

**GOVERNOR'S PROGRAM BILL**

2011

**MEMORANDUM**

AN ACT to amend the public authorities law and the public officers law, in relation to the establishment of the New York Health Benefit Exchange

**Purpose of Bill:**

This bill would establish the New York Health Benefit Exchange ("Exchange"), a public benefit corporation that will serve as a marketplace for the purchase and sale of qualified health plans in the State of New York.

**Summary of Provisions:**

Section 1 of the bill would provide that the bill, upon enactment, would be known as the "New York Health Benefit Exchange Act."

Section 2 of the bill would add new Public Authorities Law ("PAL") Article 10-E to establish the Exchange as a public benefit corporation.

New PAL § 3980 would set forth a statement of policy and purposes.

New PAL § 3981 would define certain key terms.

New PAL § 3982 would establish the Exchange as a public benefit corporation to be managed by a Board of Directors ("Board"). The Board would consist of seven directors, including three *ex officio* members: the Superintendent of Insurance (effective October 3, 2011, the Superintendent of Financial Services), the Commissioner of Health; and the State Medicaid Director. Four additional directors, who would be required to meet the qualifications specified in the bill, would be appointed by the Governor, one on the recommendation of the Temporary President of the Senate and one on the recommendation of the Speaker of the Assembly.

New PAL § 3983 would set forth the general corporate powers of the Exchange, including the power to sue and be sued, enter into contracts, make by-laws, and promulgate rules and regulations to carry out its corporate purposes.

New PAL § 3984 would set forth the functions of the Exchange, including:

- making qualified health plans, including certain qualified dental plans, available to qualified individuals and qualified employers beginning on or before January 1, 2014 [new PAL § 3984(1)];
- assigning ratings to qualified health plans offered through the Exchange in accordance with federal criteria [new PAL § 3984(2)];
- utilizing a standardized format for presenting health benefit options in the Exchange [new PAL § 3984(3)];
- if the Board deems it appropriate, standardizing the benefits available at each level of coverage specified in ACA § 1302(d) [new PAL § 3984(4)];
- establishing enrollment periods consistent with the Insurance Law, unless the Insurance Law conflicts with the ACA and guidance promulgated thereunder [new PAL § 3984(5)];
- implementing procedures for the certification, recertification and decertification of health plans as qualified health plans, consistent with guidelines issued pursuant to ACA § 1311(c), as further detailed in new PAL § 3985 [new PAL § 3984(6)];
- if deemed appropriate by the Board, selectively contracting for health care coverage offered to qualified individuals and qualified employers through the Exchange, and in doing so shall seek to contract with insurers so as to provide health care coverage choices that offer the optimal combination of choice, value, quality, and service [new PAL § 3984(7)];
- determining the minimum requirements an insurer shall meet to be considered for participation in the Exchange and the standards and criteria for selecting qualified health plans to be offered through the Exchange, in addition to those set forth in new PAL § 3985 [new PAL § 3984(8)];
- requiring that qualified health plans offer the “essential benefits” that will be defined by the Secretary pursuant to ACA § 1302(b) [new PAL § 3984(9)];
- ensuring that insurers offering health plans through the exchange do not charge an individual a fee or penalty for termination of coverage [new PAL § 3984(10)];
- providing for the operation of a toll-free telephone hotline to respond to requests for assistance [new PAL § 3984(11)];
- maintaining an Internet website through which enrollees and prospective enrollees of qualified health plans may obtain standardized comparative information on such plans [new PAL § 3984(12)];

- making available by electronic means a calculator to allow individuals to determine the actual cost of coverage after application of any available premium tax credits under Internal Revenue Code (“IRC”) § 36B and cost-sharing reductions under ACA § 1402 [new PAL § 3984(13)];
- establishing a program under which the Exchange awards grants to entities to serve as navigators under ACA § 1311(i) and associated regulations [new PAL § 3984(14)];
- informing individuals of eligibility requirements for the State’s public health insurance programs (*e.g.*, Medicaid, Child Health Plus, Family Health Plus, and Healthy NY) and, if eligible, enrolling them in such programs [new PAL § 3984(15)];
- granting certifications attesting that, for purposes of the individual responsibility penalty under IRC § 5000A, an individual is exempt from the individual responsibility requirement or from the penalty pursuant to ACA § 1411 [new PAL § 3984(16)];
- transmitting to the Secretary of the Treasury information about certification granted to individuals and employees about individuals who have notified the Exchange that they have changed employers, and about individuals who ceased coverage under a qualified health plan [new PAL § 3984(17)];
- providing each employer with the name of each employee of the employer who ceased coverage under a qualified health plan, and who was determined eligible for a premium tax credit because the employer did not offer minimum essential coverage, or because the coverage was either unaffordable or did not provide the required minimum actuarial value pursuant to federal law [new PAL § 3984(18)];
- operating a Small Business Health Options Program (“SHOP”) pursuant to ACA § 1311, through which qualified employers will be able to access coverage for their employees [new PAL § 3984(19)];
- entering into agreements with federal and state agencies and other state exchanges to carry out its responsibilities, provided that such agreements include adequate protections with respect to the confidentiality of the information to be shared and comply with all state and federal laws and regulations [new PAL § 3984(20)];
- performing duties required by the secretary or the secretary of the United States department of treasury related to determining eligibility for premium tax credits, reduced cost-sharing, or individual responsibility requirement exemptions [new PAL § 3984(21)];
- meeting certain financial integrity requirements under ACA § 1313 [new PAL § 3984(22)];

- consulting with the Advisory Committee created under the bill and with relevant stakeholders, including educated health care consumers who are enrollees in qualified health plans; individuals and entities with experience in facilitating enrollment in qualified health plans; representatives of small businesses and self-employed individuals; the state Medicaid program; advocates for enrolling hard to reach populations; health care providers; and insurers [new PAL § 3984(23)];
- submitting information provided by Exchange applicants for verification in accordance with the requirements of ACA § 1411(c) [new PAL § 3984(24)]; and
- establishing rules and regulations as set forth in new PAL § 3983(8), as deemed appropriate by the board, that shall not conflict with or prevent the application of regulations promulgated by the secretary [new PAL § 3984(25)]; and
- determining eligibility, providing notices, and providing opportunities for appeal and redetermination in accordance with the requirements of ACA §§ 1411 and 1413 [new PAL § 3984(26)].

New PAL § 3985 would describe the Exchange's obligations with regard to the certification of health plans and the oversight of qualified health plans.

New PAL § 3986 would establish an Advisory Committee, which will be representative of the interests of health care consumers, small business, the medical community and insurers. The Advisory Committee will provide advice to the Exchange, which will reflect findings about regional variations regarding the availability of health insurance coverage and other issues deemed necessary by the Committee and the Board.

New PAL § 3987 would provide that the Exchange will be financially self-sufficient by January 1, 2015, and that the Exchange will study and make recommendations for achieving such self-sufficiency as set forth in new PAL § 3988(4). In addition, as required by federal law, PAL § 3987 would require the Exchange to publish on its website information about its administrative costs. The section would also prohibit transfers of funding from the Exchange to the General Fund or, absent an appropriation, from the General Fund to the Exchange.

New PAL § 3988 would provide that the Exchange will study or cause to be studied certain matters related to its future operations, and will report its findings and recommendations to the Governor, the Temporary President of the Senate and the Speaker of the Assembly. In particular, the Exchange would:

- on or before July 1, 2012, compare the "essential benefits" identified by the Secretary to the benefits mandated by State law and recommend whether any or all of such State-mandated benefits should be offered through the Exchange at State expense [new PAL § 3988(1)];
- on or before July 1, 2012, consider issues such as whether insurers participating in the Exchange must offer all health plans sold in the Exchange to individuals

outside of the Exchange; how to develop and implement the transitional reinsurance program required under the ACA; whether to merge the individual and small group health insurance markets for rating purposes; and whether to increase the size of small employers from not more than 50 employees to not more than an average of 100 employees prior to January 1, 2016 [new PAL § 3988(2)];

- on or before July 1, 2012, make recommendations regarding the “basic health plan program” [new PAL § 3988(3)];
- on or before July 1, 2012, make recommendations regarding the funding and self-sufficiency of the Exchange [new PAL § 3988(4)];
- on or before July 1, 2012, make recommendations regarding benchmark benefits [new PAL § 3988(5)];
- on or before July 1, 2012, make recommendations upon the impact of the Exchange on the Healthy NY and Family Health Plus employer partnership programs [new PAL § 3988(6)];
- on or before July 1, 2012, make recommendations on the of role licensed health insurance agents and brokers in the Exchange [new PAL § 3988(7)];
- on or before July 1, 2012, make recommendations upon whether and to what extent health savings accounts should be offered through the Exchange [new PAL § 3988(8)]; and
- on or before December 1, 2016, recommend whether to allow large employers to participate in the Exchange beginning January 1, 2017 [new PAL § 3988(9)].

New PAL § 3989 would provide that the Exchange would be exempt from state taxation.

New PAL § 3990 would authorize the Board to appoint employees to serve as senior managerial staff, who would be exempt from the civil service system; all other employees would be subject to civil service.

New PAL § 3991 would make Public Officers Law (“POL”) §§ 17 and 19, regarding representation by the Attorney General and indemnification for damages, applicable to directors, officers and employees of the Exchange.

New PAL § 3392 would set forth language making the operation of new PAL Article 10-E contingent on sufficient federal financial support to establish and implement the Exchange.

New PAL § 3393 would provide that nothing in new PAL Article 10-E, and no action taken by the Exchange, shall be construed to preempt or supersede the authority of the Commissioner or the Superintendent or to exempt insurers, insurance producers or qualified

health plans from the Insurance Law, the Public Health Law or the regulations promulgated thereunder.

Section 3 of the bill would add new POL § 17(1)(x) to include employees of the Exchange in the list of state employees entitled to representation by the Attorney General in civil litigation.

Section 4 of the bill would add new POL § 19(1)(j) to include employees of the Exchange in the list of state employees entitled to indemnification of damages awarded in a judgment or settlement.

Section 5 of the bill would provide for severability of the bill in the event any part of it is deemed unenforceable.

Section 6 of the bill would provide that the bill would take effect immediately, and clarifies that that the Department of Health or the Insurance Department would be authorized to continue administering federal grants already received.

**Existing Law:**

The Patient Protection and Affordable Care Act, Pub. L. 111-148, and the Health Care and Education Reconciliation Act, Pub. L. 111-152, collectively referred to as the "Affordable Care Act" ("ACA") requires each state to either establish a state "American Health Benefits Exchange" ("Exchange") or participate in a regional Exchange, through which individuals and small groups will be able to purchase health insurance in the form of a qualified health benefits plan. If the state does neither, its residents will be required to participate in a federal Health Benefits Exchange.

**Statement in Support:**

New York State has long been a leader in promoting access to comprehensive health insurance coverage. The commitment to the health of the people of the State, and its ongoing efforts to implement reforms that promote the availability of affordable, quality care are consistent with the goals of the Affordable Care Act: to reduce the number of uninsured persons, provide a transparent and centralized marketplace for insurance coverage, educate consumers and small businesses about their options, and assist individuals and employees with access to programs, premium assistance tax credits and cost-sharing reductions. To achieve those objectives, the ACA includes provisions that, among other things, expand eligibility for public insurance programs, transform the health insurance system through the use of Exchanges and other market reforms, encourage quality and efficiency in the delivery of health care services, and develop programs that emphasize preventive care.

The ACA requires that each State demonstrate to the federal government the ability to operate an American Health Benefit Exchange or the federal government will operate an Exchange for the State. For a number of reasons, it is critical that New York is able to design its own Exchange. First, the State is best positioned to understand the complicated issues and far-

reaching policy ramifications of establishing and operating a new Exchange within the existing commercial insurance market within the Exchange and the market outside the Exchange. Such consideration must encompass matters such as the ability of insurers to compete fairly and the ability of consumers to access affordable, quality care, and would be needlessly complicated if the market within the Exchange is regulated by the federal government while the market outside the Exchange is regulated by the State.

Second, the federal government simply will not be equipped to understand and give appropriate consideration to the unique regional and economic needs of New York's individual and small business health insurance markets and the diversity of New York's population, with its ethnic, cultural and language differences. Third, operation of the Exchange by the State is the most certain way to ensure that consumers continue to enjoy the important protections currently embodied in state law, such as the assurance that older adults are not charged higher premiums on account of their age.

Fourth, the ACA requires the Exchange to evaluate an individual's eligibility for Medicaid and other public health coverage and enroll them if eligible. This means that it will be critical to coordinate the operations of the Exchange with the State's administration of these programs, which will achieve efficiencies and economies of scale and help reduce Medicaid spending by the State and local governments. From the county perspective, such spending represents a large percentage of local budgets and accounts for a significant portion of property taxes; accordingly, any efficiencies resulting from the State's operation of the Exchange would inure to the benefit of local taxpayers.

For these reasons, it is essential that the State enact legislation establishing an Exchange, and that such legislation conform to the requirements of the ACA. Moreover, if such legislation is not enacted in timely fashion, the State risks losing the opportunity to apply for significant federal funding to establish the Exchange.

The purpose of this legislation is to establish a single Exchange in New York – a centralized, customer-service oriented marketplace where individuals and small groups will be able to purchase qualified health plans, receive eligibility and subsidy determinations, and be enrolled in a range of coverage options, including public health coverage programs – operated by a governmental entity with the flexibility to meet the ambitious deadlines set by the ACA. A state that chooses to operate its own Exchange must demonstrate to the United States Department of Health and Human Services (“HHS”) by January 1, 2013 that such Exchange will be operational by January 1, 2014. Each Exchange must begin accepting applications by July 1, 2013, and must be operational by January 1, 2014.

The Exchange will be established as a public benefit corporation managed by a Board of Directors. Four of the seven members of the Board will have expertise in relevant areas, including individual health care coverage, small employer health care coverage, health benefits administration, health care finance, public or private health care delivery systems, and purchasing health plan coverage. The three remaining members of the Board *ex officio* members of the Board will be the Superintendent, the Commissioner and the State Medicaid Director.

The Board will consult with an Advisory Committee, comprised of 18 representatives of stakeholders and sectors that will be impacted by the operation of the Exchange, including health care consumers, small businesses, the medical community and health plans. The Committee's advice to the Board will reflect findings about regional variations regarding the availability of health insurance coverage and other issues deemed necessary by the Committee and the Board.

The Exchange will make available qualified health plans, including certain qualified dental plans, to qualified individuals and employers beginning on or before January 1, 2014 (to take effect no earlier than such date). Under this legislation, the Exchange will establish the minimum requirements an insurer shall meet to be considered for participation in the Exchange and will implement procedures for the certification, recertification and decertification of health plans as qualified health plans. The Exchange will also assign ratings to qualified health plans offered through the Exchange on the basis of relative quality and price, in accordance with the ACA.

The bill also provides certain protections meant to assist individuals in using the Exchange. For example, the bill provides that the Exchange will operate a toll-free telephone line to assist consumers and an Internet website containing standardized comparative information on qualified health plans. The website will also feature a calculator allowing individuals to determine the actual cost of coverage. The bill also requires the Exchange to establish a program to award grants to entities to serve as "navigators" to help educate consumers and facilitate enrollment.

In addition, the Exchange will include a Small Business Health Options Program ("SHOP"), which will assist small employers in facilitating the enrollment of their employees in qualified health plans offered in the group market. Until January 1, 2016, a "small employer" is defined as an employer with an average of less than 50 employees. On January 1, 2016, the term will apply to employers with an average of up to 100 employees. Under this bill, and as permitted under federal law, the Exchange will consider whether to expand the definition before 2016.

If deemed appropriate by the Board, the Exchange will selectively contract for health care coverage offered to qualified individuals and qualified employers through the Exchange. In such case, the Exchange will leverage the combined purchasing power of individuals and small businesses to offer qualified health plans that offer the optimal combination of choice, value, quality, and service. Additionally, if the Board deems it appropriate, the Exchange will standardize the benefits available through the Exchange at each level of coverage. These measures would streamline consumer choice, promoting informed decision making, transparency and, ultimately, lower prices.

The ACA imposes a number of requirements regarding financial integrity, which are reflected in the bill. In addition, because the bill creates a new article within the Public Authorities Law, various provisions of law do not expressly appear in the bill but will apply to the operations of the Exchange, such as conflict of interest protections or quorum requirements for Board meetings. The Exchange will also be subject the Freedom of Information Law and Board meetings will be subject to the Open Meetings Law, promoting transparency.



The participation of the *ex officio* directors on the Board is critical to the success of the Exchange. The nature of the Exchange and the need to integrate its functions with the regulation of the insurance markets necessitates the close involvement of the Superintendent. The engagement of the Commissioner of Health and the State Medicaid Director is important, largely because the Exchange must work seamlessly with Medicaid, Child Health Plus (“CHP”) and other public coverage programs, supported by a new, ACA compliant integrated eligibility and enrollment system. As required by the ACA, the Exchange will screen individuals to see if they are eligible for Medicaid or other public coverage programs and, if they are eligible, enroll them in such programs.

As many as one million additional people are expected to enroll in Medicaid or CHP as a result of the individual mandate, and one million people are expected to enroll in the Exchange, of whom approximately 75 percent will qualify for subsidies. It is expected that large numbers of people will transition back and forth between private health insurance and public health insurance programs as their job statuses and incomes change, making it particularly important to properly integrate the Exchange with public health insurance programs, including Medicaid, CHP and, if established, the “Basic Health Program.”

In addition to the foregoing, this legislation also recognizes that there are additional decisions that need to be made and implemented by certain dates, many of which will require the introduction and enactment of additional legislation, and the bill establishes a framework for such decisions to be made. Specifically, the bill requires the Exchange to conduct a study, or arrange for a study to be conducted, on several of these discussion points, and mandates that the Board submit a report of its findings and recommendations on each such issue to the Governor and the leaders of the Legislature by specified dates. As to certain matters, no study is necessary and the Exchange is charged only with making recommendations.

The areas for study and review include: (1) the “essential benefits” that will be identified by the Secretary in comparison to the benefits mandated by current State law; (2) changes in the insurance market, such as whether insurers participating in the Exchange must offer all health plans sold in the Exchange to individuals outside of the Exchange, how to implement the transitional reinsurance program, whether to merge the individual and small group health insurance markets for rating purposes, and whether to increase the size of small employers from not more than an average of 50 employees to not more than an average of 100 employees prior to 2016; (3) the “basic health plan program;” (4) the funding of the Exchange; (5) the benchmark benefits; and (6) whether to allow large employers to participate in the Exchange beginning January 1, 2017.

#### **Budget Implications:**

Enactment of this bill will not have any fiscal implications during the upcoming fiscal years. While the ACA requires each Exchange to be “self-sustaining” by January 1, 2015, federal funds will support the planning, implementation and operation of the Exchange through December 2014. New York has already been selected to receive funding under an Early Innovator Grant (\$27 million) and an Exchange Planning Grant (\$1 million), which will help the

state design and implement the necessary information technology ("IT") infrastructure needed to operate its Exchange.

In June, DOH expects to apply for a Level 1 Establishment Grant, which makes a year's worth of funding available to states that have made some progress under their Exchange Planning Grant. Level 2 Establishment Grants will provide funding through December 31, 2014 to applicants that are further along in the establishment of an Exchange, and are dependent on having a governance structure and the legal authority to operate the Exchange. With the enactment of this legislation, assuming other applicable criteria are met, New York will qualify to apply for such grant.

**Effective Date:**

This bill would take effect immediately.