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## MEMORANDUM

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**TO:** Honorable William Deal  
Director, Idaho Department of Insurance  
Chair, Health Insurance Exchange Working Group

**FROM:** Jack Rovner  
Kathryn Roe

**DATE:** October 9, 2012

**SUBJECT:** State-Established Nonprofit Entity as  
Idaho's State-Based Health Insurance Exchange

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### QUESTIONS PRESENTED AND ANSWERS

**Question:**

May a State elect to have a private nonprofit entity be its State-based health insurance exchange under the Patient Protection and Affordable Care Act (“PPACA”)?<sup>1</sup>

**Answer:**

Yes. PPACA permits a State to establish a private nonprofit entity to fulfill the functions of a State-based health insurance exchange.

**Question:**

How does the State establish a private nonprofit entity that meets federal standards for a State-based health insurance exchange?

**Answer:**

The State can establish such a private nonprofit entity in 3 steps:

- a.1.a.1. *Formation.* A State executive officer acting in official capacity, such as the Director of the Department of Insurance, incorporates a nonprofit entity under the State Nonprofit Corporation Act by filing articles of incorporation that meet the minimum standards for a State-based health insurance exchange set by the U.S. Department of Health and Human Services (“DHHS”) exchange regulations.
- a.1.a.2. *Designation.* An authorized State executive officer, such as the Governor, issues an order or the Legislature enacts a statute designating the nonprofit entity to DHHS as the State-based health insurance exchange.
- a.1.a.3. *Oversight.* A State agency oversees the State-based health insurance exchange, such as under the existing authority of the Department of Insurance over the business of insurance or of the Attorney General over nonprofit organizations.

**Question:**

Is there precedent in Idaho for State establishment and designation of a private nonprofit entity that meets federal standards for a healthcare initiative?

**Answer:**

Yes. Director Armstrong of the Idaho Department of Health and Welfare incorporated the Idaho Health Data Exchange under the Idaho Nonprofit Corporation Act in 2008 for the initiative originated by President George W. Bush in 2004 to encourage use of health information technology and development of a nationwide interoperable technology infrastructure for health information exchange. In 2009, Governor Otter designated the Idaho Health Data Exchange to DHHS as meeting federal standards for grants under that healthcare initiative.

**DISCUSSION**

**1. State Established and Designated Nonprofit Health Insurance Exchange**

PPACA mandates that each State have a health insurance exchange operating by January 1, 2014 that “facilitates the purchase of qualified health plans,” “provides for the establishment of a Small Business Health Options Program” or “SHOP,” and meets minimum standards for exchange operations set by the DHHS exchange regulations.<sup>2</sup> The federal government will operate each of these exchanges except in a State that demonstrates to DHHS by January 1, 2013 that the State will have a State-based exchange that meets the DHHS minimum standards operational by January 1, 2014.<sup>3</sup>

A basic requirement of a State-based exchange is that it be “a governmental agency or nonprofit entity that is established by a State.”<sup>4</sup> The nonprofit entity option enables a State to establish a private market exchange that is governed and operated by stakeholders within the State—rather than by the federal government—yet is not an organ of State government or a direct or indirect recipient of State funds. If appropriately formed and designated, the nonprofit entity can act at the State, rather than federal, level to fulfill all exchange functions required by PPACA.<sup>5</sup>

**2. State Flexibility in Design of Nonprofit Health Insurance Exchange that Meets Federal Standards**

**1.a. DHHS Minimum Standards**

The first standard is State executive or legislative action to form the nonprofit entity and designate it as the State-based Exchange.<sup>6</sup> The State may form a new nonprofit entity or designate an existing State-formed nonprofit entity as the State-based Exchange.<sup>7</sup>

The second standard is that the nonprofit entity be able to (i) “carry out the required functions of an Exchange consistent with” the DHHS exchange regulations, (ii) meet the “information reporting requirements” associated with premium tax credits, and (c) serve the “entire geographic area of the State.”<sup>8</sup>

The third standard is that the nonprofit entity’s governing board:

Be established, appointed, and overseen by the State<sup>9</sup>;

- Have a “majority of the voting members” with “relevant experience in health benefits administration, health care finance, health plan purchasing, health care delivery system administration, public health, or health policy issues related to the small group and individual markets and the uninsured”;
- Not have a “majority of voting representatives with a conflict of interest” (*i.e.*, “representatives of health insurance issuers, or agents or brokers, or any other individual licensed to sell health insurance”);
- Represent “consumer interests” (*i.e.*, includes “at least one voting member who is a consumer representative”);
- Have “formal, publicly adopted operating charter or bylaws”;
- Have, and make publicly available, “guiding principles that include ethics, conflict of interest standards, accountability and transparency standards, and disclosure of financial interest” (including “procedures for disclosure of [board members’] financial interests”); and
- Hold “regular public governing board meetings that are announced in advance.”<sup>10</sup>

**1.b. State Flexibility**

The State has extensive discretion beyond the minimum standards to design the governance, operation and financing of the State-based exchange. DHHS does “not propose to limit the State’s discretion to choose [the] type of [nonprofit] entity beyond the minimum standards.”<sup>11</sup>

As examples of this flexibility:

(1.a.i) *Board Composition*: Idaho may decide that the State-based exchange should have board seats, appointed by executive action with or without legislative advice and consent, that are designated for particular stakeholder groups. Those stakeholder groups may be identified by type, such as commercial and industrial alliances; health insurance issuer or agent and broker associations; physician, hospital or other provider associations; municipality, school district or other local governmental leagues; Tribal governments; and at least one consumer interest group. Other board seats may be allocated to governmental stakeholders by ex officio designation, such as the Directors of the Idaho Departments of Insurance and of Health and Welfare, or by executive action with or without legislative advice and consent.

(1.a.ii) *Governance*: Idaho may prepare and impose the requisite charter or bylaws and the required ethical and conflict avoidance policies on the State-based exchange, or require their development and adoption by its governing board. Idaho may determine the degree of State oversight and involvement in the State-based exchange’s operations and activities, from active supervision by the Idaho Department of Insurance to the general oversight of nonprofit organizations vested in the Idaho Attorney General and Governor.<sup>12</sup> Idaho may, for example, require the State-based exchange to file annual financial and operational reports with the Idaho Department of Insurance, the Governor and the Legislature, or subject the State-based exchange to audit by State government.

(1.a.iii) *Design*: Idaho may direct the State-based exchange to operate an “open market” on which any Idaho-licensed health insurance issuer may offer qualified health plans. Idaho may, instead,

permit the State-based exchange to be an “active purchaser” empowered to limit the health insurance issuers and qualified health plans made available. Idaho may refine the nature of the exchange navigator program and the role of agents and brokers in exchange activities. Alternatively, Idaho may leave these determinations to the governing board of the State-based exchange.

(1.a.iv) *Financing*: Idaho may decide how the State-based exchange finances its operations and otherwise sustains itself, including its navigator program. Idaho may direct that the State-based exchange generate sufficient financial resources to sustain its operations from the private sector, such as by assessments of health insurance issuers and other exchange participants or by access to private capital through bonds and other debt financing, all without access to State tax revenue.<sup>13</sup>

(1.a.v) *Contracting*: Idaho may authorize the State-based exchange to contract with “eligible entities” to carry out various exchange functions.<sup>14</sup> “Eligible entities” include the Idaho Department of Insurance, the Idaho Department of Health and Welfare, other Idaho governmental agencies, and any private corporation (other than a health insurance issuer) that has “demonstrated experience on a State or regional basis in the individual and small group health insurance markets and in benefits coverage.”<sup>15</sup> Idaho may direct that the State-based exchange give contracting preference to “eligible entities” that have operations within Idaho.

### **3. Idaho Health Data Exchange Exemplifies a Private Nonprofit Entity Established and Designated by Idaho that Satisfies Federal Standards for a Healthcare Initiative**

The Idaho Health Data Exchange provides precedent for Idaho’s establishment of a private nonprofit entity designated to DHHS as satisfying federal standards for a healthcare initiative. In 2008, Richard Armstrong, acting in his capacity as the Director of the Idaho Department of Health and Welfare, incorporated the Idaho Health Data Exchange as an Idaho nonprofit corporation under the Idaho Nonprofit Corporation Act.<sup>16</sup> In 2009, Governor Otter designated the Idaho Health Data Exchange to DHHS as meeting the applicable standards to receive federal grants under the initiative, originated by President George W. Bush in 2004, to encourage use of health information technology and development of a nationwide interoperable technology infrastructure for health information exchange.<sup>17</sup>

Governor Otter’s designation of the Idaho Health Data Exchange was in accordance with a funding process established by the Health Information Technology for Economic and Clinical Health Act, enacted in 2009 to continue the initiative.<sup>18</sup> That process made federal grants available to private nonprofit entities that met applicable federal standards and were “designated by the State as eligible to receive” such grants.<sup>19</sup> PPACA similarly makes federal grants available “for activities (including planning activities) related to establishing an American Health Benefit Exchange,” which can be a “nonprofit entity that is established by the State.”<sup>20</sup>

The Idaho Health Data Exchange’s governance structure exemplifies the kind of private–public partnership that Idaho may elect for its State-based health insurance exchange. The Idaho Health Data Exchange has a governing board drawn “from a broad base of stakeholders”—including representatives of hospitals, physicians, health insurance issuers, employers, consumers and the Director of the Idaho Department of Health and Welfare—to “ensure that its primary commitment is to the common good.”<sup>21</sup>

1 Pub. L. 111-148 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (Mar. 30, 2010).

2 42 U.S.C. § 18031(b)(1); *see* 42 U.S.C. § 18041(a); 45 C.F.R. Part 155 (DHHS exchange regulations). The minimum standards for health insurance exchange operations include (a) certifying, recertifying and decertifying health plans as “qualified health plans” eligible for purchase on the exchange; (b) facilitating comparison and purchase of “qualified health plans” on the exchange; and (c) determining eligibility of individuals and small employers to purchase “qualified health plans” on the exchange and of individuals to receive premium tax credits and cost-sharing reductions or to be enrolled in Medicaid or the Children’s Health Insurance Program. 42 U.S.C. § 18031(d).

3 42 U.S.C. § 18041(c).

4 42 U.S.C. § 18031(d)(1).

5 A State may also elect to have the nonprofit entity administer the individual market reinsurance and the individual and small group markets risk adjustment programs established by PPACA. The individual market reinsurance program is intended to stabilize a State’s individual market for the initial 3 years of exchange operations (that is, for 2014 through 2016). *See* 42 U.S.C. §§ 18061(a), (b)(1). A “not-for-profit organization” qualifies to act as a State’s reinsurance program administrator if it has a purpose “to help stabilize premiums for coverage in the [State’s] individual market,” and a function to coordinate “funding and operation of the risk-spreading mechanisms” of the individual market reinsurance program. 42 U.S.C. § 18061(c)(1). A nonprofit entity acting as the State-based exchange may meet these standards to also serve as Idaho’s reinsurance program administrator if Idaho assigns the nonprofit entity the requisite purpose and function.

A State that establishes a State-based exchange may elect to have the exchange also operate the State’s risk adjustment program for the individual and small group markets inside and outside the exchange. *See* 42 U.S.C. § 18063; 45 C.F.R. § 153.310; *see also* 77 *Fed. Reg.* 17220, 17230 (Mar. 23, 2012). Idaho may thus task the nonprofit entity acting as the State-based exchange to also operate the risk adjustment program in Idaho. DHHS has acknowledged that a State may “have a single entity administer reinsurance and risk adjustment, provided that the entity meets the separate requirements to administer both programs.” *Id.* at 17231.

6 *See Id.* Code § 67-802, which recognizes the broad authority of Idaho’s Governor to exercise the “supreme executive power of the state” through “issuing executive orders.” DHHS notes that, if the authority for designating a nonprofit entity as the State-based exchange “is not clear on its face,” the State must provide a statement from “the Governor’s legal counsel, or the State Attorney General’s Office (correspondence or a formal legal opinion) certifying that the State is authorized to establish [such] an [e]xchange under State law.” DHHS, “Blueprint for Approval of Affordable State-Based and State Partnership Insurance Exchanges” § 1.1, p. 19 (Aug. 14, 2012), available at <http://cciio.cms.gov/resources/files/hie-blueprint-081312.pdf> (last accessed Oct. 5, 2012).

7 *See* 76 *Fed. Reg.* 41866, 41870 (July 15, 2011).

8 45 C.F.R. § 155.105(b). The exchange functions that the nonprofit entity must be capable of performing to be the State-based exchange encompass (a) consumer assistance, including the navigator program; (b) certification, recertification and decertification of qualified health plans; (c) eligibility determinations for individual market and SHOP participation and for premium tax credits and cost-sharing reductions; (d) enrollment facilitation; (e) premium payment and collection facilitation; (f) issuance of certificates of exemption from the individual mandate; (g) SHOP operations; (h) quality improvement strategy evaluation and oversight; and (i) financial integrity and oversight. 45 C.F.R. Part 155, Subparts C, D, E, H and K.

The exchange’s information reporting requirements under Internal Revenue Code § 36B, which implements the premium tax credit, include furnishing the Internal Revenue Service and each affected taxpayer, “with respect to any [qualified] health plan provided through the [e]xchange,” (a) the coverage level (*i.e.*, “bronze,” “silver,” “gold,” or “platinum”) of the qualified health plan and the period during which the taxpayer had that coverage in effect; (b) the qualified health plan’s total premium; (c) the aggregate amount of advance payments of premium tax credits and of cost-sharing reductions; (d) the name, address and tax identification number of the primary insured and the name and tax identification number of each other individual covered by the qualified health plan; (e) information provided to the exchange, including any change of circumstances, needed to determine eligibility for and the amount of advance payments of premium tax credits; and (f)

information needed to determine whether the taxpayer has received “excess” advance payments of premium tax credits. 26 U.S.C. § 36B(f)(3).

9 See DHHS, “Cooperative Agreement to Support Establishment of Affordable Care Act Health Insurance Exchanges,” Funding Opportunity No. IE-HBE-12-001, CFDA: 93.525, § III.1, p. 13 (June 29, 2012), available at [www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=15353](http://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=15353) (last accessed Oct. 5, 2012). The Funding Opportunity explains that a nonprofit State-based exchange should be “created or established by the State (through legislative or other legal authority), and have State oversight (i.e., the governing body is established, appointed, and overseen by the State) and [be] subject to specific limitations on its authority to act as established by the State.” *Id.*

10 45 C.F.R. §§ 155.100(b), 155.110(c), (d).

11 76 *Fed. Reg.* at 41870.

12 See *Id.* Code § 67-1401(6), which assigns to the Idaho Attorney General supervision of nonprofit organizations, including their “examination . . . to ascertain the condition of [their] affairs and to what extent [they] may have departed from the general purpose for which [they were] formed”; *Id.* Code § 67-802(6), which vests the Idaho Governor with the authority to “require the attorney general . . . to inquire into the affairs or management of any corporation existing under the laws of [Idaho].” *Cf.* 45 C.F.R. § 155.110(f), stating that DHHS “may periodically review the accountability structure and governance principles of a State Exchange.”

13 Ongoing exchange operations may not be funded with federal dollars. See 42 U.S.C. §§ 18031(d)(5)(A), (i)(6). On the other hand, federal funding is available to cover the cost of establishing the State-based exchange. See 42 U.S.C. § 18031(a). Opportunities to apply for federal exchange establishment grants will remain open to Idaho through October 15, 2014. See DHHS, “Cooperative Agreement to Support Establishment of Affordable Care Act Health Insurance Exchanges,” *supra* note 9, p. 33.

14 See 45 C.F.R. § 155.110(a); *accord*, 42 U.S.C. § 18031(f)(3)(A).

15 45 C.F.R. § 155.110(a); *accord*, 42 U.S.C. § 18031(f)(3)(B). An “eligible entity” cannot be a health insurance issuer or in a “controlled group of corporations” that includes a health insurance issuer. 45 C.F.R. § 155.110(a)(1)(iii); *accord*, 42 U.S.C. § 18031(f)(3)(B)(i)(III).

16 Nonprofit Articles of Incorporation for the Idaho Health Data Exchange, Inc. (filed Jan. 29, 2008), available at <http://www.accessidaho.org/public/sos/corp/C176929.html> (last accessed Oct. 5, 2012). Director Armstrong incorporated the Idaho Health Data Exchange under the Idaho Nonprofit Corporation Act (Idaho Code Title 30 Chapter 3) as “the most effective way to achieve [the] charge” that the Idaho Legislature set in creating the Idaho Health Quality Planning Commission to “promote improved quality of care and improved health outcomes through investment in health information technology and in patient safety and quality initiatives in the state of Idaho.” State of Idaho, “Health Information Technology Planning—Advanced Planning Document,” IDHIT P-APD 09-001M, p. 3 (Oct. 30, 2009), available at <http://hsd.aphsa.org/issues/docs/2010/IdahoApprovedP-APD.pdf> (last accessed Oct. 5, 2012); *Id.* Code § 56-1054(1). The Idaho Legislature’s enactment was in response to President George W. Bush’s vision for “developing a nationwide interoperable health information technology infrastructure.” Executive Order 13335 of April 27, 2004, published in 69 *Fed. Reg.* 24059 (Apr. 30, 2004).

17 See State of Idaho, “Health Information Technology Planning—Advanced Planning Document,” *supra* note 16, p. 4. The applicable federal standards for a designated State nonprofit entity to qualify for electronic health information exchange grants include (a) “broad stakeholder representation on its governing board,” (b) “use [of] information technology to improve health care quality and efficiency through the authorized and secure electronic exchange and use of health information” as “one of its principal goals,” and (c) “conflict of interest policies that demonstrate a commitment to open, fair, and nondiscriminatory participation by stakeholders.” 42 U.S.C. § 300jj-33(f).

18 42 U.S.C. § 300jj-33. DHHS implemented that funding process through its Funding Opportunity Announcement. *See* DHHS “State Health Information Exchange Cooperative Agreement Program,” Funding Opportunity Announcement CFDA: 93.719, § III.A, p. 24 (updated Sept. 4, 2009), available at [http://healthit.hhs.gov/portal/server.pt?open=512&objID=1336&parentname=CommunityPage&parentid=10&mode=2&in\\_hi\\_userid=11113&cached=true](http://healthit.hhs.gov/portal/server.pt?open=512&objID=1336&parentname=CommunityPage&parentid=10&mode=2&in_hi_userid=11113&cached=true) (last accessed Oct. 5, 2012).

19 42 U.S.C. § 300jj-33(f).

20 42 U.S.C. §§ 18031(a)(3), (d)(1). A nonprofit State-based exchange “is eligible to apply for funding if designated as the applicant entity by the State,” and a State’s Governor may make that designation. DHHS, “Cooperative Agreement to Support Establishment of Affordable Care Act Health Insurance Exchanges,” Funding Opportunity No. IE-HBE-12-001, CFDA: 93.525, *supra* note 9, p. 13.

21 Idaho Health Data Exchange, “2009-2013 Operational Plan,” p. 7 (rev. Jan. 29, 2010), available at [www.idahohde.org/dsite/sites/default/files/webform/uploads/IHDE%20OPERATIONAL%20Plan%20-%20Board%20Copy%204-5-10.pdf](http://www.idahohde.org/dsite/sites/default/files/webform/uploads/IHDE%20OPERATIONAL%20Plan%20-%20Board%20Copy%204-5-10.pdf) (last accessed Oct. 5, 2012).