

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

HEALTH CARE REFORM REVIEW COMMITTEE

Thursday, October 6, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives George J. Keiser, Donald L. Clark, Robert Frantsvog, Eliot Glassheim, Jim Kasper, Gary Kreidt, Ralph Metcalf, Marvin E. Nelson, Karen M. Rohr, Lonny B. Winnich; Senators Spencer D. Berry, Dick Dever, Jerry Klein, Judy Lee, Tim Mathern

Members absent: Representatives Nancy Johnson, Lee Kaldor, Lisa Meier, Robin Weisz

Others present: See [Appendix A](#)

It was moved by Representative Clark, seconded by Senator Mathern, and carried on a voice vote that the minutes of the September 20, 2011, meeting be approved as distributed.

Chairman Keiser welcomed committee members and stated that other than the two morning presentations, the remainder of the meeting will be devoted to reviewing the committee bill draft that provides for a state-administered health benefit exchange. He said if the committee is not able to complete the review of the bill draft in a single day, the committee will recess and return Friday morning to complete the review. Although the agenda reflects a 4:30 p.m. adjournment or recess, he said, he will recess the meeting if it appears the committee needs to break, and he will allow the meeting to go past 4:30 p.m. if the committee is being productive.

INSURANCE DEPARTMENT

Chairman Keiser called on Ms. Melissa Hauer, General Counsel, Insurance Department, for an update on the status of the states' implementation of the health benefit exchange provisions of the federal Affordable Care Act (ACA) and to provide followup information requested at the previous meeting.

Ms. Hauer distributed a copy of her written testimony ([Appendix B](#)), including her comments on the committee bill draft, the *North Dakota Health Benefit Exchange Stakeholder Final Report* dated September 23, 2011, and the *HTMS ND HBE Planning Status Report* dated September 30, 2011. She said this material supplements the material she provided following the September 20, 2011, committee meeting (on file in the Legislative Council office).

In response to a question from Senator Lee, Ms. Hauer said the Insurance Department is in regular contact and is working closely with the Information

Technology Department and Department of Human Services. She said the federal Department of Health and Human Services (HHS) has confirmed that the remaining exchange planning grant funds the Insurance Department received can be transferred from the Insurance Department to another state agency.

In response to a question from Representative Keiser, Ms. Hauer said HHS wants and expects to have a consumer operated and oriented plan (CO-OP) certified in each state. She said it is her understanding the ACA requires a CO-OP in each state.

Representative Kasper said he received information supporting the position the ACA does not require states to have a certified CO-OP. He said he would like written confirmation from HHS regarding this matter.

Ms. Hauer said she will request confirmation from HHS. Additionally, she said, her position--ACA requires each state to have a CO-OP--is based on the ACA, however the proposed rules appear to take a softer position on this and say each state "should" have a certified CO-OP.

In response to a question from Senator Mathern, Ms. Rebecca Ternes, Deputy, Insurance Department, said if a state forms a partnership with the federal government for administration of the state's health benefit exchange, the options include a plan management model or a consumer assistance model. She said she is not aware of any set deadline by which a decision needs to be made regarding entering into such a partnership, but she assumes the states would need to decide by early 2012. She said there are very few details about how the partnership model would actually work.

In response to a question from Representative Keiser, Ms. Ternes said she has not received specific information regarding what options a state might have regarding transitioning from a partnership model to a state-administered or federally administered model.

In response to a question from Senator Berry, Ms. Ternes said the reasoning behind a partnership model for administration of the state's health benefit exchange is that it would save states time and money, but she said the information she has received so far makes it clear the partnership would require federal administration.

Representative Keiser said it seems the committee has its hands full establishing a state-administered

program and does not need the additional challenge of negotiating with the federal government to establish a partnership model.

Chairman Keiser called on Ms. Nancy Wise, HTMS, Indianapolis, Indiana, for a presentation ([Appendix C](#)) regarding the services HTMS is performing for the Insurance Department under a contract to conduct background research, analyze data, identify options, and recommend a viable plan for developing and sustaining a state health benefit exchange. Ms. Wise gave a computer presentation and distributed a written copy of the computer presentation.

Senator Mathern raised the following concerns:

- The timing of the consultant's project, such that the Legislative Assembly is making decisions now but will not be receiving the consultant's report until later;
- Problematic methodologies in conducting the public meetings for stakeholders; and
- Who HTMS will be interviewing.

Ms. Wise said she shares his concerns regarding timing. She said HTMS has sped up its deliverables to get as much information as possible to the Insurance Commissioner and legislators before the legislative session.

Representative Keiser said although he agrees with Senator Mathern's timing concerns he also thinks the Insurance Commissioner took steps to get as much of the HTMS material as possible delivered before the 2011 special session. He said he also expects the consultant's report will be valuable information for use during the 2013 regular legislative session.

Ms. Ternes said she expects the consultant's information will be valuable during the special session as well as during the 2013 regular legislative session. She said the public meetings for stakeholders were not conducted by HTMS.

In response to a question from Representative Glassheim, Ms. Wise said initial reporting indicates states are expecting it will cost between \$30 million to \$50 million to develop the health benefit exchanges--with the smaller states typically expecting to incur smaller expenses. She said she expects operating costs of the exchange to vary based on the volume as well as the degree of complexity and the range of services offered through a state's exchange. In the case of the federal Level 1 establishment grants, the application deadline is December 2011, and the Level 2 establishment grant is typically not sought by the states until completion of the initial planning.

In response to a question from Representative Keiser, Ms. Wise said although she has reviewed the committee's bill draft, she is not prepared to make any comments regarding the substance of the bill draft.

In response to a question from Senator Lee, Ms. Wise said HTMS has or will conduct interviews with the minority and majority leaders of both chambers as well as the chairman of the Health Care Reform Review Committee. Additionally, she said,

HTMS will be contacting other legislators that are identified as interested in the health benefit exchange and will be contacting consumers and other stakeholders.

Ms. Andrea Fonkert, Public Relations Officer, Insurance Department, said she will provide committee members with a list of stakeholders and interested persons that have been identified to be interviewed.

BILL DRAFT REVIEW

Chairman Keiser said the committee will spend the remainder of the committee meeting reviewing the committee [bill draft](#) section by section. He invited interested persons to comment as the committee conducts this review.

Committee counsel stated the version of the committee bill draft distributed is the color version, which shows the changes to the North Dakota Century Code portions of the [bill draft](#) made from the previous version that was reviewed at the September 20, 2011, committee meeting. Additionally, she said, although the appropriations and other special clauses at the end of the bill draft have been revised from the previous version of the bill draft, these changes are not reflected in color because they are not Century Code changes.

Senator Mathern distributed a handout ([Appendix D](#)) of proposed revisions; Ms. Maggie Anderson, Director, Medical Services Division, Department of Human Services, distributed written comments ([Appendix E](#)) with proposed bill draft revisions; Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, Fargo, distributed written comments ([Appendix F](#)) with proposed bill draft revisions; and Ms. Courtney Koebele, North Dakota Medical Association, distributed written comments ([Appendix G](#)) with proposed bill draft revisions.

Senator Mathern said instead of creating a state entity to govern the state's health benefit exchange, he would like to have an entity that is a separate, public-private partnership govern the health benefit exchange. He said the current approach to government and the private sector supports this approach.

Additionally, Senator Mathern said because the health benefit exchange will be implementing some very significant changes to the state's Medicaid program, he would like to revise the committee bill draft to assure that one of the consumer representatives on the health benefit exchange board represents consumers who have low incomes.

It was moved by Senator Mathern and seconded by Representative Glassheim that the committee bill draft be revised to provide for a state health benefit exchange that is governed by an entity formed by a public-private partnership.

Representative Glassheim questioned why the committee bill draft provides for a new division under the Office of Management and Budget (OMB) instead of creating a new, stand-alone state entity.

Senator Mathern drew the analogy of Mr. Steve Jobs and questioned whether Apple would have been as successful if it were a governmental entity. He said the private sector has some special attributes that may be valuable in governing a health benefit exchange. For example, he said, private entities are able to be more flexible and responsive than the traditional state entity.

Senator Berry said he would like more information regarding how the proposed public-private governance would work, including what elements of state government would apply.

Senator Mathern said under a public-private governance structure the board could include state officials, such as the Insurance Commissioner, the Governor, legislators, and a representative of the State Department of Health and also could retain open meetings and open records requirements.

Representative Kasper said he appreciates Senator Mathern's proposal, but he thinks that due to the fluid nature of the federal health care reform law, it makes sense to have the state govern the health benefit exchange and to also have private sector representatives on the board. He said he wants the executive branch of state government to be responsible for implementing the legislation and to be accountable to the legislative branch. He said perhaps at a later date, once the health benefit exchange is established and the federal law is less volatile, the governance structure of the state's health benefit exchange could be revised to provide for more private sector involvement.

Senator Klein said he supports Representative Kasper's approach.

Representative Keiser said he thinks the committee bill draft approach to governance is not all that different from Senator Mathern's proposal. He said whereas the Utah health benefit exchange is purely a state entity and the Massachusetts health benefit exchange is a private entity, the committee bill draft provides for both private and public participation on the board and the advisory group. Specifically, he said, he is concerned about how the Massachusetts model has incurred huge expenses and has made some poor spending choices.

Representative Keiser said he envisions the board being the policysetter, and OMB being charged with implementing this policy with the advice of the advisory board. He said he is concerned there may be a lack of state control and accountability if the state's health benefit exchange is separate and freestanding. Overall, he said, he thinks this committee bill draft is a model the legislative body can support.

Senator Mathern said he does not think the private sector in North Dakota would spend funds frivolously.

Representative Glassheim said he will support the committee bill draft, but he is concerned how the proposed governance model will deal with the situation of OMB disagreeing with the board's policy.

The motion failed on a roll call vote.

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

The committee considered the definition of "small employer" under proposed Section 54-66-01.

Ms. Hauer stated the revisions to the definition make the state's definition consistent with the ACA definition. However, she said, the committee bill draft definition is different from the definition of "small employer" under Section 26.1-36.3-01(32). She said she will research this matter and report back regarding whether it may be appropriate to change the other definition in order to be consistent with the committee bill draft definition.

In response to a question from Senator Dever, Ms. Hauer said the Insurance Department is still awaiting clarification from HHS regarding how the small group of one would be counted. She said it is her understanding a business owner would not count in establishing a small group of one.

Mr. Jay McLaren, Medica, Minneapolis, Minnesota, stated the ACA definition of "small employer" does not include the employer in counting the number of employees. He said he supports the definition reflected in the committee bill draft.

In response to a question from Senator Lee, Ms. Lisa Carlson, Sanford Health Plan, Sioux Falls, South Dakota, said she supports the use of the plan year for calculating the number of employees. Committee counsel said the use of plan year versus calendar year is consistent with the HHS proposed rules.

In response to a question from Representative Kasper, Ms. Carlson and Mr. McLaren said under the HHS proposed rules, in calculating employees, a part-time employee counts as a full-time employee.

In response to a question from Representative Rohr, Ms. Hauer said as it relates to the definition of "qualified individual," she will see if she is able to find data regarding the number of individuals who may qualify as "an alien lawfully present in the United States."

Committee counsel reported the committee bill draft definition of "qualified individual" is consistent with the National Association of Insurance Commissioners (NAIC) model Act and appears to be consistent with Section 1312(F)(3) of the ACA.

It was moved by Representative Kasper, seconded by Senator Berry, and carried on a roll call vote to accept proposed Section 54-66-01. Representatives Keiser, Clark, Frantsvog, Glassheim, Kasper, Kreidt, Metcalf, Nelson, Rohr, and Winrich and Senators Berry, Dever, Klein, Lee, and Mathern voted "aye." No negative votes were cast.

Representative Keiser said he thinks proposed Section 54-66-02 needs some revision regarding the governance structure.

Representative Kreidt agreed with Representatives Keiser and Glassheim that clarification is needed that OMB does not supervise the board.

Chairman Keiser said he will work with committee counsel during the lunch break to redraft this section.

Representative Winrich said the committee bill draft should be revised to clarify OMB administers the health benefit exchange and the board sets policy.

Ms. Lisa Feldner, Chief Information Officer, Information Technology Department, testified the Information Technology Department has some statutorily created boards that could be used as models in redrafting this portion of the committee bill draft.

Ms. Hauer said the reference in the committee bill draft to the required effective date of the health benefit exchange should be October 1, 2013, instead of January 1, 2014. She said the health benefit exchange needs to be ready to operate three months before the plans begin.

The committee reviewed proposed Section 54-66-03.

Representative Kasper suggested increasing the board size to 9, 10, or 11 members in order to allow for more expertise and to allow for two legislator members.

Ms. Carlson said she supports increasing the size of the board. In reviewing other states, she said, it appears California's board will have five members, and then the next smallest board is nine members, and then they go up in size to the largest board of 15 members. She said of the 11 states she has surveyed, they are almost evenly split regarding whether the conflict of interest provisions allow for a health insurance carrier representative on the board.

Committee counsel reviewed the three conflict of interest provisions provided on page 8 of the committee bill draft. She said Alternative A is based on the language of Washington's law, prohibiting all board members from having a conflict of interest; Alternative B allows the industry representative board members to have a conflict of interest but does not allow the consumer representatives to have a conflict; and Alternative C directs the board to adopt rules to address how the board will deal with conflict of interest issues. She said Alternative C is drafted to allow the board to go through a process similar to that undertaken by the Comprehensive Health Association of North Dakota (CHAND) Board in adopting a board policy addressing conflict of interest matters.

Committee counsel reviewed HHS proposed rule 155.110(c)(3), which appears to allow a state to create a board that has members who have a conflict of interest. She said the proposed rules take the position that a board member that represents industry interests will have a conflict of interest, but that a consumer representative is intended to not have a conflict of interest.

Senator Lee said she favors Alternative C because it would be fast and open, such that the rules would allow for flexibility as well as accountability.

Representative Glassheim said he tends to favor Alternative B. He said he accepts a minority of the board members--who represent industry interests--will have the desired expertise but will also have a conflict of interest; whereas, the consumer representatives should truly represent the consumers and not the economic interests of a business entity.

Senator Mathern said the conflict of interest issues are broader than economic interests and may include conflicts that arise due to a board member's spouse's interests.

Senator Berry said he supports Alternative C because it has a track record of success with the CHAND Board.

Ms. Ternes said the HHS proposed rules are very open as it relates to conflict of interest. She said the only clear directive is that the board may not have a majority of members representing the insurance industry.

Senator Dever said in evaluating whether a conflict of interest exists, the analysis should consider whether the board member uniquely benefits.

Representative Glassheim said he supports a transparent system and thinks it may avoid conflict to codify the conflict of interest provisions instead of leaving it up to the board to address by rule. He said perhaps the basic provisions relating to conflict of interest could be codified, and the remainder could be addressed through the adoption of rules.

Mr. Josh Askvig, AARP, said he supports increasing the board size to increase the number of consumer representatives; however, he does not support board members representing the health insurance industry because such membership would result in conflicts of interest. He said testimony received indicates it is possible to create a board that sets out board membership that avoids conflicts of interest. He said he questions the validity of Alternative B because it seems wrong to allow everyone but the consumer representatives to have conflicts of interest.

In response to a question from Senator Berry, Senator Lee said the CHAND conflict of interest policy did not occur in response to any particular conflict of interest problems but was addressed in order to address any conflicts that may arise in the future.

In response to Ms. Koebele's request to add a physician member on the board, Senator Lee questioned whether adding a physician member may be a Pandora's Box situation. Ms. Koebele said physicians are unique in the health care profession because they are team leaders in patient care.

In response to a question from Representative Keiser, Ms. Koebele said she thinks the conflict of interest assessment should focus on whether the board member would uniquely benefit from an action of the board. Additionally, she said, at first glance, Alternative C appears to be most workable.

Mr. Norbert Mayer, National Association of Insurance and Financial Advisors - North Dakota, said he supports Alternative C and supports industry

representation on the board as long as it is not the majority.

Mr. St. Aubyn said the issue of conflict of interest may vary based on what issues arise. He said Alternative C allows the board to adopt rules that deal with these unique situations.

Representative Nelson said the conflict of interest alternatives are not necessarily exclusive. He said he likes Alternative B in concert with Alternative C.

It was moved by Senator Klein and seconded by Representative Kasper that the committee bill draft be revised to allow for conflict of interest Alternative C.

Senator Klein rejected Senator Mathern's request to amend the motion to allow for a combination of Alternatives B and C.

Representative Kasper said he is concerned that Alternative B may result in being unable to find members to serve as consumer representative due to perceived or actual conflicts of interest.

Senator Berry said he supports the flexibility of Alternative C.

Representative Glassheim said the conflict of interest provisions need to distinguish between an institutional conflict and a personal conflict.

Senator Dever said he thinks conflict of interest is a matter of perception, and the Governor is in the best position to exercise his judgment and not appoint someone who has a perceived or actual conflict of interest.

Representative Keiser said this is North Dakota and not California, and therefore, we can benefit from flexibility. He said he supports allowing a board member to represent that board member's position with passion, and he distinguishes this from a personal conflict of interest. Ultimately, he said, if the Legislative Assembly does not like how the board addresses the issue of conflict of interest, the law can be amended in 2013.

The motion carried on a roll call vote. Representatives Keiser, Clark, Frantsvog, Kasper, Kreidt, Metcalf, and Rohr and Senators Berry, Dever, Klein, and Lee voted "aye." Representatives Glassheim, Nelson, and Winrich and Senator Mathern voted "nay."

The committee reviewed proposed Section 54-66-03.

Representative Kasper suggested the board membership be revised to provide for two ex officio, nonvoting members and then the following nine voting members:

- One insurance industry representative;
- One health care provider representative;
- One small employer;
- Three consumer representatives;
- One physician; and
- Two legislators.

Representative Glassheim said he opposes putting legislators on the board. He said the Legislative Assembly is the policymaking branch, and it is inappropriate for them to serve on an executive

branch board. He said the role of the Legislative Assembly is to set policy and control the purse strings.

Representative Kasper said if legislative members are going to be appointed to serve on a board, they are going to want to vote on board decisions. He said ultimately all nine board members are consumers.

In response to a question from Representative Winrich, Ms. Ternes said under the HHS proposed rules, Representative Kasper's proposed board makeup likely would comply with the federal requirements because the majority does not represent the insurance industry.

Senator Mathern suggested Representative Kasper's proposal be modified to remove the legislators or make the two legislators nonvoting, add two additional consumer members, and provide that at least one of the consumer members represents low-income consumers. He said the Legislative Assembly's role is to enact the laws. If at a later date it seems appropriate to add legislator members, the law can be amended to do so.

In response to a question from Senator Berry, Representative Kasper said he envisions the health care industry provider would represent the administrative aspect of the health care industry, such as hospitals and clinics.

Representative Rohr suggested "health care provider" is a broad term, and this is a positive thing.

Representative Keiser questioned whether it is good policy to put a physician on the board. He said the health care industry is made up of various professions. He said perhaps it would be better to replace the physician member with a medical service provider member.

Senator Lee agreed the law should not get too specific on board members. She said more than physicians are impacted by the ACA; however, the primary concern of providers is reimbursement.

Representative Frantsvog suggested the physician member be replaced with a representative of medical service providers.

It was moved by Representative Frantsvog and seconded by Representative Kasper that the committee bill draft be revised to provide for a 13-member board made up of four ex officio nonvoting members--Insurance Commissioner, executive director of the Department of Human Services, and two legislators--and nine voting members--one representing insurance agents, one representing the health insurance industry, one representing medical providers, one representing small group employers, three representing consumers, one physician, and one representing other health service providers.

Mr. St. Aubyn said in determining who should be represented on the board, the committee should remember the purpose of the health benefit exchange is to make health insurance products available to consumers. He said the health benefit exchange is not about reimbursement. He said the advisory

boards are a more appropriate forum for special interest matters to be addressed.

Senator Lee said she thinks the medical providers may more appropriately be represented on the advisory board.

Representative Kasper said it is very important that the board have the necessary expertise. He said he would not support a board membership that was made up of a majority of consumer representatives.

The motion carried on a roll call vote. Representatives Keiser, Clark, Frantsvog, Glassheim, Kasper, Nelson, and Winrich and Senators Berry and Dever voted "aye." Representatives Kreidt, Metcalf, and Rohr and Senators Klein, Lee, and Mathern voted "nay."

Mr. Askvig suggested that under proposed Section 54-66-03(2) the committee remove the illustrative language regarding what entity qualifies as a statewide consumer entity.

It was moved by Senator Lee and seconded by Senator Dever that the committee bill draft be revised to remove subsection 2 of proposed Section 54-66-03.

Senator Glassheim said if this motion passes, he will request the committee reconsider its actions whereby it revised the board membership. He said he supported the previous motion with the expectation there would be some assurance the consumer representatives would truly represent consumers. If this motion passes, he said, there would no longer be any assurance the consumer representative actually represents consumers.

Senator Lee said it seems inappropriate to limit the Governor's selection of consumer representatives. She said under the committee bill draft the Governor's ability to appoint a member is limited by the names submitted by the statewide consumer entities. She does not support this limitation.

Representative Glassheim said he wants some specificity in the law to ensure the consumer representatives truly represent consumers and are not just political favors to people who donate to the Governor's campaign.

Senator Dever supported Senator Lee's position.

Senator Lee rejected Senator Berry's proposal to amend the motion to keep subsection 2 but remove the illustrative language.

Senator Mathern said the statewide consumer entities are intended to be value-based versus focused on the delivery of a product.

Representative Winrich said the consumer representative language in the committee bill draft is not very restrictive and still leaves the Governor significant flexibility.

Representative Keiser said in his experience the Governor likely would welcome the nominee process in order to assist in filling board openings.

Senator Lee said under the committee bill draft the Governor would be restricted from appointing an individual who is not affiliated in some way with one of the nominating entities.

Representative Glassheim said the process of submitting nominees to the Governor is a common practice, and there is nothing in the law that would prevent an entity from forwarding a name of a person who is not affiliated with that entity.

Senator Berry questioned what qualified as a statewide consumer entity.

The motion failed on a roll call vote. Representative Clark and Senators Dever, Klein, and Lee voted "aye." Representatives Keiser, Frantsvog, Glassheim, Kasper, Kreidt, Metcalf, Nelson, Rohr, and Winrich and Senators Berry and Mathern voted "nay."

It was moved by Senator Berry and seconded by Representative Winrich to amend subsection 2 of proposed Section 54-66-03 to remove the illustrative list of statewide consumer entities.

Representative Kasper questioned whether it might work to revise the language to allow individuals to submit nominees.

The motion carried on a roll call vote. Representatives Clark, Frantsvog, Glassheim, Kasper, Kreidt, Metcalf, Rohr, and Winrich and Senators Berry, Dever, Klein, and Lee voted "aye." Representatives Keiser and Nelson and Senator Mathern voted "nay."

It was moved by Senator Klein and seconded by Senator Berry that the committee bill draft be revised to provide one of the three consumer representatives is an at-large nominee selected by the Governor.

Senator Mathern said the consumer representative of the board is not intended to represent the nominating entity but is intended to represent consumers.

Representative Keiser said he supports this motion.

Representative Glassheim said he questions why the committee is willing to narrowly specify the other board positions but seems unconcerned about the consumer member.

Senator Lee said she views this approach as evenhanded and not hypocritical.

The motion carried on a roll call vote. Representatives Keiser, Clark, Frantsvog, Kasper, Kreidt, and Rohr and Senators Berry, Dever, Klein, and Lee voted "aye." Representatives Glassheim, Metcalf, Nelson, and Winrich and Senator Mathern voted "nay."

Senator Dever questioned whether the ACA requires that the board have a representative of the Native American Indian tribes in the state.

Ms. Anderson said Section 155.130 of the HHS proposed rules requires the board regularly consult on an ongoing basis with federally recognized tribes located within the state.

Mr. Scott J. Davis, Executive Director, Indian Affairs Commission, stated he is consulting with the Department of Human Services regarding the requirements of the ACA. He said he is not certain what is required as it relates to consultation.

Representative Keiser questioned whether the committee bill draft should be amended to require the board enter consultation agreements with each of the tribes.

Representative Kasper questioned whether the ACA requires the board to consult with the Indian Affairs Commission, or whether it requires consultation with each of the five tribal chairmen individually.

Mr. Davis said although he would support a single consultation with the Indian Affairs Commission, he will research this matter further and will consult with the Indian Affairs Commission. He said he hopes to have a response for the legislators to consider at the special session.

Senator Berry said he supports a single consultation with the Indian Affairs Commission if it meets the requirements of the ACA.

Representative Glassheim said we need to consult with HHS to see if consultation with the Indian Affairs Commission would be equivalent to consulting with the five separate tribal nations.

Ms. Anderson distributed a copy of a letter ([Appendix H](#)) dated September 14, 2011, from the Secretary of Health and Human Services to the Governors of each of the states regarding tribal consultation.

Chairman Keiser distributed a flowchart ([Appendix I](#)) that reflects the proposed governing structure for the health benefit exchange. He said he met with committee counsel during the lunch break, and this flowchart is the result of that meeting.

In response to Senator Mathern's concern, there may be conflicts between policy and funding. Representative Keiser said both OMB and the board are under the Governor.

Chairman Keiser directed committee counsel to revise the committee bill draft to reflect the governance structure set out in the flowchart.

It was moved by Representative Kasper, seconded by Representative Clark, and carried on a voice vote that the advisory group established under proposed Section 54-66-04 be renamed the Health Benefit Exchange Advisory Group.

Mr. McLaren stated Section 155.130 of the HHS proposed rules requires that the exchange regularly consult on an ongoing basis with educated health care consumers, so perhaps the advisory group should be amended to meet this requirement.

Mr. St. Aubyn recommended the committee revise the membership of the advisory board so it is not limited to 11 members and so that it has a broader membership, such as the NAIC redline version the committee reviewed at the September 20, 2011, meeting.

Ms. Ternes said the proposed federal rule is not specific to the advisory group, but the committee bill draft could be amended to provide the advisory group membership may include the entities listed under the proposed rule.

It was moved by Senator Mathern, seconded by Senator Lee, and carried on a voice vote that the committee bill draft be revised so the statutory membership of the Health Benefit Exchange Advisory Group is permissive, not limited to 11 members, and reflects the proposed membership under the NAIC redline version reviewed at the September meeting and the proposed changes suggested by Ms. Anderson and revised to include a technology advisory group.

Senator Mathern suggested the committee bill draft be revised to clarify the health benefit exchange may work with other states. He said the per person cost of building the health benefit exchange infrastructure may make it necessary for the state to work with other states for one or more portions of the health benefit exchange.

Representative Keiser said he thinks the committee bill draft as drafted allows the health benefit exchange to contract with and work with other entities as it determines appropriate.

Ms. Hauer requested the committee consider revising the language regarding ratesetting under proposed Section 54-66-06(3).

Representative Keiser said he recognizes the basic goal of not creating dual regulatory systems, but he also recognizes ratesetting under the health benefit exchange could turn into a politicized issue, and he wants to prevent this from happening.

Mr. St. Aubyn said Blue Cross Blue Shield of North Dakota supports the ratesetting approach taken in the committee bill draft; however, he provided proposed revisions for committee consideration. He said under the proposed revisions, the ratesetting process would be the same inside the exchange as it is outside the exchange.

Representative Kasper said Mr. St. Aubyn's proposed approach makes a significant change to the current ratesetting procedure. He said if the committee were to adopt that proposal, the committee should hold at least one committee meeting to address this single issue.

Mr. St. Aubyn said his proposal is really no different from the process provided for in the committee bill draft.

Senator Mathern said he thought one of the committee's goals was to be consistent inside and outside the exchange.

Mr. St. Aubyn said the ratesetting language in the committee bill draft was included because Representative Keiser wanted to address concerns, such as those that occurred in the Massachusetts exchange whereby the rate approval process became politicized. He said his proposed revisions to the committee bill draft were intended to address the issue raised by the Insurance Commissioner that the committee bill draft created two different ratesetting procedures. He said that it does make sense to have a single rate approval process, as the Insurance

Commissioner may not know whether a policy will be sold in the exchange or outside the exchange or both.

In response to a question from Representative Winrich, Mr. St. Aubyn said if the committee bill draft was revised to reflect the Insurance Department's proposed language, the rate approval process, would not provide for a detailed certification.

Ms. Carlson said she thought the original intent of the committee bill draft was to convey whether the insurance policy met the Insurance Commissioner's rate standards. She said the current rate approval process does not include a certification process, and she questioned why the health benefit exchange would care about the details of the proposed certification.

It was moved by Representative Kasper and seconded by Representative Kreidt that the committee bill draft be revised to reflect the Insurance Department's proposed changes to the rate approval process.

Senator Mathern questioned whether this rate approval issue would have any negative impact by allowing different rates for policies inside the exchange versus outside the exchange.

Ms. Hauer said the committee bill draft revision proposed by the Insurance Department would treat policies inside the exchange the same as policies outside the exchange.

In response to a question from Senator Lee, Mr. Michael Fix, Life and Health Division Director and Actuary, Insurance Department, briefly explained the process used by the department for rate approval. He said the 28-point actuarial memorandum guidelines the Insurance Department uses include an actuarial certification requirement. He said the committee bill draft makes significant changes in the rate approval process. Specifically, he said, the committee bill draft shifts a burden to the Insurance Department's actuary.

In response to a question from Senator Mathern, Mr. Fix said the committee bill draft makes the rate approval process more difficult for the Insurance Department.

The motion carried on a roll call vote. Representatives Keiser, Clark, Frantsvog, Glassheim, Kasper, Kreidt, Metcalf, Nelson, Rohr, and Winrich and Senators Dever and Klein voted "aye." Senators Berry, Lee, and Mathern voted "nay."

It was moved by Representative Kasper, seconded by Representative Kreidt, and carried on a voice vote that the committee bill draft be revised to remove proposed Section 54-66-07(15)(c) relating to use of state funds.

The committee reviewed proposed Section 54-66-08.

Senator Mathern said he does not want to limit navigators to insurance producers.

Representative Keiser said conceptually he has a problem with the ACA's navigator requirement. He said although he wants to have trained navigators, he does not want to let agents fill this role of navigator.

Representative Keiser said he would like to have the committee bill draft revised to provide the navigator would be an office of the newly created Health Benefit Exchange Division. He said the office could consist of one or more individuals who are charged with performing a broad range of the ACA navigator duties, such as public education and raising awareness of the health benefit exchange. Additionally, he said, the new office would be responsible for training those individuals who have the existing relationships with employees and employees to ensure those individuals are able to assist consumers in enrolling under the health benefit exchange.

Representative Keiser said his proposal would be similar to the services provided by the Insurance Department in assisting in the enrollment of Medicare Part D coverage. However, he said, unlike the Medicare Part D system, under which the pharmacists and physicians who helped consumers were not compensated for their services, he would like the insurance agents and other individuals to receive appropriate compensation for helping consumers.

Representative Kasper said navigators need to prove they have a basic understanding of the health insurance arena.

Ms. Anderson said because the health benefit exchange includes Medicaid and the state's children's health insurance program (CHIP), navigators need to be knowledgeable regarding these two programs.

In response to a question from Representative Glassheim, Representative Keiser said under his proposal the navigator under the new office of the Health Benefit Exchange Division could certify individuals to ensure they have the necessary training to assist consumers in using the health benefit exchange. He said by avoiding designating the individuals who are actually assisting the consumers as "navigators," there is no limitation on having those individuals receive compensation for the service.

Representative Kasper said the individuals assisting consumers need to understand the insurance and financial implications, as well as Medicaid and CHIP. He said if these people are appropriately trained, they should receive appropriate compensation for this service.

Mr. Mayer said the issues of navigators and compensation are very important issues for the National Association of Insurance Financial Advisors - North Dakota.

Ms. Carlson said the proposed HHS rules provide navigators may be paid for their services, but they may not be insurance companies. She said she suggests the committee retain the language in the committee bill draft but revise it to recognize the requirements of HHS proposed rule Section 155.210.

Ms. Ternes said the navigator grants required under the ACA may not come from federal funds. She said the Insurance Department does not have a simple solution to the issues relating to navigators.

Representative Keiser said he would work with committee counsel to revise the committee bill draft to create a state navigator under the new Health Benefit Exchange Division.

Representative Glassheim said even if the state's health benefit exchange plan is approved by HHS, the proposed navigator plan seems to go against the existing network in place to assist consumers.

Representative Winrich said the committee's proposal to address navigators seems inconsistent with the plan envisioned under the ACA; however, the approach may not necessarily reject the network currently in place to help people understand the exchange.

Senator Lee said she recognizes the valuable services currently offered by agents, and she hopes they will be able to continue to receive compensation for their services.

Representative Keiser said he agrees with Senator Lee. He said if agents are not paid for these services, they may no longer provide them. He said he thinks the navigator provision of the ACA is an example of an unintended consequence of the ACA.

The committee reviewed the proposed Section 54-66-10.

Mr. St. Aubyn said the NAIC redline bill draft version reviewed at the September 20, 2011, committee meeting included an appeal process for insurance companies which has been removed in the committee bill draft.

Committee counsel said Section 28-32-01(1) provides the administrative hearing provisions of chapter 28-32 would apply because the application to sell an insurance policy on the exchange would be an "application seeking a right, privilege, or an authorization from an agency"; therefore, it is not necessary to specify the administrative hearing process unless the committee seeks to have a process that differs from the process established under Chapter 28-32--the Administrative Agencies Practice Act.

Committee counsel said if the committee wishes to specify which party will be assessed costs and fees or wishes to provide the administrative hearing officer's order is final and is not a recommendation to the administrative agency, then these items should be specified in the committee bill draft.

It was moved by Senator Mathern, seconded by Representative Kreidt, and carried on a voice vote that the committee bill draft be revised to provide the administrative hearing costs and finality provisions recommended by Mr. St. Aubyn.

The committee reviewed proposed Section 54-66-12. Committee counsel said if the committee decides to go ahead and fund the health benefit exchange through increased premium taxes, assessments, or user fees or a combination of these, this section will need to be revised to better address how the board establishes what funds will be collected, how the funds are to be collected, and how the collected funds are transferred to the newly

created health benefit exchange fund. Additionally, she said, subsection 4 of this section should be revised to better reflect the committee's wishes regarding authorized uses of collected funds, carryforward of funds in the health benefit exchange fund, and rebates.

Committee counsel distributed a document ([Appendix J](#)) prepared by the Insurance Department which estimated the amount of increased premium that would result from an increase in the premium tax on major medical insurance policies.

Committee counsel said the premium tax estimates were prepared by the Insurance Department at her request. She said these figures are estimates, and it is important to realize:

- The Insurance Department does not gather premium tax data specific to major medical policies;
- There are retaliatory tax issues that might impact the premium tax collected; and
- These estimates are unable to take into account the fact some insurers may enter or leave the state and other states may also choose to fund all or a portion of those states' health benefit exchanges with increases in premium tax.

Representative Keiser said he thinks the Workforce Safety and Insurance funding mechanism is similar to the funding mechanism provided under the committee bill draft. He said subsection 4 of the proposed Section 54-66-12 needs to be revised to better address what the board is to do if excess funds are collected.

Senator Mathern said the committee should consider funding the health benefit exchange through the funds currently collected to fund CHAND.

Committee counsel and Ms. Ternes stated if the CHAND assessment is used to fund the exchange, the committee may want to remove the current premium tax credit the insurance companies receive for the CHAND assessment.

Representative Keiser said he does not support using the currently collected premium tax dollars to fund the exchange. He said additional funds need to be generated rather than using money from the general fund.

Representative Kreidt said he is concerned about what will happen if the ACA is found unconstitutional and the federal funds dry up.

Representative Keiser said the federal courts should make a determination on the constitutionality of the ACA before January 1, 2015, so the issue of state funding of the exchange is a few years away.

Mr. St. Aubyn questioned who will be responsible for determining how much funding will be necessary, and who will direct the Insurance Commissioner to increase the premium tax. Representative Keiser said the committee bill draft requires an appropriation for any funds collected.

In response to a question from Representative Kasper, Ms. Ternes said although the insurance

regulatory trust fund supports the activities of the Insurance Department, most of the premium tax collected goes to the general fund.

Representative Keiser said he thinks a combination of funding sources will be necessary to fund the exchange.

Ms. Ternes said as far as timing collections, it makes sense to begin collections at the beginning of the calendar year. She said in order for the state to be ready to fund the exchange by January 2015, the necessary legislation would need to be passed during the 2013 regular legislative session.

Ms. Carole Kessel, Chief Examiner, Insurance Department, said she created the funding document committee members received. She said the basic annual renewal fee is \$125, but due to the retaliatory provision several insurance companies pay a higher annual fee; therefore, although the Insurance Department collects more than \$125 per insurer, an increase in this fee would only increase a portion of the annual fees being paid.

In response to a comment from Senator Mathern that the funding of the exchange will require a combination of sources, Ms. Ternes said insurance companies are required to renew annually, and an increase in the annual fee is one possible funding mechanism.

Representative Keiser said he would work with committee counsel to revise proposed Section 54-66-12 and to clarify the Insurance Commissioner shall transfer any remaining planning grant funds to the division in order for the division to use those funds or transfer them to the Department of Human Services or the Information Technology Department.

In response to a question from Representative Keiser, Ms. Pam Sharp, Director, Office of Management and Budget, said her initial research indicates the newly created division would require at least nine full-time equivalent (FTE) positions to establish the exchange and would need to retain at least nine FTE positions to operate the exchange.

In response to a question from Representative Keiser, Ms. Feldner said if the Information Technology Department were to build the exchange system in-house, it would require approximately 19 FTE positions plus contractors. She said the department would need at least 11 FTE positions to maintain the exchange system once it is built. However, she said, she expects the department will recognize some savings by purchasing some parts of the system from other states.

Representative Keiser said the contingent expiration date clause of the committee bill draft may need to be revised to address what happens if the federal government does not meet the current timelines.

Senator Mathern said he thinks the committee bill draft should be revised to give the state agencies the necessary flexibility to work with HHS if the state plan is found to be inadequate in any way. He said with a legislative body that meets biennially, this may be an important issue.

Representative Keiser said the federal government realizes North Dakota and some other states meet biennially and should be flexible in dealing with us. He said he expects the state's plan will be approved or approved conditionally.

Chairman Keiser said at the next committee meeting the committee will receive more detailed information from the Information Technology Department, Department of Human Services, and OMB regarding the departments' fiscal needs and FTE position needs, as well as the timeline of these funding and staffing needs.

No further business appearing, Chairman Keiser adjourned the meeting at 6:10 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:10