INTRODUCTION:
Health insurance exchanges (HIE) are entities that organize the market for health insurance by connecting small businesses and individuals into larger pools that spread the risk for insurance companies, while facilitating the availability, choice and purchase of private health insurance for the uninsured. While there are legal issues that warrant consideration under a federal, state, or private exchange framework, those issues are not insurmountable barriers to implementation.

The section below outlines the legal issues and solutions for a health insurance exchange if administered through the federal or state government or through a private entity.

FEDERAL EXCHANGES: Congress has the power to implement an HIE at the federal level, but must consider certain laws and regulations during both design and implementation as outlined below:

- **Interstate Commerce:** The federal government has the authority to regulate matters that substantially affect interstate commerce. While the power to regulate interstate commerce is not unbounded, the power certainly extends to insurance regulation.
- **Tax and Spending:** The federal government can tax and spend for the general welfare of citizens, thus Congress could use tax incentives and its spending power to incentivize participation in a federal exchange or to develop a “play or pay” framework with the states.
- **McCarran Ferguson Act:** Congress specifically delegated the regulation of insurance to the states. Therefore, Congress must clearly and explicitly communicate its intention to preempt state regulation of insurance in any insurance regulation it legislates.
- **Anti-commandeering:** The federal government is prohibited from appropriating state officials to implement federal laws. Therefore, a federal HIE must not require implementation by state employees.
- **Due Process and Equal Protection:** When selecting insurers for inclusion in the exchange, the federal government must act rationally when making legislative classifications and distinctions. This analysis will also apply to state exchanges.
- **Takings Clause:** Severe regulation of insurance has in a few instances been found by the courts to constitute a taking. This must be considered when determining the limitations that will be placed on insurance providers to encourage participation in the HIE. This analysis will also apply to state exchanges.
- **Administrative Procedures Act:** A federal HIE must comply with the standards and procedures relating to the freedom of information, records privacy, and adjudication applicable to all federal agencies.
- **Other Considerations:** A comprehensive review of the tax code, as well as employee benefit and public health laws should be conducted once the federal HIE has been designed.
STATE EXCHANGES: There are no insurmountable legal barriers to implementation of HIEs at the state level. Certain Constitutional issues that apply equally to state exchanges have been analyzed under the federal exchange framework and stated above.

- **State Administrative Procedures Acts**: Most, if not all, states have adopted legislation that outlines procedures for rulemaking, records privacy, adjudication, tort claims and government contracting. A state HIE must comply with existing state law, but these laws must be analyzed on a state by state basis.

- **Employee Retirement Income Security Act (ERISA)**: Federal law preempts any state law that relates to an employee benefit health plan. A state HIE would only be preempted if participation by employers is mandatory or if the state requires action on the part of an employer.

- **Health Insurance Portability and Accountability Act (HIPAA)**: Existing federal legislation contains non-discrimination, guaranteed access and pre-existing condition requirements that may need to be met by a state exchange if it offers insurance to employment-related groups.

PRIVATE EXCHANGES: Implementation of a private HIE is not prevented by existing state or federal law.

- **Private Health Care Voluntary Purchasing Alliance Model Act**: A number of states have adopted laws or regulations authorizing the creation of private exchanges. Review of existing laws would be required to ensure they adequately support a multi-insurer framework.

- **Antitrust Laws**: Current federal antitrust laws prohibit unreasonable restraints of trade. States, however, are exempt from antitrust law and could extend this exemption to private exchanges. Private exchanges can also be structured to avoid antitrust violations.

- **Multiple Employer Welfare Arrangement Regulation (MEWAs)**: Membership and organizational rules will determine whether the state or federal government, or both, regulates private HIEs.

- **HIPAA**: The consumer safeguards provided by existing federal legislation likely would not apply to HIEs unless a contractual relationship was established that identified the exchange as a business associate of insurers. Under this agreement, HIEs would be limited in their ability to disclose personal health data to employers.

CONCLUSION:
Health insurance purchasing exchanges have been proposed as a possible means of making insurance more accessible, increasing competition among health plans, and promoting choice of insurer. President Obama’s campaign proposal and various congressional leaders have proposed establishing insurance exchanges through federal legislation. Although exchanges implicate many design and policy issues regardless of whether they are implemented at a federal, state, or private entity level, there are no absolute legal bars to the establishment of health insurance exchanges.