



# The Patient Protection and Affordable Care Act (ACA) – Implications for State Procurement Officials

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## Executive Summary

The Patient Protection and Affordable Care Act could transform state governments' role in the provision of health care. Health benefit exchanges, a critical component of the Act, are being developed in many states and on an accelerated timeline.

This whitepaper examines the role of health benefit exchanges, options for states in creating them, and the implications for state procurement officials and activities. Recommendations for states, such as the evaluation of alternative governance models and procurement laws, leveraging procurement officials, value-added capabilities, and staff training needs, will help state procurement officials play an important role in the creation and implementation of state health exchanges.

But in order for procurement officials to play a role, they need to become involved in the health benefit exchange process immediately. As the whitepaper concludes:

Readiness for an exchange must be demonstrated by January 1, 2013, and states in the lead (like Indiana) translate that deadline into the need for development and testing in 2012. Even more urgency is required if states expect to save money by scaling solutions through cooperative procurement. State procurement officials need to be engaged now.

## Introduction

The Patient Protection and Affordable Care Act (ACA) was signed into law on March 23, 2010.<sup>1</sup> The ambitious (and controversial) legislation focuses on reforming the private insurance market, improving the financial viability of Medicare, expanding Medicare drug coverage, and providing better medical coverage for those with pre-existing medical conditions.<sup>2</sup>

One of the chief components of the healthcare reform law is the creation of state health benefit exchanges.<sup>3</sup> The exchanges will have several functions for health care consumers.

The exchanges will be the place where consumers find out whether they are eligible for assistance in paying for insurance.<sup>4</sup> The exchange will also provide comprehensive information for determining what healthcare plans are available to them.<sup>5</sup>

The law states that “each State shall establish an American Health Benefit Exchange for the state by January 1, 2014 or the Federal government will provide an exchange for states that choose not to establish their own exchange.”<sup>6</sup> On January 1, 2013, HHS will be making a determination about the state’s readiness to implement the exchange, a deadline that has accelerated planning for development and testing effort into 2010. While federal regulations will define key elements of the ACA, each state will be able to design critical aspects of the operation and financing of its Exchange and will continue to make decisions about the regulation of its insurance markets.<sup>7</sup>

*The Patient Protection and Affordable Care Act (ACA) was signed into law on March 23, 2010*

This whitepaper will focus on the Health Benefit Exchanges and their implications for state procurement officials. While the final form of ACA remains in doubt (the individual mandate portion of the law has been the subject of numerous lawsuits<sup>8</sup>), many states have started down the legislative/regulatory path necessary to create their state Exchange. As each state examines important issues necessary to their Exchange, several important themes have been detected:

- The location of the Exchange within (or outside) of state government has implications for state procurement
- Aggressive federal deadlines for implementation of the many ACA policies and programs have created a perception that state procurement processes are not agile enough to meet schedule constraints
- Multistate exchange efforts will require early clarification of the role of co-operative procurement

<sup>1</sup> [www.govtrack.us](http://www.govtrack.us)

<sup>2</sup> <http://www.healthcare.gov/law/introduction/index.html>

<sup>3</sup> The Robert Wood Johnson Foundation. *Laying the Foundation for Health Reform*. February 2011.

<sup>4</sup> *Ibid.*

<sup>5</sup> Commonwealth of Pennsylvania. *The Commonwealth Health Care Reform Implementation Advisory Committee Final Report*. January 2011

<sup>6</sup> [dhhs.nv.gov/HealthCare/.../exchanges/ExchangeLanguageInTheACA-Sections1311-1324.pdf](http://dhhs.nv.gov/HealthCare/.../exchanges/ExchangeLanguageInTheACA-Sections1311-1324.pdf)

<sup>7</sup> National Academy of Social Insurance. *Designing an Exchange: A Toolkit for State Policymakers*. January 2011.

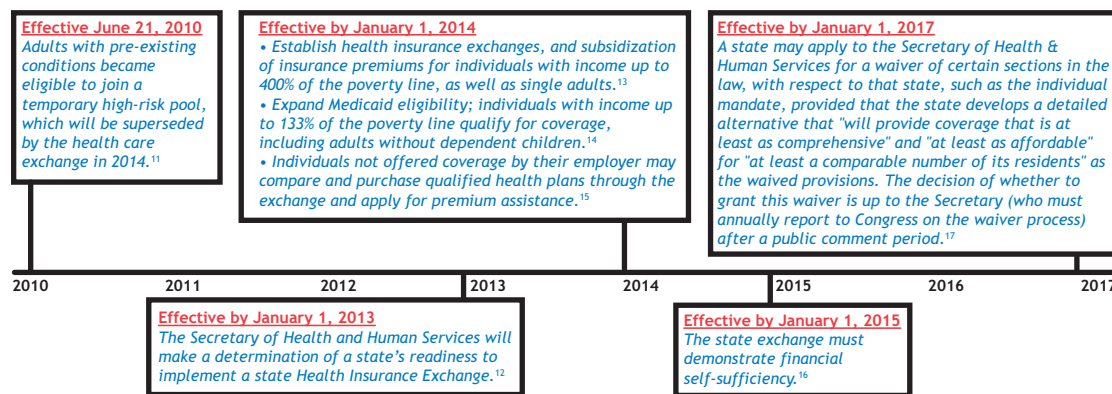
<sup>8</sup> <http://www.healthreformgps.org/resources/category/legal-challenges>

Each of these issues will be covered in more detail in this whitepaper. But first, this paper will examine the timeline for ACA implementation (with the caveat that timelines may change pending outcomes of various legal challenges).

## Current Timeline for ACA Implementation

As noted in the Introduction, states are required to have a functioning state Exchange (either state-run or federally-run) by January 1, 2014. At the time the ACA was signed into law, only a handful of states (Massachusetts, Utah and New York) had existing health benefit exchanges.<sup>9</sup> The timeline below shows the accelerated schedule states face in conceptualizing, developing, and implementing Health Benefit Exchanges:<sup>10</sup>

*States are required to have a functioning state Exchange (either state-run or federally-run) by January 1, 2014*



States also have the option of operating a single Exchange that serves the entire state, multiple Exchanges serving different geographic areas within the state, or a multi-state Exchange that serves two or more states.<sup>18</sup> The literature suggests that in the near term, it is not feasible for states to establish multi-state Exchanges due to differences in state insurance regulations. However, there may be opportunities to consolidate some Exchange functions across state lines in the coming years.<sup>19</sup> While policy differences may hinder regional approaches to risk and exchange management, there clearly are opportunities for states to explore and leverage cooperative procurement opportunities for supporting infrastructure.

*There may be opportunities to consolidate some Exchange functions across state lines in the coming years*

<sup>9</sup> www.healthpass.com

<sup>10</sup> This timeline is not a comprehensive listing of guideposts for ACA implementation; just those activities with impact on state exchanges and/or state procurement activities.

<sup>11</sup> <http://www.csmonitor.com/USA/Politics/2010/0324/Health-care-reform-bill-101-rules-for-preexisting-conditions>

<sup>12</sup> Commonwealth of Pennsylvania. *The Commonwealth Health Care Reform Implementation Advisory Committee Final Report*. January 2011.

<sup>13</sup> <http://www.csmonitor.com/USA/Politics/2010/0320/Health-care-reform-bill-101-Who-gets-subsidized-insurance>

<sup>14</sup> <http://www.kaiserhealthnews.org/Stories/2010/March/22/consumers-guide-health-reform.aspx>

<sup>15</sup> See footnote 12.

<sup>16</sup> Ibid.

<sup>17</sup> <http://www.healthreformgps.org/resources/waivers-for-state-innovation>

<sup>18</sup> Robert Wood Johnson Foundation: *Health Insurance Exchanges: Key Issues for State Implementation*. September 2010.

<sup>19</sup> Ibid.

## State Exchange vs. Federal Exchange

To Exchange or not to Exchange? That is indeed the question states must answer. States with small populations may wonder if the fixed costs of setting up an Exchange can be recouped if a limited number of health care consumers participate. In addition, some states may be skeptical about the value of an Exchange and prefer to let the federal government perform that task, especially in light of court challenges that may have a significant bearing on the final ACA outcome.<sup>20</sup>

One challenge for states that are debating whether or not they should attempt to operate an exchange is that they may need to make this decision without enough information to make a fully informed decision.<sup>21</sup>

As a study prepared by the Robert Wood Johnson Foundation notes,<sup>22</sup> "It is currently not known, for example, how exactly the federal fall-back option would operate. States do not know how the federal government would fund the ongoing operation of a federally-led exchange."

As of June 2011, only two states have indicated they are not creating their own state Exchange. Alaska and Minnesota did not apply for an initial planning grant, with each state citing their opposition to the federal legislation as the reason for their actions.<sup>23</sup>

State procurement officials likely will not be making the policy decisions regarding the model for the state exchange. One model is the market organizer or clearinghouse, making plan details and information available to potential consumers with functionality that permits comparison of plans. At the other extreme, like that used by CALPERS and other state departments of human resources, is the "active purchaser." An active purchaser model would use a bidding process, by applying restrictive certification and reporting requirements, and/or by negotiating with plans to identify and select high performers.<sup>24</sup> In between, a "selective contractor" model would set minimum standards that a plan would have to meet to be included in the exchange, but the exchange would not limit the number of health care plans that could be included on the exchange.<sup>25</sup>

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<sup>20</sup> Robert Wood Johnson Foundation. *Laying the Foundation for Health Reform*. February 2011, p. 5.6-5.7.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> <http://www.mnmed.org/News/NewsFullStory/tabid/2266/ArticleID/3787/CBModuleId/3/Default.aspx>

<sup>24</sup> State Health Access Data Assistance Center (SHADAC), *Health Insurance Exchanges* (October 2010).

<sup>25</sup> 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.

## Current State Activity

As of February 2011, 26 states and the District of Columbia had passed legislation to create workgroups, committees, or task forces to study the impact of ACA.<sup>26</sup>

The Commonwealth of Pennsylvania, for example, created a Health Care Reform Implementation Advisory Committee to study ACA and explore options for the Commonwealth moving forward. The advisory group was created by Executive Order by then-Governor Ed Rendell on June 20, 2010.<sup>27</sup> The Committee was charged with:

- Designing the optimal programmatic model for the Commonwealth’s High Risk Pool
- Designing the optimal organizational model to support a customer friendly and efficient health benefit exchange
- Identifying technology, organization and process improvements necessary to support the implementation of all state obligations under the Act
- Developing a strategic plan for the implementation of the Act
- Drafting legislation to enable full implementation of the Act<sup>28</sup>

The Committee examined various options for the Commonwealth to pursue in creating their exchange. In the analysis of the pros and cons for housing the exchange in a state agency, the report noted that “it would be potentially difficult for the exchange to be nimble in hiring and contracting practices, unless exceptions are made to the state’s personnel and procurement rules while ensuring accountability and transparency.”<sup>29</sup> Conversely, the Committee observed that a non-profit entity (outside of the state government apparatus) “would have flexibility in setting accountable and transparent hiring and procurement practices.”<sup>30</sup>

The State of New York, in the Second Quarter Exchange Planning Grant Report, examined barriers to the creation of a State Benefit Exchange. Again, state procurement requirements were scrutinized for their impact on Exchange creation. The New York project stated that “lengthy procurement requirements” may create barriers to exchange planning and development.<sup>31</sup>

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<sup>26</sup> Ibid.

<sup>27</sup> See footnote 12.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> State of New York. *Second Quarter Project Report*. April 20, 2011.

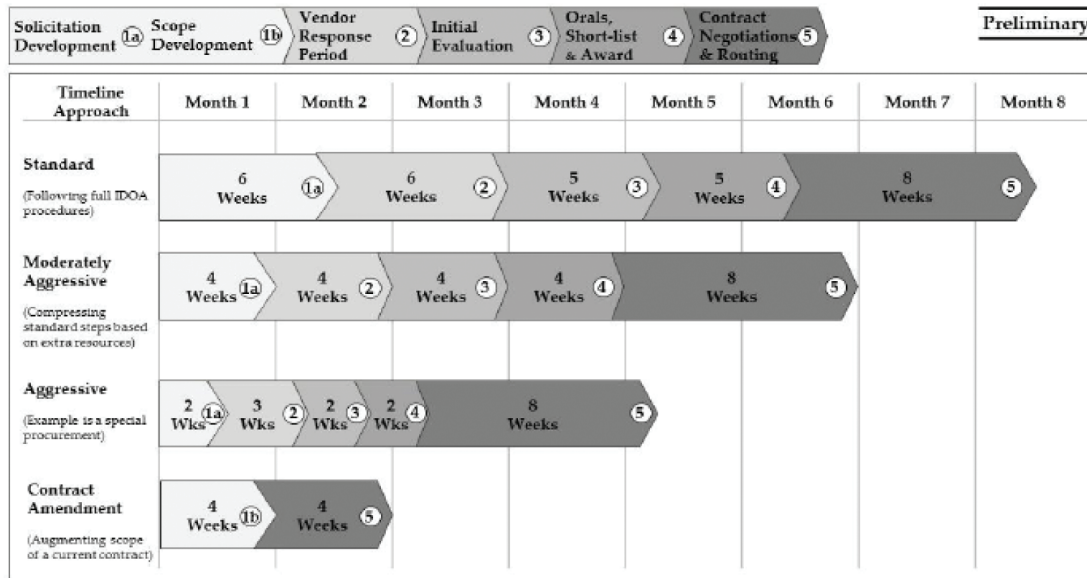
## Indiana: Planning a State Exchange

In late May 2011, Indiana, Rhode Island, and Washington were the first states to receive approval for Exchange Level One Establishment grants. This funding will allow states to begin to move from planning to building their Exchanges. The information below outlines the procurement deadlines facing Indiana and the special challenges ACA creates for state procurement:

The State will utilize a procurement team consisting of procurement specialist, Ikaso Consulting, and Ice Miller. This team will work collaboratively with the State's Department of Administration (DOA) and the HCR Team to conduct procurements and manage the financial aspects of the relationships with contractors. Procurements and contracts will need to be fast-tracked in order to comply with the ACA deadlines while also complying with all applicable state and federal procurement laws and regulations.

Ikaso will research market capabilities and make recommendations about the strategy and structure for procurement solicitation. This includes supporting strategic decisions to pursue contract amendments and new procurements, selecting the optimal vehicle for new procurements, including special procurement options, RFI or RFP, and supporting negotiation strategies to best steward funds for the Exchange. Ikaso will assist in the contracting process, including procurement development, procurement execution, and negotiations. Thereafter, Ikaso will ensure that vendors are held financially accountable for performance through appropriate use of deliverable-based payment, performance-based payment withholds, incentives, and other mechanisms.

The chart below lays out the average timelines for each procurement approach:<sup>32</sup>



Note: Steps 1 and 2 will require additional time for more complex solicitations  
 Steps 3 and 4 will require additional time for more complex solicitations or those with a large number of respondents

The “moderately aggressive” approach shaves nearly six weeks off of the standard procurement procedure. The most aggressive procurement timeline compresses the process nearly in half; the standard procurement procedure is 30 weeks vs. the 17 week aggressive timeline.

The most aggressive procurement timeline compresses the process nearly in half

## NAIC Model Legislation

As a result of these study groups, clear options have emerged to states regarding the structure and location of the Health Benefit Exchanges. In November 2010, the National Association of Insurance Commissioners (NAIC) developed the American Health Benefit Exchange Model Act. In Section 4 of the model Act, the drafting note outlines the pros and cons of the different locations of the state Exchange.

In outlining the benefits of locating the Exchange in a new or existing state agency, NAIC notes that “some possible advantages to having the Exchange within a State agency include having a direct link to the State administration and a more direct ability to coordinate with other key state agencies<sup>33</sup>...” On the negative side, NAIC lists a possible disadvantage as “...the possible difficulty for the Exchange to be nimble in hiring and contracting practices.”<sup>34</sup>

<sup>32</sup> State of Indiana. *Indiana Insurance Market Level One Funding Solicitation*. 2011.

<sup>33</sup> NAIC. *American Health Benefit Exchange Model Act*, draft 11/22/10.

<sup>34</sup> *Ibid*.

Other analyses agree with this conclusion. The Public Consulting Group<sup>35</sup> recommends that “states[...]establish a governing body that is separate and apart from state agencies to serve as the policy-making body for the Exchange. One of the reasons given for the recommendation is that “states will need to consider whether state procurement rules apply to the Exchange or whether the Exchange will be given greater latitude to procure goods and services[...].”<sup>36</sup>

## Implications of Different Governing Structures

What is particularly troubling about these recommendations is that most sources indicate that, from an oversight perspective, the Exchange would best be served located within the state government apparatus. NAIC observes that “Some possible advantages to having the Exchange within a State agency include having a direct link to the State administration and a more direct ability to coordinate with other key State agencies, such as the State Medicaid agency and the State insurance department.”<sup>37</sup>

Some states are experimenting with a regional Exchange approach

The NAIC also notes that having the Exchange established as an independent public agency might lead to “possible difficulty [...] to coordinate health care purchasing strategies and initiatives with key State agencies.”<sup>38</sup>

Some states are experimenting with a regional Exchange approach. While all of the New England states have receiving individual state planning grants from the federal government, they are also exploring the feasibility of a multistate approach.

On December 7, 2010, the New England States Consortium Systems Organization (NESCO) facilitated a meeting of stakeholders to discuss and identify opportunities for collaboration in New England related to the planning and development of health insurance exchanges.<sup>39</sup> NESCO identified “coordinating in the development of procurement activities” as a major opportunity for collaboration. The group noted two potential options for procurement collaboration:

- Collaboration around the development of RFP specifications and separate procurements; or
- Collaboration around the development of RFP specifications and a joint procurement.<sup>40</sup>

NESCO was awarded a \$35.6 million “Early Innovator” grant to create the New England States Collaborative Insurance Exchange System (NESCIES). NESCIES will also create and support a Health Information Exchange learning collaborative, led by a multi-state steering committee, where participating states can share lessons learned from developing their state based exchanges as well as participate in the development of cost-effective and reusable technology components, intellectual property, and best practices for implementing an insurance exchange.<sup>41</sup>

<sup>35</sup> See footnote #20,

<sup>36</sup> Ibid.

<sup>37</sup> See footnote #21.

<sup>38</sup> Ibid.

<sup>39</sup> NESCO. *Opportunities for Regional Collaboration on Health Insurance Exchange Planning: Results of Initial Meeting of New England States*. January 2011.

<sup>40</sup> Ibid.

<sup>41</sup> <http://nescies.org/index.htm>

## State Procurement vs. Federal Timelines

One of the chief concerns states have with the Exchange legislation is the accelerated schedule prescribed by the legislation. These deadlines have caused states stress in a couple of ways.

New York's Project Report described the manpower stress caused as a result of ACA, saying that between additional responsibilities placed on state agencies, a gubernatorial administration change, and fiscal concerns, "these efforts were completed through reliance on the already reduced State workforce, without additional staffing."<sup>42</sup> In addition, the state was unable to make full use of federal planning grants due to the length of the procurement process. These resources included the inability to hire dedicated staff and consultant support. The Project Report admits that "the processes set forth in New York State law to ensure the integrity of the State's procurement and hiring practices take time to complete. In quarter two, the demands and timelines for effective implementation of federal reform demanded action prior to the availability of resources."<sup>43</sup>

As noted in Indiana's Level One Funding Solicitation, the procurements associated with Exchange creation will have to be "fast tracked" or compressed in order to meet federal deadlines; but, as Indiana also notes, the acceleration of the procurement process is contingent upon having "extra resources" available to allow for a quicker process.

## Multistate Procurement for Individual Health Exchanges

Several states are examining the pros and cons of cooperative procurement opportunities even while running their state-specific Exchange. The state of Washington notes that "joint procurement of certain back-office administrative functions such as processing enrollment, providing customer service, and developing a website, may be possible to coordinate with other states. In addition, regional quality and/or payment reform demonstration projects, or grants, are also worth considering."<sup>44</sup>

## Recommendations for State Procurement Officials

This whitepaper has identified two special strategic challenges that will be discussed in more detail here. First, in many of the issue briefs, procurement has been linked to human resources/hiring as processes that may not accommodate the schedule constraints associated with ACA. These summaries ignore the obvious procurement goals of promoting transparency, quality, and equity in whatever governing process is used. Second, there are opportunities (and challenges) associated

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<sup>42</sup> See footnote #25.

<sup>43</sup> Ibid.

<sup>44</sup> Washington State Health Care Authority. *Issue Brief #2: Exchange Governance and Organizational Structure*. January 1, 2011.

with multi-state cooperative procurement of infrastructure, a collaboration that state procurement officials already have experience with. The central theme here is: whatever the governance structure, state procurement offices and their NASPO networks are specially situated to help states solve procurement challenges associated with health care exchanges.

### Strategic Procurement Considerations

#### *Evaluate Alternative Governance Models and Procurement Laws*

The National Association of Insurance Commissioners (NAIC) has drafted model state legislation that is aligned with the ACA. The model NAIC statute states, “Some possible advantages to establishing the Exchange as an independent public agency, or a quasi-governmental agency, include possible exemption from State personnel and procurement laws and more independence from existing State agencies, which could result in less of a possibility of the Exchange being politicized.”<sup>45</sup> A Maine study similarly concluded that a nonprofit structure for the health care exchange would be more “nimble” as regards procurement and hiring practices.<sup>46</sup> New York concluded that its procurement laws do not lend themselves to the federal deadlines.<sup>47</sup>

State procurement officials need to get to the table now regarding the discussion about governance structures. Curiously, while some of these papers combine personnel and procurement in the list of laws that might be avoided with a nonprofit organization or separate state authority, the papers do not address the advantages of having public procurement laws. These laws limit the effect of political influence, for example, identified by some analysis as a disadvantage of keeping the insurance exchanges in state agencies.

Procurement laws also have processes that promote equity,<sup>48</sup> no doubt a political concern among state leaders who are trying to encourage industry involvement in providing exchange solutions. Moreover, the procurement laws of most states in many ways mirror commercial practices, like the use of requests for proposals. Early efforts at research and planning for exchanges, even in states who have exempted the exchange from procurement laws, use processes almost identical to those that already exist in public procurement. So it is not clear what exactly exemption from procurement laws is intended to achieve. Early engagement by state procurement officials in the discussion of appropriate governance would highlight the value that tried-and-true procurement methods bring.

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<sup>45</sup> NAIC. American Health Benefit Exchange Model Act, draft 11/22/10, Section 4 Drafting Note.

<sup>46</sup> Amy Lischko, Tufts University School of Medicine. Health Care Reform: Exchange Options Discussion. September 2010, Slide No. 20

<sup>47</sup> New York State. *First Quarter Project Report: State Planning and Establishment Grants for the Affordable Care Act’s Exchanges*. January 31, 2011, p. 9.

<sup>48</sup> National Association of State Procurement Officials. *State & Local Government Procurement: A Practical Guide* (2008), p. 18.

Concern about staff capacity to support these procurements is a fair consideration. State procurement offices already have been challenged in their ability to meet demand given budget constraints driven by dire economic conditions. And as this paper demonstrates, procurement of exchanges will involve unique challenges. State procurement officials will have to determine whether they have the resources to meet the ambitious deadlines in the ACA. In Indiana for example, who apparently is following state procurement laws, augmentation of staff is being provided using consultants.<sup>49</sup>

*Leverage Procurement’s Value-Added Capabilities: Governance Model Agnosticism*

Even where a separate nonprofit organization or authority is established, or procurement of an insurance exchange is otherwise exempted from applicability from procurement laws, state procurement personnel still may add value. They have expertise in dealing with the issues that likely will arise and that are preliminarily outlined in this paper. The establishment of separate authorities or exemption of exchange procurements from procurement laws does not necessarily mean that state procurement offices have nothing to contribute. To the contrary, as this whitepaper illustrates, they do.

*Educate About Governance Model Effect on Cooperative Procurement*

Cooperation has two dimensions in this context. There apparently is basic skepticism about the ability of states’ insurance regulators to perform the necessary coordination needed to provide a regional exchange.

On the other hand, there may be opportunities to cooperate on procurement of infrastructure needed for exchanges. In its report, researchers in Maine acknowledge the possible of achieving economies of scale.<sup>50</sup>

State procurement officials have experience sourcing complex requirements. Colorado recently led a cooperative procurement by the Western States Contracting Alliance to source an e-procurement system that can be configured to meet all state requirements. In 2008, Ohio led the first ever cooperative procurement of algebra assessment tools for use by multiple states’ departments of education. The National Association of State Procurement Officials has the contractual mechanisms in place already to perform sophisticated cooperative procurements of this nature.<sup>51</sup> However, state procurement officials have to engage their programs early to determine feasibility and the availability of resources necessary to meet the ACA deadlines.

State procurement officials have experience sourcing complex requirements

<sup>49</sup> Indiana Insurance Market Inc. Indiana Insurance Market Level One Funding Solicitation: Project Narrative & IT Gap Analysis Summary (undated).

<sup>50</sup> Amy Lischko, Tufts University School of Medicine. *Health Care Reform: Exchange Options Discussion*. September 2010, Slide No. 16.

<sup>51</sup> National Association of State Procurement Officials. *State & Local Government Procurement: A Practical Guide* (2008), pp. 72-74

State procurement officials individually must assess their statutory authority to participate in cooperative procurements in this context. For example, the involvement of nonprofit, nongovernmental entities may limit this opportunity under some state laws. Most states have statutes authorizing cooperative procurements among public entities - even political subdivisions or authorities created by statute but separate from the state. However, there may be less alignment among states with respect to states' authority to cooperatively procure with nonprofit organizations other than governments. Moreover, it may be unrealistic to suspect nonprofit organizations to lead a procurement that will satisfy the cooperative procurement statutes of any state wanting to cooperate.

*Clarify the Exchange Model: Market Organizer, Selective Contractor, or Active Purchaser*

The exchange model will affect procurement professional strategy and resources.<sup>52</sup> A less ambitious market organizer approach will look like more traditional information technology procurements. E-procurement system procurements could be analogous to an exchange IT solution that aggregates insurance plans for consumer evaluation and selection.

A selective contractor model would be closer to multiple-award price agreements or indefinite delivery/indefinite quantity contracts currently maintained by the states. These contracts commonly involve some application of standards to determine which vendors are entitled to be listed. One notable difference: programs likely would have to develop and apply standards used for determining which insurance plans will be offered on the exchange. Procurement offices would assist in administration of the contracts, but the evaluative assessment to determine whether plan met minimum standards would involve expertise not present in procurement offices.

The type of exchange model will directly affect the resources required to source and administer the exchange contract

An active purchaser model<sup>53</sup> would make value decisions about which plans were meritorious in terms of cost, coverage and other service aspects, warranting inclusion on the exchange. For example, the Pennsylvania study identified one option: making only the highest rated quality plans available on the exchange.<sup>54</sup> The evaluation would be analogous to the best value evaluations conducted for other complex service procurements. This process would require significant program involvement to serve on evaluation committees, although procurement professionals have experience facilitating and guiding these kinds of evaluations.

The choice of the exchange model is a strategic decision, one that will be made outside of the procurement function. The type of exchange model will directly affect the resources required to source and administer the exchange contract.

<sup>52</sup> See, generally, National Academy of Social Insurance. *Designing an Exchange: A Toolkit for State Policymakers*. January 2011.

<sup>53</sup> See, e.g., California Health Benefit Exchange. *The Exchange as Active Purchaser*. Available at [http://www.californiahealthbenefitexchange.com/active\\_purchaser.htm](http://www.californiahealthbenefitexchange.com/active_purchaser.htm)

<sup>54</sup> Commonwealth of Pennsylvania. *The Commonwealth Health Care Reform Implementation Advisory Committee Final Report*. January 2011, p. 60.

## Market Research and Procurement Planning

The previous subsection covered topics considered strategic in the sense that their resolution affects resource decisions broadly. This subsection addresses more traditional procurement issues commonly encountered during market research and procurement planning.

### *Train Procurement Staff to Support Complex Procurements with IT Characteristics*

Indiana has described the insurance exchange as having the characteristics of information technology planning.<sup>55</sup> There are various other elements of the exchange, including a “Navigator” function that assists the additional individuals who now will have to make evaluative judgments regarding insurance plans. In terms of difficulty, these requirements will be more like Medicaid management and other complex service procurements. State procurement offices may have to train procurement professionals in supporting fast-tracked procurements where requirements are being managed by the program with a formal project management methodology. Close collaboration and consultations with the state Chief Information Officer (CIO) is essential for the success of these procurements.

State procurement offices may have to train procurement professionals in supporting fast-tracked procurements

### *The Use of Consultants: Define an Organizational Conflicts of Interest Policy*

Indiana is using consultants for procurement planning and solicitation development.<sup>56</sup> They are working collaboratively with the Department of Administration. New Mexico likewise is sourcing a “planning consultant” for its exchange.

Expect heavy use of consultants in this industry for these requirements. And be cautious. The federal *Common Rule* for the U.S. Department of Health and Human Services considers organizational conflicts of interest (OCI) to be restrictive of full and open competition.<sup>57</sup>

Organizational conflicts of interest exist where there may be unequal access to information or biased ground rules in connection with a procurement. An example would be a company’s assisting in solicitation development and then teaming with a prime contractor on proposal development in response to the solicitation. The Federal Acquisition Regulations and some states have formal organization conflicts of interest policies to preserve the integrity of the competitive process.<sup>58</sup>

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<sup>55</sup> Indiana Insurance Market Inc. Indiana Insurance Market Level One Funding Solicitation: Project Narrative & IT Gap Analysis Summary (undated).

<sup>56</sup> Ibid.

<sup>57</sup> 45 C.F.R. § 92.36(c)(1)(v).

<sup>58</sup> FAR Subpart 9.5, *Organizational and Consultant Conflicts of Interest*, 48 C.F.R. Subpart 9.5.

Sound policies generally define the constraints on these conflicts using clear definitions. The solicitations for consultant services inform competitors of subsequent limits on their ability to participate in solicitations. Moreover, the solicitations themselves inform offerors of the existence of organizational conflict of interest restrictions and may even inform offerors of the identity of companies who are restricted. OCI generally is addressed in the solicitation with proposal certifications and descriptions of potential conflicts situations. The agency then evaluates questionable relationships.

### *Expect Requests for Confidentiality during Market Research*

States differ in their approach to treatment of claims of confidential information by vendors. Indiana explicitly permitted some market research communications to be submitted subject to claims of confidentiality. Colorado did the same on its recent cooperative e-procurement solicitation.

Find a way to accommodate legitimate claims of confidentiality. The insurance exchange is innovative. Companies likely will not be forthcoming during market research with useable, rich data and information knowing that competitors have access to it. Coordinate with legal counsel early regarding approaches to permit submission of material with “confidential and proprietary” legends, the common way that trade secrets are marked and protected.

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Market research communications may require execution of nondisclosure agreements by participating personnel. Especially where consultants are used for market research and solicitation development, nondisclosure agreements must be carefully crafted with the assistance of counsel.

The special interest of technology companies in these innovative systems raises another issue related to governance. Consultants for Indiana expressed the opinion that no special authority was required in Indiana for nonprofit organizations to begin insurance exchange planning.<sup>59</sup> In Colorado, a nonprofit entity also started exchange planning while exchange authority legislation worked its way through the General Assembly. This melding of government and nonprofit organization operations may raise an issue regarding treatment of information.

One of the stated benefits of using a nonprofit organization as the governing body is the agility with not having to comply with many state statutes. If an exchange authority is created as an agency or subdivision of the state by statute, any records transferred by a nonprofit agency (that might have been performing preliminary

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<sup>59</sup> Indiana Insurance Market Inc. Indiana Insurance Market Level One Funding Solicitation: Project Narrative & IT Gap Analysis Summary (undated), p. 6.

planning activities) to the exchange authority - e.g. market research and procurement records – may be subject to open records laws. This issue is not unlike those faced by states who exchange procurement records during cooperative procurements led by one state for the entire consortium.

## Solicitation, Evaluation, and Award

The topics discussed next relate to solicitation, evaluation, and award of the contract. This discussion highlights those issues expected to be of particular relevance to insurance exchange procurements.

### *Train Staff on the Unique Privacy, Security, and Confidentiality Requirements*

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (HIPAA) imposed special requirements for protected health information (PHI). In some situations, where third parties may have access to PHI, business associate agreements must be executed. Health insurance exchange procurements, and the attendant other contracts needed to support the exchange, may require execution of business associate agreements.

Health care exchanges will involve access to highly personal data. Many states have data breach notification laws. Perhaps more than ever, liability allocation for data breach will be a key aspect of negotiations and contracts. Engage counsel early to frame the contours of liability allocation expectations in solicitations. As a minimum, contractors should be expected to provide any data breach notifications required under the statutes.

Operation of exchanges will require a unique collaboration among various business entities. Collaboration may involve exchange of data and information considered propriety. Expect to have to facilitate the execution of nondisclosure agreements among business partners who are operating the exchange.

Operation of exchanges will require a unique collaboration among various business entities

### *Understand the Implications of Schedule Constraints Imposed by the ACA*

Early in the solicitation planning process, critical path schedules must be identified. Exchanges are expected to be self-sustaining by 2015. HHS will be assessing states' readiness to implement the exchange by January 1, 2013. The State of Indiana plans to build and test the exchange during 2012, meaning an award during 2011 or early in 2012 is required. Indiana already is well on the way to consultant selection: other states may have to source the technical assistance necessary to develop the solicitation. State procurement officials with construction procurement and management responsibility will be especially well positioned for this kind of planning.

Indiana identifies three main streams in its planning and execution: policy, business operations, and IT systems. For a procurement office supporting exchange procurement, the resource challenge in meeting aggressive schedules is compounded by the effect of parallel planning and sourcing.

There is a two year period between the HHS assessment of readiness and the 2015 date that exchanges must be self sustaining. There is no way to know how much flexibility there is in the HHS and ACA schedule. Even Indiana's planned development and testing in 2012 may not be finished. However, Indiana's plans appear calculated to demonstrate the state's readiness and preclude the federal government's preempting the state's exchange effort with its own.

### *Prepare for Complex Data Migration and Integration Requirements*

Development of requirements will require familiarity with a host of new standards. And the standards are evolving. Exchange procurements will look like IT procurements in many respects, and they will involve sophisticated data migration and integration requirements. The health care standards are an additional overlay on the complexity.

Some states already have Single Benefit Eligibility Systems that provide integrated eligibility determinations for a variety of programs. Colorado's Combined Benefit Management System is one example, and that program has been plagued by its own set of implementation issues. Expect the insurance exchange requirements to include integration to such systems.

Also expect integration to any existing Medicaid Management Information and other similar systems. The fundamental idea of the exchange is to make eligibility determinations and enrollment easier, after adding a comparison feature that is new. The new exchange concept contemplates movement between Medicaid and subsidized insurance programs available on the exchange as consumers' financial conditions change. Moreover, the system contemplates some movement of consumers between subsidized insurance plans and affordable plans that also are available on the exchange. This prospect of "movement" will complicate the requirements definition phase.

Expect integration to any existing Medicaid Management Information and other similar systems

The other strategic decision that policy makers need to make is the relationship between the individual exchange and the Small Business Health Option program (SHOP).<sup>60</sup> Some states for now are keeping the two exchanges separate. The individual exchange is expected to factor in eligibility for federal tax credits (and apply them) at the time of eligibility determination and enrollment. SHOP enrollment of small business employees will involve a different process that ideally

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<sup>60</sup> See, generally, National Academy of Social Insurance. *Designing an Exchange: A Toolkit for State Policymakers*. January 2011.

would be integrated with business processes. In any event, an integration of the two exchange concepts would complicate the process of requirements definition.

### *Rethink Contract Term and the Scheduling of Reprocurement*

States that source statewide price agreements commonly procure a contract with a three to five year performance period, structured with options after the first year or two of performance. Given the number of stakeholders and the complexity of the exchange and its integration, the term for the exchange contract may have to be longer.

There are several factors that require revisiting contract terms in exchange procurements. First, the method of financing the exchanges will vary - and are just now being developed. Some tie-in to premiums, however, can be expected to finance infrastructure. Cost recovery for significant up-front capital investment takes longer. Follow-on procurements would require well thought out transition planning and a significant amount of time. Given an expected 1 year planning and procurement period on the reprocurement, contract terms may need to be longer. Ensure that state statutes do no inhibit use of longer contract terms.

Ensure that state statutes do no inhibit use of longer contract terms

Any of the exchange models may involve a departure from traditional sourcing scheduling. In normal supply and service price agreements, especially those cooperatively procured, states exert significant effort to make “best value” determinations and then establish a relationship with vendors. As a consequence, they usually revisit the relationship at the time of annual option renewals and made adjustments in pricing and services. But they don’t continuously reprocure. The exchange models may dictate otherwise and pose special resource challenges. More procurement resources would be required if the model employs “evergreen” applications and qualifications, permitting insurance plans to apply for exchange inclusion through the year rather than phasing sourcing decisions as is typically done now by procurement offices.

### *Be Prepared For Creative Financing Alternatives: The Challenge of Adverse Selection*

The means of financing exchanges still is being discussed. However, premiums likely will factor into financing the infrastructure. This whitepaper has already highlighted the probable requirement that the exchange would have to integrate available tax credits under ACA after the eligibility determination and at the time of enrollment. The solicitation will have to map out the range of alternatives for financing the exchange.

Some state procurement officials have had experience with creative financing in other contexts. Self-funded e-procurement systems in the early 2000s required re-examination of pricing and the concept of redetermination/renegotiation if transaction volumes were not achieved as expected. Energy performance contracting uses savings as a financing mechanism for sizeable capital improvements.

Health insurance exchanges will have scale more programs to integrate, adding more complexity. The risk pools served by consumers buying from the exchange may be different from that of other health insurance providers. *Adverse selection* is the term used to describe a situation where only the high risk consumers buy from the exchange, driving inordinate health care costs to companies offering insurance on the exchange.<sup>61</sup> The contours of financing of the exchange that integrates health insurance costs, premiums, federal tax credits, and transaction volumes will have to be defined in any solicitation.

### *Exchanges Will Require Advanced RFP Negotiation Practices*

This industry is evolving. Liability allocation, security and privacy, and intellectual property issues in contracts will be particularly difficult. Considerable give-and-take during procurement and contract negotiations will be required. It is unlikely that a set of terms and conditions can be published in a solicitation with the expectation that they will not have to be negotiated and tailored to the specific solution being proposed.

States hoping to foster broad-based competition will need an RFP process that accommodates complexity

States hoping to foster broad-based competition will need an RFP process that accommodates complexity. These are a few of the more progressive practices in RFPs that may be required:

- While exceptions to a state's terms and conditions may be discouraged -- some may be constrained legally - permit vendors to take exceptions and proposed alternatives. Factor those alternatives and exceptions into the evaluation.
- Use a competitive range process to identify those offerors most likely to be selected for award, avoiding needless expenditure of effort by companies whose selection is unlikely.
- Permit not only clarifications but also substantive discussions with offerors, where the weaknesses and strengths of proposals can be addressed. Consider holding discussions in connection with oral presentations by offerors in the competitive range. Achieve equity by keeping the scope of discussions substantially the same for vendors.

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<sup>61</sup> National Academy of Social Insurance. *Designing an Exchange: A Toolkit for State Policymakers*. January 2011, p. 15.

- Use best and final offerors to permit revisions to proposals. Permit offerors to make final technical revisions. Permit revisions to pricing/financing proposals.
- Use a practical approach to post-award formalization of contracts that recognizes that some final revisions to contract language have to be permitted, so long as the revisions do not materially prejudice other offerors from the perspective of impact on the final evaluation.

## Special Issues in Contracting

This part of the paper focuses on issues that commonly arise during contract performance. Handling change contractually is critical. Of course, all of these issues must be addressed early during procurement planning and solicitation development.

### *Adapt Changes Provisions to Deal with Legal Challenges and Changes to Law*

Some states have challenged the ACA on constitutional grounds. There could be a range of outcomes, from total to partial invalidation of the legislation. Most contracts contain “compliance with law” provisions. Consider using terms that contemplate the need for changes to accommodate either judicial or legislative revisions to the requirements.

These provisions should deal with contractor entitlement to adjustments in schedule, price or other financing structures to accommodate these changes. Inclusion of changes provisions in the model contract and solicitation should avoid claims that the entire contract must be resolicited. In some cases, changes might be so substantial that revisions of requirements and resolicitation might be warranted.

State procurement officials have been challenged before by complex governance structures. Approvals often take time. Find a way to establish expectations regarding the time for major milestone approvals by governing bodies. Permit equitable adjustment to schedules or financing terms if those expectations are substantially not met.

### *Align Intellectual Property Rights with Federal Grant Requirements*

In contracts federally funded by HHS, the *Common Rule* sets minimum intellectual property rights for copyrights. HHS reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes: (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.<sup>62</sup>

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<sup>62</sup> 45 C.F.R. § 92.34.

This reservation may not account for all aspects of intellectual property in any given solution, especially those involving multiple contractors. Further, the reservation may be insufficient to permit deployment between states, a special concern when states are cooperatively procuring infrastructure. Engage counsel early to ensure that state intellectual property terms and conditions meet federal requirements with respect to minimum rights in intellectual property and data delivered under the contract.

Engage counsel early to ensure that state intellectual property terms and conditions meet federal requirements with respect to minimum rights in intellectual property and data delivered under the contract

### *Deal Contractually With Adverse Selection and Other Unrealized Market/Risk Assumptions*

As has been mentioned, the risk pool characteristics for likely consumers may vary widely. Adverse selection may cause enrollment and loss experience to vary from industry assumptions. Where the system is funded in part with premiums - themselves set based on risk assumptions - there may have to be mechanisms for renegotiating premiums or other financing components. Current state procurement experience with repricing may be limited to periodic price adjustments for commodities based on wholesale price increases being charged to the vendors by their suppliers. And these often are limited to annual adjustments. These triggers and criteria for financing readjustments may have to be modified in exchanges.

From time to time, the federal government uses price redetermination clauses.<sup>63</sup> These types of clauses could be adapted for exchange contracts to define conditions under which financing/premium renegotiation could be triggered. Moreover, the clauses could include the factors that should be considered in the renegotiation.<sup>64</sup>

### *Expand State Confidentiality Provisions*

Typical confidentiality provisions in state contracts deal with the confidentiality of state records. Those traditional clauses may have to be modified to embrace protected health information and special requirements under HIPAA.

Moreover, the confidentiality provisions may have to be further expanded because of the number of companies that may be state partners in the delivery of the exchange. The exchange is in the best position to set expectations about sharing of information between companies that may be proprietary. NASA Federal Acquisition Regulation Supplements in particular have agreements facilitating sharing of proprietary information that may be models for exchange contracts with many different commercial stakeholders.<sup>65</sup>

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<sup>63</sup> See, e.g., FAR 16.205, 48 C.F.R. § 16.205.

<sup>64</sup> In 2000, the Colorado/Utah joint e-procurement system solicitation and contract included a fee renegotiation provision that permitted either party to request negotiation, required open book cost data disclosure by both parties, and identified factors that would be considered. The clause was accepted by industry, but never used, because the production option was not exercised by the states.

<sup>65</sup> NASA FAR Supplement 1852.237-72 and 73, *Access to Sensitive Information and Release of Sensitive Information*, 48 C.F.R. § 1852.237-72 and 48 C.F.R. § 1852.237-73.

### *Include Contract Transition Assistance Obligations*

The complexity of insurance exchanges will make contractor transition difficult. Failure to plan ahead for transition can prejudice subsequent attempts to use competition effectively.

The contract (and solicitation) should state expectations regarding the obligation of the incumbent contractor to assist in any subsequent contract transitions. The obligation should include such things as the time when the assistance obligation begins, how long it will last past the expiration of the current contract, the nature of any infrastructure or facility transfer, the expectations regarding transfer of data, and obligations regarding on-the-job assistance to insure continuity of operations.

No one thinks about transition until it is needed. Define the contractual transition obligations when the original contract is executed. That requires preplanning in the solicitation phase.

## Conclusions

For many states, the decision on governance already has been made. For those that have not yet selected a governance model, senior leadership should be made aware that the procurement system is designed to achieve:

- Efficiency and cost reduction through open competition
- Transparency; and
- Equity

Even if an insurance exchange is exempted from the procurement laws of the state, the public will still expect those objectives to be achieved. Public procurement professionals can help meet those objectives.

Even in states that have exempted the exchange from the procurement laws, public procurement's experience with the issues raised in this whitepaper makes them a valuable member of the exchange team. They can leverage their considerable experience using cooperative procurements to satisfy more-and-more complex service requirements, and their skills in sourcing and structuring contracts, to satisfy exchange objectives.

State procurement  
officials need to be  
engaged now

Time is running out, though. Readiness for an exchange must be demonstrated by January 1, 2013, and states in the lead (like Indiana) translate that deadline into the need for development and testing in 2012. Even more urgency is required if states expect to save money by scaling solutions through cooperative procurement. State procurement officials need to be engaged now.