



Healthcare Association  
of New York State

**Testimony of the**

**Healthcare Association of New York State**

**at the**

**Public Forum on the Establishment of a Health  
Insurance Exchange in New York State**

**May 16, 2011**

Thank you for providing the Healthcare Association of New York State (HANYYS) with the opportunity to testify at the Public Forum on the Establishment of a Health Insurance Exchange in New York State. I am Jeffrey Gold, Vice President of Managed Care and Special Counsel at HANYYS, which represents more than 550 not-for-profit and public hospitals, health systems, nursing homes, and home care agencies throughout New York State. We appreciate being provided with this opportunity to comment on the important policy issues surrounding the planning and implementation of Health Insurance Exchanges in New York State. We applaud this Administration's continuing commitment to obtain stakeholder input as it shapes the course of health care reform in New York.

Our testimony today will be limited to only those several issues that, in HANYYS' view have the most immediacy. We hope and intend to submit further comments and thoughts to the Administration on the many other structural and policy questions around the development and operation of the exchanges once there has been some opportunity to assess where these initial choices take us.

### **Introduction to Health Insurance Exchanges**

The Patient Protection and Affordable Care Act (ACA) directs each State to establish an American Health Benefit Exchange ("AHBE") for individuals and a Small Business Health Options Program ("SHOP Exchange") for small businesses no later than January 1, 2014. The AHBE and SHOP Exchange are intended to be marketplaces where individuals and small businesses can purchase health insurance policies. The federal law was designed to promote competition in the insurance marketplace while ensuring access to affordable, comprehensive

health insurance coverage. Policies offered by health plans on the Exchanges will compete within the exchanges based on price and quality.

In addition, Congress intended that Health Insurance Exchanges would reduce the number of uninsured Americans, including New York's 2.6 million uninsured residents. This would be an enormous benefit to the people and State of New York. It would also benefit New York hospitals and other health care providers which have long rendered uncompensated care, undercompensated care and care for which inordinate effort must be made to recover at least marginal compensation. Reducing the number of uninsured and underinsured consumers will improve access to essential health care services and improve the financial condition of New York's healthcare community.

New York must be mindful of key deadlines imposed by ACA as it plans for its Exchanges. Most importantly, the Secretary of the United States Department of Health and Human Services (HHS) will determine on or before January 1, 2013 whether New York is making sufficient progress toward operating its Exchanges and whether the State can proceed with its implementation plans. Planning for Exchanges may be daunting but if by January 1, 2013, New York has not taken the actions the Secretary deems necessary to make Exchanges operational by January 1, 2014, the Secretary will establish and operate an Exchange in New York on the State's behalf. New York's plans must consider the broad array of functions its Exchanges will be responsible for, including eligibility determination; outreach, enrollment and customer service; health plan selection, education, and management; and enforcement of the individual mandate and reporting.

### **New York Must Enact Exchange Enabling Legislation**

As of April 25, 2011, four States had passed or enacted legislation to establish ACA compliant Health Insurance Exchanges and 21 States had legislation pending. Legislation was introduced but did not pass in an additional six States. Only fourteen States, including New York, have not yet introduced legislation to establish Exchanges. Now is the time for New York to take definite steps toward establishing Exchanges before it risks missing upcoming deadlines and funding opportunities.

With only twelve days remaining in the 2011 Legislative Session, New York must act swiftly and make significant decisions related to Exchange planning to ensure that the State remains eligible to receive additional funding and is on target to meet deadlines contained in ACA.

In 2010, HHS made available planning and establishment grants to States interested in creating Exchanges. New York applied for and received a Level One Establishment Grant which provides States with up to one year of funding toward Exchange planning in the amount of \$1 million. New York has stated it will use those funds to determine if insurance regulations need to be modified for the Exchange; to engage stakeholders in the evaluation, planning, and development of the Exchange; to determine if the Exchange should be built on or integrated with existing programs; to design governance; and to draft legislation.

New York now has the opportunity to apply for a multiyear Level Two Establishment Grant for continued Exchange development. However, in order to receive this grant, New York must:

- Enact legislation to establish and operate an Exchange;

- Choose a governance structure for the Exchange;
- Create a budget and initial plan for financial sustainability by 2015;
- Develop a plan outlining steps to prevent fraud, waste, and abuse; and
- Develop a plan describing how consumer assistance capacity in the State will be created, continued, and/or expanded including provision for a call center.

In addition to the Level One Establishment Grant for Exchanges, New York was also just one of seven states awarded an Early Innovator Grant in the amount of \$27 million to build off its eMedNY Medicaid Management Information System to develop Exchange information technology (IT). New York must meet several additional deadlines to maintain funding through the Early Innovator Grant. Significantly, New York must conduct a detailed design review of its Exchange IT systems by October 2011 and finalize its IT and integration architecture by December 2011. Furthermore, by October 2012, New York must also demonstrate operational readiness of its Exchange IT systems.

If New York wishes to establish its own Health Insurance Exchanges, the State must focus on threshold policy decisions and enact enabling legislation as soon as possible. In order to “get out of the gate” we recommend that the enabling legislation should only include the minimum elements necessary to obtain a Level Two Establishment Grant. At this point, the legislation need only authorize the establishment and operation of an exchange and identify the governance structure for the Exchange. The legislation should direct the operating entity to create a budget and initial plan for financial sustainability by 2015; develop a plan outlining steps to prevent

fraud, waste and abuse; and develop a plan describing how consumer assistance needs will be met.

Because time is of the essence, other policy decisions related to structure, purchasing role, benefits design, adverse selection, and organization of the market can be addressed through future legislation or rulemaking activity when the State has more time to fully weigh the options and consider their implications for future success of the Exchanges. We particularly believe that good decisions will be most likely made if the current trend to have timely and meaningful dialogue and input from the stakeholder community continues.

### **New York's Commitment to Establishing Exchanges**

While there is a great deal of energy and excitement about the potential of the exchange marketplace, we think it important to take into consideration the possibility that parts of the ACA may yet unravel or be extensively modified. Several States have brought legal challenges against the individual mandate and it remains unknown whether the Supreme Court will ultimately strike down any aspect of the requirement that Americans be compelled to obtain creditable coverage on or off the Exchanges. It is also well known that one party's agenda in Washington includes the threat to defund or repeal ACA in whole or in part. This may result in the elimination of premium assistance subsidies given to individuals to purchase health insurance on the Exchanges. Such action may also reduce or eliminate future planning and establishment grants available to New York to implement its Exchanges.

In this uncertain federal environment, New York must make a commitment to establishing and operating Exchanges. Given the vast amount of resources necessary to make Exchanges operational by January 1, 2014, New York must decide whether it will commit to maintaining its Exchanges regardless of activity and influence at the Federal level, particularly if New York is inclined to have a “Massachusetts Connector-like” model. It is entirely possible that the individual mandate to purchase health insurance and premium assistance subsidies may not remain the way they are currently contemplated in the ACA.

We think that this concern is an additional argument in favor of keeping the enabling legislation fairly straightforward and that New York should not, at this time, create a highly detailed regulatory scheme unless we are committed to operating Exchanges and to paying for them in a manner similar to that used by the Commonwealth of Massachusetts.

### **Governance Model for New York’s Exchanges**

The only decision that must be made is a basic one: what should the governance model for the Exchanges be? Based more on practical considerations than ideology, HANYS recommends that a public authority be created to operate the Exchanges rather than house the Exchanges in a State agency or hand the Exchanges off to a nonprofit organization.

#### ***Public Authority***

We note that New York has historically endowed public authorities with the power to provide essential services to New Yorkers on behalf of the State because public authorities are flexible yet maintain accountability and transparency to consumers.

A significant advantage of selecting a public authority to operate New York's Exchanges is that legislators will carefully consider the structure of the public authority's governing body, the size of the board, and how board members are appointed. Additionally, two reform bills passed in 2005 and 2009 which require public authorities to adopt ethics codes and establish audit and governance committees that must prepare detailed annual reports about public authorities' activities, expenditures, and operations. These laws significantly strengthened the accountability, transparency, and governance provisions of public authorities in New York.

If a public authority were to be selected to run the Exchanges, it should be able to quickly react to changing market conditions and would still be subject to regulation, Open Meetings Law, Freedom of Information Law, and the State Administrative Procedure Act. Public authorities are also generally financially independent from state government agencies and are not subject to the same budget constraints that tend to broadly impact state agencies.

### ***State Agency***

Embedding the exchange function in a State agency will have some support and for good reason. Consumer protection groups may be most comfortable with a regulatory agency overseeing operations of the Exchanges. Accountability should be high. There are talented and dedicated staff among the various agencies that are committed to good government practices. We

nevertheless urge a public authority model at this time. HANYS worries that due to the current economic climate, the ongoing budget pressures, Exchanges embedded in a State agency may struggle to hire, train, and retain the quality of staff that will be necessary to operate the Exchanges. Some commentators have noted that state hiring processes are generally subject to civil service laws and regulations which can limit the pool of prospective employees, restrict management flexibility, and increase the time needed to staff the Exchanges. In California, the exchange legislation apparently exempts the Exchange from civil service hiring requirements. Should New York opt for an agency governance model, it may be too difficult to quickly and adequately staff the Exchanges to keep up with what will be a complex and demanding mission.

State agencies may also struggle to keep pace with fluid market conditions. Contract approval processes, procurement rules, the ability to hire vendors and consultants, and the need to react to modified federal regulations likely to arrive require a nimbleness that even the best run of state agencies will struggle with.

### ***Nonprofit organization***

From the many discussions HANYS has been party to, there appears to be virtual consensus that a nonprofit organization would be the least ideal choice for governing the New York's Exchanges. Should the nonprofit organization model be selected, the State would be delegating to the nonprofit entity decisions regarding: determination of subsidies based on income, exemption of certain consumers from the individual mandate, assessment of penalties on individuals that fail to purchase creditable coverage, and imposition of taxes on businesses whose employees purchase coverage through the AHBE rather than selecting employer-

sponsored coverage. Clearly, the nonprofit will have sensitive information, like financial records, to make these decisions. Consumers groups appear to be less trusting of nonpublic and nongovernmental entities having access to such information because they are perceived as having less accountability. It has seemed clear from the many stakeholder discussions in which HANYS has participated that a number of key stakeholders organizations do not believe that a nonprofit will be strong enough or forceful enough to regulate market behavior in the way they hope Exchanges will operate.

### **Purchaser Model**

HANYS appreciates being afforded the opportunity to participate in the discussions on, and comment upon, policy decisions related to structure, purchasing role, benefits design, adverse selection, and organization of the market but we think these decisions need not be decided today. We believe that these decisions need to be considered in the context we raised above- that is- is New York prepared to pay for, design and operate a Massachusetts Connector-like model, even if there is a significant modification to ACA provisions pertaining to the Exchanges or individual mandate to purchase creditable coverage?

We think that the next decision to be made once enabling legislation has been enacted and a governance model has been selected is the purchasing role of the Exchanges. HANYS therefore offers a preliminary view on the purchasing role of the Exchanges and so far believes the selective contractor model may be best suited for our market because it may strike a balance between protecting consumers while promoting competition among health plans. A selective contractor would establish minimum standards that health plans would have to meet to sell

policies on the Exchange, but would not limit the number of health plans that may be offered on the Exchanges for any other reason. Selective contractors are perceived to be consumer oriented and have the greatest potential to achieve ACA's goal of providing access to affordable, high quality coverage through competition.

The other basic options are the clearinghouse model and active purchaser model. Some believe that clearinghouses strongly favor insurers while active purchasers contain the strongest consumer protections but can suppress competition. Clearinghouse models, like the Utah Health Exchange, allow any interested insurer to sell health insurance policies on the Exchanges. This model does not set additional standards for health plans other than what is required for plans to be qualified to sell policies on the Exchanges. On the other hand, the active purchaser would negotiate directly with insurers and only allow those plans that offer policies of the highest value to consumers on the Exchanges. However, this model has the potential to limit the number of plans offered on the Exchanges.

We would be pleased to provide our detailed recommendations on purchaser models, benefits design, adverse selection, and organization of the market in the future and again thank the Administration for this chance to comment on insurance exchanges.

### **HANYS Position**

- New York must decide if it is creating Health Insurance Exchanges.
- If so, New York must secure legislation establishing Exchanges and the governance structure.

- HANYS supports a public authority as the governance structure for the Exchanges.
- HANYS preliminarily believes a selective contractor should be the purchasing model for New York's Exchanges.
- All other policy determinations should be viewed through the lens of whether New York is committed to robust Exchanges regardless of what happens in Washington and should be considered after basic legislation is passed.