

# PUBLICATION

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## Affordable Care Act: Navigators Get Clarified and Standardized in CMS's Latest Proposed Rule

May 1, 2013

On Friday, April 5, 2013, the Centers for Medicare & Medicaid Services (CMS) published a proposed rule (45 CFR Part 155) that clarifies and implements standards for providers of consumer-related assistance under the Affordable Care Act (ACA). The proposed rule clarifies the ineligibility of certain entities to become Navigators and further clarifies when state-imposed Navigator licensing, certification or other standards are permissible. The proposed rule also sets standards that would help ensure that Navigators and non-Navigator assistance personnel providing services in Federally-Facilitated Exchanges, including State Partnership Exchanges, are trained, impartial and providing assistance in an accessible manner.

### Background

The ACA requires health insurance marketplaces, known as Exchanges, to award grants to Navigators, *i.e.*, eligible public and private entities or individuals charged with providing fair and impartial information to consumers about health insurance, the Exchange and various components and concepts germane to health insurance and the Exchange.

The ACA calls for the creation of Exchanges and permits each state to choose whether it will operate a health insurance Exchange. The Department of Health and Human Services (HHS) will establish and operate an Exchange in each state where a state-operated Exchange was not created. The ACA directs each Exchange, whether operated by a state or by HHS, to award Navigator grants to eligible entities.

The primary goal of the Navigator program is to assist consumers in making choices about their health care options and acquiring health care coverage, including information about all insurance affordability programs including Medicaid, SCHIP and access to premium tax credits. All Navigators are required to provide fair, impartial and accurate information to consumers. Decision-makers for state-operated Exchanges are responsible for developing and disseminating standards applicable to state-Exchange Navigators. The Secretary of HHS is responsible for developing and disseminating standards applicable to Navigators for any Exchange not fully run by a state. Navigators will not make eligibility determinations and will not select Qualified Health Plans (QHP) for consumers or enroll applicants into a QHP.

### Regulations Applicable to All Navigators

In a previous rule HHS pronounced that to receive a Navigator grant, an entity or individual must "meet any licensing, certification or other standards prescribed by the state or any state-operated or Federally-Facilitated Exchange, if applicable." The proposed rule would amend the regulations to clarify that any Navigator licensing, certification or other standards prescribed by the state or Exchange must not prevent the application of key provisions of Title I of the ACA, including the provision that calls for each Exchange to include at least two types of Navigators: one from a community and consumer-focused non-profit group and one from any other category of Navigators. Thus, in accordance with the ACA, the proposed rule prevents states and Exchanges from (1) imposing requirements that would place all Navigators into a single category (*i.e.*, that all Navigators be agents or brokers or obtain errors and omissions coverage); and (2) impeding Navigators' ability to perform their required duties.

Previous regulations prohibited many entities from becoming a Navigator. These included health insurance issuers; subsidiaries of health insurance issuers; an association that includes members of, or lobbies on behalf of, the insurance industry; or entities that receive any consideration, directly or indirectly, from any health insurance issuer in connection with the enrollment of any individuals or employees in a QHP or non-QHP. The proposed rule expands the list to include stop loss insurance issuers; subsidiaries of a stop loss issuer; or any entity that receives any consideration, directly or indirectly, from any issuer of stop loss insurance in connection with the enrollment of any individuals or employees in a QHP or non-QHP.

### **Conflict of Interest in Federally-Facilitated Exchanges**

The Secretary of HHS is tasked with prescribing standards and training for federally-funded Navigators to ensure that information made available by Navigators is fair, accurate and impartial. Previously released rules prohibit Navigators and non-Navigator assistance personnel (e.g, Exchange call center personnel) offering services through a federally-funded Exchange from having a conflict of interest, described as a private or personal interest sufficient to influence, or to appear to influence, the objective exercise of their official duties. The proposed rule requires Navigator entities, including a Navigator grant applicant, (1) to submit to the Exchange a written attestation that the Navigator and its staff do not have prohibited conflicts of interest; (2) submit a written plan to remain free of prohibited conflicts of interest during their term as Navigator; and (3) provide information to consumers about the full range of QHP options and insurance affordability programs such as premium tax credits and cost sharing reductions and Medicaid and CHIP, for which the consumer is eligible. The foregoing requirements also apply to non-Navigator assistance personnel.

In addition, the proposed rule includes a requirement that certain conflicts would not bar Navigators and non-Navigator assistance personnel from participating in an Exchange subject to very specific disclosure requirements. Specifically, the proposed rule requires three types of disclosures: (1) Navigators must disclose to each consumer any line of insurance business that the Navigator intends to sell while serving as a Navigator (however, as noted above, the Navigator is precluded from selling health insurance); (2) Navigators must disclose to each consumer any existing and former employment relationship between the Navigator, its staff and any issuer of health insurance or stop loss insurance or subsidiaries of such insurance in the last five years and any existing employment relationship between any health insurance issuer or stop loss insurance issuer, or subsidiary or such issuer, and the individual's spouse or domestic partner; and (3) Navigators must disclose to each consumer any existing or anticipated financial, business or contractual relationships with one or more issuers of health insurance or stop loss insurance or subsidiaries of such issuers. Again, while these relationships with issuers of health insurance and stop loss insurance must be disclosed, these relationships do not prohibit a Navigator from participating in federally-funded Exchanges.

### **Training Standards in Federally-Facilitated Exchanges**

The existing proposed rule directs Exchanges to develop and disseminate a set of training standards, to be met by all entities and individuals carrying out Navigator functions. The updated proposed rule requires certification of all Navigators in federally-facilitated Exchanges and all federally-funded non-Navigator assistance personnel in state-operated Exchanges. Proposed certification standards require (1) demonstration of ability to assist consumers in both the individual Exchange and SHOP; and (2) demonstration of ability to help any individual who presents him or herself for assistance. The proposed rule also specifies the training and certification requirements for Navigators in Partnership and Federally-Facilitated Exchanges and for non-Navigator assistance programs in Federally-Facilitated Exchanges, including State Partnership Exchanges and all federally funded non-navigator assistance personnel in State-based Exchanges. The preamble to the proposed rule notes that up to 30 hours of training, including standards for certification after receiving a passing score on an HHS approved exam, will be required. The rule includes the standards for the training modules which include eligibility and enrollment determination training; privacy and security

requirements to protect personally identifiable information; and premium tax credit and cost-sharing reduction and insurance affordability program training. Under the proposed rule, Federally-Facilitated Exchanges (including State Partnership Exchanges) will monitor compliance with the certification and training standards.

State-based Exchanges may adopt the Federal standards or develop their own requirements that meet the Federal standards.

### **Funding for Federal Navigators**

On Tuesday, April 9, 2013, CMS announced the availability of new funding to support Navigators in Federally-Facilitated and State Partnership Exchanges. This funding opportunity is financed by 2013 Prevention and Public Health Funds (PPHF-2013). HHS will award up to \$54 million to recipients of Navigator grants. Each Navigator grant applicant is eligible for only one, non-renewable, one-year cooperative agreement award. At least \$600,000 in funds will be available for each state with a Federally-Facilitated Exchange or State Partnership Exchange. The amount of funding for each state is based on the number of uninsured in that state. Consistent with the proposed rule published on April 5, 2013, all applicants must include with their applications a brief statement attesting that the applicant is not ineligible to serve as a Navigator, for example, because of an employment relationship with a health insurance issuer. Applicants for the Navigator grants are strongly encouraged to submit a non-binding Letter of Intent to Apply to CMS by May 1, 2013. Applications are due June 7, 2013. The anticipated award date is August 15, 2013.

Should you have any questions regarding the Navigator and consumer-assistance provisions of the Affordable Care Act or the implementation and requirements of the Affordable Care Act, please contact a member of the Firm's Insurance Regulatory Group.