

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### HEALTH CARE REFORM REVIEW COMMITTEE

Tuesday, September 20, 2011  
Brynhild Haugland Room, State Capitol  
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 1:00 p.m.

**Members present:** Representatives George J. Keiser, Robert Frantsvog, Eliot Glassheim, Nancy Johnson, Jim Kasper, Gary Kreidt, Ralph Metcalf, Marvin E. Nelson, Karen M. Rohr, Robin Weisz, Lonny B. Winrich; Senators Dick Dever, Jerry Klein, Judy Lee, Tim Mathern

**Members absent:** Representatives Donald L. Clark, Lee Kaldor, Lisa Meier; Senator Spencer D. Berry

**Others present:** See [Appendix A](#)

**It was moved by Representative Kasper, seconded by Representative Frantsvog, and carried on a voice vote that the minutes of the August 5, 2011, meeting be approved as distributed.**

Chairman Keiser welcomed committee members and recognized the 1:00 p.m. start time was chosen in order to accommodate other committee obligations of some of the committee members.

Chairman Keiser said the meeting agenda would include addressing technology issues related to the creation of a state health benefit exchange and reviewing two committee bill drafts and one or more committee member bill drafts. He said the committee bill drafts are both based on the National Association of Insurance Commissioners (NAIC) model Act. However, he said, one of the committee bill drafts reflects the consensus efforts of the stakeholders--AARP, Blue Cross Blue Shield of North Dakota, Medica, and Sanford Health--and the other bill draft is based on the stakeholders' consensus efforts but is revised to reflect committee comments.

#### TECHNOLOGY

Chairman Keiser called on Ms. Lisa Feldner, Chief Information Officer, Information Technology Department, and Ms. Jennifer Witham, Director, Information Technology Services Division, Department of Human Services, to conduct a demonstration of Wisconsin Access--the proposed Wisconsin health benefit exchange--and to provide information regarding the technology requirements of a state or federally administered health benefit exchange under the Affordable Care Act (ACA), technology timing issues related to a state or federally administered health benefit exchange under the ACA, and technology funding issues related to a state or

federally administered health benefit exchange. Ms. Feldner and Ms. Witham provided a computer presentation ([Appendix B](#)) to present the information.

In response to a question from Senator Dever, Ms. Feldner said she expects the technology behind the state's health benefit exchange will be made of multiple modular components. She said in creating the technology behind the exchange, it will be important to create an exchange that fits the needs of the state.

In response to a question from Representative Keiser, Ms. Maggie Anderson, Director, Medical Services Division, Department of Human Services, stated the Department of Human Services' estimates regarding the number of adults who will be covered under the state's Medicaid program under the ACA do not include the early retirees (aged 62 through 64) with income above the Medicaid income levels who will qualify under the ACA loophole. Ms. Anderson said Congress is reevaluating this loophole, and if it is not closed, the department will have to revise its estimates.

In response to a question from Representative Weisz, Ms. Anderson said under the ACA the modified adjusted gross income (MAGI) will apply the same methodology under the children's health insurance program (CHIP). However, she said, under CHIP the state will also need to meet the maintenance of effort requirements.

In response to a question from Senator Mathern, Ms. Anderson said the federal Department of Health and Human Services (HHS) recently posted new information regarding the partnership model of the health benefit exchange. She said she does not yet know how this new information may impact the HHS proposed rules. She said it is important to remember there are multiple federal rules at play--HHS, the Department of the Treasury, and the Internal Revenue Service.

Ms. Witham said the take-home message she wants to leave the committee with is that the state needs to take steps regardless of who governs the health benefit exchange.

In response to a question from Senator Mathern regarding the Wisconsin health benefit exchange prototype, Ms. Feldner said the Wisconsin prototype is expected to meet the federal health benefit exchange mandates and meet the associated Medicaid system requirements.

In response to a question from Representative Kasper, Ms. Feldner said the health benefit exchange technology approach being taken by Rhode Island and Wisconsin seems promising as far as application in North Dakota. Additionally, she said, the approach being taken in California and Indiana may be worth a look. She said she recently was able to connect with her information technology counterpart in South Dakota and expressed North Dakota's interest in working with South Dakota in designing North Dakota's health benefit exchange.

Ms. Lisa Carlson, Sanford Health, Sioux Falls, South Dakota, reported she participates with the South Dakota subgroups working on establishing a health benefit exchange. At this point, she said, the intent in South Dakota is to build an exchange that meets the minimum requirements of the ACA. With this approach, she said, the state can add to and revise the exchange as the exchange matures.

### INSURANCE DEPARTMENT

Chairman Keiser called on Ms. Melissa Hauer, General Counsel, Insurance Department, to present information regarding the status of the state's implementation of the ACA. Ms. Hauer distributed written testimony ([Appendix C](#)).

In response to a question from Representative Kasper, Ms. Hauer said the requirement that the state certify a consumer operated and oriented plan (CO-OP) program was a result of amendments offered by United States Senator Kent Conrad.

In response to a question from Senator Mathern, Ms. Hauer said the Insurance Department will provide the committee more information regarding the state deadlines for the CO-OP program requirements and whether the program requires that the CO-OP be a new entity or whether it can be an existing entity.

Ms. Hauer said HTMS--the company with which the Insurance Department contracted under the state's health benefit exchange planning grant--will seek to meet with legislators as part of the contracted project.

In response to a question from Representative Kasper, Ms. Hauer said for purposes of the Insurance Department's stakeholder meetings to address implementation of the ACA, the Insurance Department, with input from the Department of Human Services and the Information Technology Department, developed the questions used at the stakeholder focus groups. She said the questions varied depending on which group of stakeholders was attending. Overall, she said, the initial feedback on the meetings looks positive.

Senator Lee said she has visited with professionals who attended the Insurance Department's stakeholder meetings, and they did not have positive feedback. She said she is surprised the meetings were separated by stakeholder groups, as she thinks it would have been valuable for all stakeholders to learn from each other by hearing each other's positions and perspectives on the ACA.

Ms. Hauer said the Insurance Department struggled in determining the best approach to designing the stakeholder focus groups. She said ultimately the department decided there was value to getting a pure perspective of each group. However, she said, she does see the value in Senator Lee's remarks, and perhaps future meetings can be designed differently.

In response to a question from Senator Mathern, Ms. Hauer said she will consult with the Insurance Commissioner to see if it is possible to share with the Health Care Reform Review Committee the HTMS recommendations and weekly reports being made to the Insurance Commissioner. Senator Mathern said it makes sense for the committee to take advantage of the work being done by HTMS in order to avoid duplication.

Senator Lee said she is frustrated that the stakeholder focus group attendees were not clearly informed of the steps being taken at the state level to implement the ACA, including the activities of the Health Care Reform Review Committee. She said ultimately the health benefit exchange is a policy decision that the Legislative Assembly will be addressing, but some of the focus group attendees perceived the Insurance Commissioner to be the policymaker and the focus groups to be the only forum to address issues related to the ACA.

Ms. Hauer said at the stakeholder focus group she attended, the activities of the Health Care Reform Review Committee were addressed in detail. However, she said, steps will be taken to keep focus group attendees informed.

In response to a question from Representative Kasper regarding the HHS determination that the state's external review process does not meet the minimum federal standards, Ms. Hauer said the HHS decision was made in late July 2011. She said although there was an appeal or reconsideration opportunity, because there was no new information to submit to HHS, the Insurance Commissioner decided not to pursue an appeal or ask for reconsideration. She said she does not think the failure of the Insurance Commissioner to appeal has any impact on the ability of the Attorney General to pursue any legal action.

Representative Kasper requested that the Insurance Commissioner provide committee members with a copy of the HHS denial letter and the related information submitted to HHS and provided by HHS.

Senator Lee said the Insurance Commissioner should have reported this denial at the committee's August 5, 2011, meeting. She said she questions whether the Insurance Commissioner is strenuously enforcing the laws.

Ms. Hauer said the Insurance Commissioner received the HHS determination just days before the committee's meeting. She said not only was the Insurance Commissioner unsure of where the report of the denial might fit in the agenda, but he also was still digesting the substance of the decision.

Senator Lee said it was a terrible oversight for the Insurance Commissioner to fail to bring this matter before the committee. She said not only was it a missed opportunity, but now the period for appeal has passed.

Representative Keiser said his recollection from the 2011 legislative session was that the Insurance Commissioner introduced House Bill No. 1127, which was based on an NAIC model Act, and which went beyond the federal requirements for an independent external review. He said enrolled House Bill No. 1127 essentially bootstrapped on the federal requirements, and he thinks this may be a winnable appeal if pursued in federal court.

In response to a question from Senator Dever, Ms. Hauer said that at the time House Bill No. 1127 was passed, the federal rules were final; however, the rules have been tweaked since passage of the bill. She said if the independent external review law is amended during the upcoming special session, HHS will likely reevaluate its decision.

In response to a question from Representative Keiser, Ms. Hauer said the Insurance Commissioner has used approximately \$250,000 of the \$1 million health benefit exchange planning grant. She said she will research whether it might be possible for the Insurance Commissioner to distribute a portion of the remaining funds to other state agencies to assist in implementation of the ACA requirements.

## BILL DRAFTS

The committee received two bill drafts prepared for the committee--both based on the NAIC model Act, but one reflecting the consensus efforts of the stakeholders [[11.0805.01000](#)] and the other based on the stakeholders' consensus efforts but revised to reflect committee comments [[11.0806.01000](#)].

Chairman Keiser called on Senator Mathern to review his bill draft [[11.0802.02000](#)]. He said his bill draft is based on the stakeholder's consensus bill draft; however, his bill draft differs in the following areas:

- The governance model, including specific language providing for tribal involvement;
- Repeal of the Comprehensive Health Association of North Dakota (CHAND);
- Provision of a financing mechanism for the health benefit exchange, providing for the funding for CHAND to be transitioned to fund the exchange;
- The conflict of interest restrictions for the health benefit exchange board; and
- The health benefit exchange board is provided flexibility in several matters, including whether to establish a single risk pool for individual and small group policies and in developing navigator requirements.

Chairman Keiser said the stakeholder consensus bill draft provides for a freestanding nonprofit entity to govern the exchange, the committee bill draft provides

for a state agency to govern the exchange, and Senator Mathern's bill draft appears to provide for a state/private partnership to govern the exchange.

**It was moved by Representative Kasper and seconded by Senator Lee that the committee use the bill draft based on committee comments as the vehicle for further revisions, including adopting the state entity governance structure.**

In response to a question from Senator Lee, Senator Mathern said his goal in submitting a bill draft for the committee to consider is to help the committee consider options. He said as his bill draft relates to a governance structure, although he sees the legislative nominees as responsive to the Legislative Assembly, he recognizes they would be appointed by the Governor and therefore would ultimately be accountable to the Governor.

In response to a question from Representative Frantsvog, Senator Mathern said although he envisions approximately 12 members serving on the advisory boards, he thinks the number of individuals serving on the advisory boards should be flexible, and it is more important to focus on the expertise that needs to be included on the advisory boards.

Senator Lee said in considering the conflict of interest provisions under Senator Mathern's bill draft, she is concerned about excluding those individuals who have the most expertise. Senator Mathern said he thinks expertise is available without creating conflicts of interest, for example, by having retirees, higher education professionals, and professionals who are not actually practicing in a conflicted industry serve on the governing board.

Representative Keiser said he is gravely concerned there will be problems if the law creates a governing entity that has too much distance from state monitoring and not enough accountability. He said he supports putting the health benefit exchange under the umbrella of the Office of Management and Budget (OMB). Additionally, he said, it is important to put the governing board under the Administrative Agencies Practice Act, so rulemaking and appeal requirements are clearly established.

Representative Keiser said he thinks the governing approach of putting the health benefit exchange under OMB is fiscally sound and a good fit considering there are conflicts if the exchange is put under the Insurance Commissioner, Department of Human Services, or State Department of Health.

Senator Mathern said in considering his bill draft, the issue is not meant to be whether the governing entity is covered by the Administrative Agencies Practice Act, as he could go either way on that point, but the issue is that it is important to get specialists to serve on the governing board.

Representative Glassheim said he needs more clarification on how the health benefit exchange board would fit within OMB. Representative Keiser said he envisions the board working similarly to how Workforce Safety and Insurance is designed. Representative Glassheim questioned how the health

benefit exchange board would function similarly to the Workforce Safety and Insurance Board. Representative Keiser said they would be similar in that both boards would answer to the Governor.

**The motion passed on a roll call vote.**

Representatives Keiser, Frantsvog, Johnson, Kasper, Kreidt, Metcalf, Nelson, Rohr, Weisz, and Winrich and Senators Dever, Klein, and Lee voted "aye." Representative Glassheim and Senator Mathern voted "nay."

Chairman Keiser called on Ms. Pam Sharp, Director, Office of Management and Budget, to present proposed revisions to the committee bill draft. Ms. Sharp provided written examples of the requested three changes ([Appendix D](#)).

Ms. Sharp said she seeks clarification on how the government structure would function under the committee's bill draft. Chairman Keiser requested that Ms. Sharp work with committee counsel to revise the governance structure to make the basic approach function smoothly.

Ms. Sharp reviewed the appropriation requests for the Department of Human Services and the Information Technology Department to defray the costs associated with incorporating the Medicaid and CHIP eligibility determination functionality into the state's health benefit exchange. She clarified the handout includes a typo and the general fund appropriation request is \$8,736,675.

Chairman Keiser called on Ms. Anderson to review the Department of Human Services' appropriation request for defraying expenses associated with implementation of the ACA.

Ms. Sharp reviewed the proposed intent and appropriation language to allow OMB to apply for available federal exchange establishment grants to be used for the purpose of exchange planning activities, as well as authority to apply for other grant opportunities that may become available related to the health benefit exchange.

In response to a question from Representative Kasper regarding the open-ended nature of the proposed language, Ms. Sharp said she agrees the language could be revised.

In response to a question from Senator Mathern, committee counsel said if the committee recommends legislation for the special session, the bill draft will include an effective date clause that provides the bill will be effective December 1, 2011.

**It was moved by Senator Mathern, seconded by Senator Lee, and carried on a voice vote that committee counsel revise the committee bill draft to reflect the OMB-suggested appropriation language.**

Chairman Keiser called on Ms. Hauer to comment regarding questions on and suggested changes to the committee bill draft. Her written testimony is included in [Appendix C](#).

Ms. Carlson testified the definitions of "defined benefit" and "defined contribution" are not in the NAIC model Act; but because she expects the exchange will

be addressing these types of policies, the definitions were included in the committee bill draft. She said a defined benefit policy would provide for a fixed employer contribution and the employer making the policy choice decision, whereas a defined contribution policy would provide for a fixed dollar amount and the employee making the policy choice decision. She said defined benefit policies are the current, traditional approach to employer-provided health insurance.

Senator Mathern and Representative Winrich questioned whether different terminology might be used in order to avoid confusion.

Chairman Keiser said if the terms are able to be defined more clearly, he would like those revisions to be included in the next bill draft revision.

Chairman Keiser called on committee counsel to review proposed revisions to the committee bill draft. Committee counsel distributed written material ([Appendix E](#)).

**It was moved by Representative Glassheim and seconded by Representative Johnson that committee counsel revise the committee bill draft to reflect the committee counsel proposed revisions.**

Representative Winrich questioned the value of adding language to the bill draft which limits the state agencies from contracting with the federal government.

Senator Lee said the proposed language regarding limitations on the actions of state agencies is in response to state concerns that for purposes of implementing the ACA, HHS may be attempting to bypass legislative bodies by working with state agencies and avoiding state legislation.

Senator Mathern said he is concerned the committee may be going too far to prevent state agencies from taking steps to act in the state's best interest.

**The motion carried on a voice vote.**

Chairman Keiser said committee counsel should consider the conflict of interest language in Senator Mathern's bill draft in revising the committee bill draft conflict of interest language.

Representative Kasper suggested the language "health care actuarial" be revised to "actuarial science."

Representative Kasper said as it relates to conflict of interest provisions, there are problems with excluding active industry members.

Senator Lee said the CHAND Board of Directors recently addressed conflict of interest issues. She suggested a representative of the Insurance Department work with committee counsel and share this information.

Chairman Keiser requested the Insurance Department work with committee counsel to:

- Clarify the dual regulation language. He said he wants to make sure the exchange does not create a dual regulation situation.



- Revise the language regarding contracting with an eligible entity in order to be consistent with federal law.
- Clarify the language regarding safeguarding of confidential data.

Representative Keiser said the language regarding rate reviews was included at his request. He said the intent of the language in the bill draft is to depoliticize the rate approval process. He said he realizes the language in the bill draft is different from the language in existing law for policies not offered through the exchange.

In response to a question from Representative Johnson, Representative Keiser said that it is possible to have two standards for rate approval--one for policies sold on the exchange and one for those policies sold outside the exchange.

Representative Kasper questioned whether under the proposed rate approval process it might work to direct parties to arbitration.

Senator Lee said she understands Representative Keiser's point, but she said this may be an instance of the devil being in the details.

Representative Kasper said he disagrees with the Insurance Commissioner's position that an insurance agent is prohibited from wearing two hats--not allowed to act as a navigator if the agent also accepts commissions from a health insurer.

Ms. Hauer said the ACA provides a navigator must agree to not accept any compensation from a health insurer. She said the ACA is silent on whether that restriction is limited per transaction or in general.

Representative Keiser requested additional information regarding navigators and fiduciary duties at the next meeting.

Senator Mathern requested that the committee bill draft be revised to include the language regarding tribal involvement included in his bill draft.

Senator Klein said he thinks the executive director of the Indian Affairs Commission should participate in the activities of the health benefit exchange board, regardless of whether there is statutory language requiring an invitation. He said the board and the exchange should represent all North Dakotans, including Indians.

Representative Winrich said he does not see any conflict between Senator Mathern's and Senator Klein's positions, and there does not seem to be any harm in including Senator Mathern's proposed language.

**It was moved by Senator Mathern, seconded by Representative Winrich, and carried on a voice vote that committee counsel revise the committee bill draft to reflect Senator Mathern's proposed language regarding involvement of the Indian Affairs Commission.**

Representative Glasheim distributed a list of proposed revisions to the committee bill draft ([Appendix F](#)).

Senator Lee said she recognized the value of having a physician sit on the board, but time

constraints may result in lack of participation. She said she would like additional information regarding the federal consumer representation requirements on the board.

Representative Kasper said he supports moving from a five-member to seven-member health benefit exchange board, but he expects there will be a long list of entities and special interests who will want to be included on the board's membership.

Ms. Hauer said the Insurance Department will research the issue of consumer representation requirements and will report to the committee at the next meeting.

Chairman Keiser called on Mr. Josh Askvig, AARP, to comment regarding the committee's bill draft. Mr. Askvig provided written testimony ([Appendix G](#)). He said AARP will also research the issue of federal requirements regarding consumer representation.

Representative Glasheim said board representation of physicians' interests is very important because physician expenses account for 30 percent to 50 percent of the cost of medical care.

Representative Glasheim said without additional clarification, just about anyone could be a "consumer." Therefore, he said, he would like to have nonprofit organizations submit nominee names for the board's consumer member.

Representative Keiser said it is common practice to have organizations submit nominees for board appointments.

Senator Lee said she would prefer the law not specifically name the entities that would be submitting nominees to the Governor.

Chairman Keiser briefly reviewed the committee bill draft. He said Section 14 of the bill draft is intended to address the situation if the federal courts invalidate all or a portion of the ACA.

Representative Kasper questioned what would happen if Congress repealed all or a portion of the ACA.

Senator Mathern said we are not giving ourselves enough credit. He said we need to create a health benefit exchange regardless of the ACA requirements. Representative Keiser said he agrees with Senator Mathern that regardless of the ACA, we need to create a health benefit exchange.

Senator Mathern questioned how the health benefit exchange is going to be funded.

Chairman Keiser left the meeting, and Vice Chairman Klein assumed the chair for the remainder of the committee meeting.

Chairman Klein called on Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, Fargo, for comments regarding the committee bill draft. Mr. St. Aubyn suggested the chairman set a deadline by which time people submit bill draft revision requests, thereby allowing adequate time for the bill draft to be prepared and made available for public review before the next committee meeting.

Chairman Klein called on Mr. Geoffrey Bartsh, Medica, Minneapolis, Minnesota, for comments

regarding the committee bill draft. Mr. Bartsh said there is value to codifying the technology advisory board, and he recommends the committee revise the bill draft to include the consumer and technical advisory board language of the consensus bill draft.

Chairman Klein called on Mr. David Middaugh, agent, Fargo, for comments on the committee bill draft. Mr. Middaugh said the National Association of Insurance and Financial Advisors disagrees with the Insurance Commissioner's interpretation that an agent is prohibited from being a navigator if the agent also receives compensation from an insurer on a different transaction. He said he would be happy to present additional information regarding this topic at a future meeting.

Mr. Middaugh said the agent community is very interested and concerned about the committee bill draft in general and the navigator issue in particular. He said over half of the audience members at today's committee meeting are agents.

Chairman Klein called on Mr. Bill Schultz, agent, Fargo, for comments regarding the committee bill draft. Mr. Schultz said he would be disappointed if the committee bill draft had the effect of prohibiting him, as an agent, from acting as a navigator. Additionally, he questioned the language in the bill draft providing a navigator's duty is to focus on the best interests of the consumer, but at the same time the navigator is limited to directing those consumers to policies sold on the exchange. He said a best interest evaluation would require consideration of products inside and outside the exchange.

No further business appearing, Chairman Klein adjourned the meeting at 5:30 p.m.

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Jennifer S. N. Clark  
Committee Counsel

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