. Auth. §2800–2802.

Comptroller reviews books of PA at least every five years. Pub. Auth. §2803.

PAs must submit detailed personnel reports to the Comptroller, chair of legislative fiscal committees, and Authorities Budget Office. Pub. Auth. §2806.

Directors must annually prepare and present to the members of the NFPC a detailed financial/business report. NFPC §519.

NFPC must file regular corporate reports, as required by other laws. NFPC §520.

Members have a right to inspect the records and books of the NFPC. NFPC §621(b).

Bylaws or certificate of incorporation can include provisions giving board or members the right to demand and/or conduct audits (example: NYISO Bylaws, art III, sec 1(b)).

NFPCs organized for charitable purposes may have heightened reporting, registration, and record-keeping requirements overseen and enforced by the Attorney General, who has broad investigative and rulemaking powers in this area. EPTL §8-1.4.

State Administrative Procedure Act (SAPA) and Rulemaking

SAPA governs the adoption of rules and regulations by state agencies and provides standards for agency rulemaking. SAPA §102, 201.

Applies. SAPA §102, 201.

Does not apply.

Article 78 Review^c

Applies.

Applies.

NFPC can be considered “quasi-public” by way of a government charter, in which case art. 78, in the nature of mandamus (i.e., compelling an officer or body to perform a duty enjoined upon it by law), would apply in limited situations. See *Matter of Sines*, 156 A.D.2d 878 (3d Dep’t 1989).

^c An Article 78 proceeding is a uniform device used to challenge the decisions and actions (or lack thereof) of an administrative agency or governmental body in court. The device encompasses three common law writs: a writ of mandamus, which compels action and applies to ministerial duties; a writ of prohibition, which prevents a body from taking an action; and a writ of certiorari, which reviews administrative decisions post-hearing.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPC)****Accountability**

Article 78
Review (cont.)

For example, denial of a member's right to inspect the books under NFPC §621(b) can be challenged in an art. 78 proceeding. See *Smith*, 35 A.D.3d 749 (2d Dep't 2006).

Note that an art. 78 proceeding in the nature of *certiorari* (i. e., reviewing agency decisions) cannot be maintained against an NFPC.

Court of Claims^d Court of Claims has jurisdiction over claims for damages asserted against state agencies.

Must be legislatively mandated to come within jurisdiction of Court of Claims (See *Brown*, 41 Msc.2d. 427 (1963)); otherwise, jurisdiction is in NY Supreme Court.

Example: In the NYS Thruway Authority, Court of Claims has exclusive jurisdiction over tort or contract claims. Pub. Auth. §361-b.

Court of Claims does not have jurisdiction over an NFPC.

^d The New York State Court of Claims is a court of limited jurisdiction that is the exclusive forum for civil litigation seeking damages against the State or certain State-created entities.

State Agency**Public Authority/
Public Benefit Corporation****State-Created Non-for-Profit
Corporation (NFPC)****Operations**

Civil Service Civil service rules apply.

Civil service rules may apply, depending on enabling legislation, and PAs can be exempted. Civ. Serv. §41(1)(e), (2).

For example, the Roswell Park Cancer Institute's enabling legislation expressly provides that its employees are subject to the civil service laws (Pub. Auth. §3556(1)(b)); while the Monroe County Water Authority's enabling legislation expressly provides that it may hire an attorney and an engineer, which positions shall be in the exempt class of the civil service (id. at §1095(3); and the Long Island Power Authority is given the power to appoint officers, employees, and agents, without regard to the civil service laws (id. at §1020-f(c)).

Civil service rules do not apply.

State Agency

**Public Authority/
Public Benefit Corporation**

**State-Created Non-for-Profit
Corporation (NFPC)**

Operations

Union

Collective Bargaining

Collective bargaining rights and responsibilities are governed by the Taylor Law. Civ. Serv. §201.

Generally applies (Civ. Serv. §201), although employees of PAs can be exempted from the Taylor Law. See, for example, the Long Island Power Authority. Pub. Auth. §1020-u.

Private entities are subject to federal and state labor laws; the Taylor Law does not apply.

Procurement

1. Bidding Requirements

Generally (see below), state agencies must conduct formal competitive procurements. State Fin. §163(7), (9)(a).

PAs must adopt (by resolution) comprehensive procurement guidelines dealing with bidding and selection of contractors. Pub. Auth. §2879.

Not subject to government procurement requirements, but no self-dealing is allowed.

There are detailed reporting requirements for assets and services bought or sold without competitive bidding. Pub. Auth. §2800(1)(a).

2. Office of the State Comptroller (OSC) Oversight: Audits and Review of Contracts^e

The OSC prepares and prescribes a system of accounting for state contracts. State Fin. §112(1).
The OSC must approve contracts with state agencies over \$50K, and contracts with OGS over \$85K. State Fin. §112(2)(a).

The OSC has discretion to review state contracts in excess of \$1 million if those contracts use public monies or are not competitively bid (Pub. Auth. §2879-a(1)), but not those for the sale of commercial paper or bonds. *Id.* at (2)(a).

The OSC has no direct oversight here, but NFPCs have to conduct periodic audits and reviews.

Advertising in the procurement opportunities newsletter is required for acquisitions of \$15K+. Econ. Dev. §146.

3. Minority- and Women-Owned Business Enterprise (MWBE) Provisions

Apply. Exec. Law §310(11)(a).

Apply to most PAs (but can be exempted by statute). Exec. §310(11)(b); Pub. Auth. §2879(3)(c).

Do not apply.

4. Role of Office for Technology (OFT)

Controls technology purchases of state agencies.

None.

None.

^e Note that contracts subject to approval by OSC are also subject to approval, as to form, by the State Attorney General.

	State Agency	Public Authority/ Public Benefit Corporation	State-Created Non-for-Profit Corporation (NFPC)
Operations			
5. Role of Office of General Services (OGS)	<p>OGS maintains a list of “preferred sources” (those contractors that are exempted from the competitive procurement process) — e. g., goods produced by corrections services and sheltered workshops. State Fin. §162.</p> <p>Agencies must give priority to preferred sources, then to centralized contracts, and then to agency contract. <i>Id.</i> at §163(3).</p>	May be required to purchase through OGS. See State Fin., art. 11.	None.
Pensions and Benefits	Agency employees are covered by the State Employee Retirement System.	<p>Employees may be eligible for certain state benefits, depending on enabling legislation.</p> <p>Example: Roswell Park Cancer Institute is given the power to offer participation in the State Employee Retirement System. Pub. Auth. §3554(8).</p>	Generally not in state system.
Salaries Set by Statute	<p>Salaries are set by statutory minimum and maximum grades (Civ. Serv. §130); grades and adjustments are governed by statute. Civ. Serv. §131-32.</p> <p>See also Exec. §169, which sets salaries for state commissioners and similar positions.</p>	<p>Method of determining salaries is usually left to board or chief executive.</p> <p>In general, salaries of executives are set by board. Pub. Auth. §2824.</p>	<p>NFPCs are given general power to fix “reasonable” compensation of directors, officers, and employees. NFPCL §202(a)(12).</p> <p>If not set in bylaws, fixing of salaries for officers must be done by vote of majority of entire board (unless higher proportion is set in certificate). NFPCL §715(f).</p>

	State Agency	Public Authority/ Public Benefit Corporation	State-Created Non-for-Profit Corporation (NFPC)
Finance			
Appropriations	Legislature must appropriate funds.	<p>If PAs generate their own revenue (e.g., through tolls), then such revenue is generally not appropriated; additional funds may be appropriated by the legislature.</p> <p>Funds are not governmentally appropriated; they are usually funded through contributions or other sources of funds (e.g., fees for services).</p>	If created by legislation, however, appropriation may be required, if funds go into state treasury.
Division of Budget (DOB) Oversight	Agency expenditures are subject to certification and approval by the budget office.	<p>Each PA must prepare an “investment report” detailing how PA funds are managed/invested (Pub. Auth. §2925(1)), which must be submitted to DOB for review (Pub. Auth. §2925(7)(a)).</p> <p>PAs must submit an annual report on procurement contracts to DOB. Pub. Auth. §2879(8)(a).</p>	<p>Not applicable.</p> <p>In NYISO, budget is prepared by the management committee, and then must be approved by board. See NYISO Bylaws, art 2, sec 7.</p>
OSC Approval of Expenditures	Required.	May be required, depending on legislation, or at the request of PA.	Not required.
Authorities Budget Office Review	Not applicable.	Applies. NY Pub. Auth. §4-7.	Not applicable.
Inspector General Oversight	The Inspector General has oversight jurisdiction over all state agencies. Exec. §51.	The Inspector General has oversight jurisdiction over all PAs, except multistate or multinational authorities (e.g., the Port Authority of NY and NJ). Exec. §51.	The Inspector General does not have oversight jurisdiction over NFPCs.

Additional copies of *Building the Infrastructure for a New York Health Benefit Exchange* may be downloaded, at no charge, from the United Hospital Fund website, www.uhfny.org.



 **United
Hospital Fund**

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