

The Hilltop Institute



analysis to advance the health of vulnerable populations

Overview of the July 17, 2013 Final Rule on Standards for Navigators and Non-Navigator Assistance Personnel

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Overview of the July 17, 2013 Final Rule on Standards for Navigators and Non-Navigator Assistance Personnel

Introduction

On July 17, 2013, the U.S. Department of Health and Human Services (HHS) issued a final rule on *Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors* (<https://www.federalregister.gov/articles/2013/07/17/2013-17125/patient-protection-and-affordable-care-act-exchange-functions-standards-for-navigators-and>). This rule finalizes provisions in the Notices of Proposed Rulemaking (NPRMs), released on January 22, 2013, and April 5, 2013, related to:

- Various requirements for Navigators and non-Navigator Assistance Personnel (Assisters)
- Requirements for Exchanges to have a Certified Application Counselor program and the details of that program
- Conflict of interest, training and certification, and meaningful access standards

This document provides a high-level summary of this rule and highlights key changes to the regulation since the issue of the proposed rule.

Consumer Assistance Tools and Programs of an Exchange (45 CFR §155.205)

This section of the rule lists the consumer assistance tools and programs of an Exchange. HHS finalized this section as proposed, with a technical correction to the referral language. The revised language states, “The Exchange must provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under §2793 of the Public Health Service Act, or any other appropriate state agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage.”

Navigator Program Standards

Entities and Individuals Eligible to be Navigators (45 CFR §155.210(c)(1)(iii)

HHS finalized this section as proposed, indicating that a state or Exchange must not prevent the application of the provisions of Title 1 of the Affordable Care Act (ACA). For example, requiring a Navigator to hold an agent or broker license would violate this provision.



Prohibition on Navigator Conduct (45 CFR §155.210(d))

This section states that a Navigator may not be a health insurance issuer; a subsidiary of a health insurance issuer; or an association that includes members of or lobbies on behalf of the insurance industry, or receives any consideration, directly or indirectly, from any health insurance issuer in connection with the enrollment of any individuals or employees in a qualified health plan (QHP) or non-QHP.^{1, 2, 3} In addition, the proposed rule does not allow Navigators to be an issuer of, or a subsidiary of an issuer of, stop-loss insurance, and they may not receive any consideration, directly or indirectly, from an issuer of stop-loss insurance in connection with the enrollment of any individuals or employees in a QHP or a non-QHP. HHS finalized this section as proposed.

In response to comments, HHS clarified that staff or employees of a Navigator grantee who are in no way involved in the Navigator program are not required to comply with the conflict of interest standards that are applicable to Navigator program staff.

Conflict of Interest Standards (45 CFR §§155.215(a)(1), 155.205(d), 155.215(a)(2))

The section finalized the proposed rule on conflict of interest standards for Navigators and Assistants in federally facilitated exchanges (FFE) and state partnership exchanges (SPEs), as well as Assistants in state-based Exchanges that are funded through federal §1311(a) Exchange Establishment grants. HHS states that the same conflict of interest considerations that apply to Navigators should apply to Assistants. Specifically, the final rule requires these parties to:

- Submit to the Exchange a written attestation that they have no conflicts of interest.
- Provide a written plan to remain free from conflicts of interest during their term.
- Provide information to consumers about the full range of QHP options and insurance affordability programs.
- Disclose certain conflicts of interest (which do not prohibit serving as a Navigator or Assistant) to the Exchange and to each consumer receiving application assistance, such as:

¹ Section 2791(b)(2) of the Public Health Service Act defines a health insurance issuer as “. . . an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA). Such term does not include a group health plan.” Consistent with this definition, in this context, whether an entity is a health insurance issuer is generally determined according to state law.

² The federal prohibition on receiving remuneration from a carrier related to enrollment does not apply to consideration received by a provider to support specific activities, such as the provision of medical services that are not connected to the enrollment of individuals or employees in QHPs.

³ An entity that receives a grant or other funding from a health insurance or stop-loss insurance issuer would not be prohibited from serving as a Navigator or Assistant unless such grant or funding were related to the enrollment of individuals or employees in a QHP or non-QHP. However, the entity is required to disclose the receipt of the grant or funding from the issuer to the Exchange and consumers receiving application assistance.



- Any lines of insurance business, other than health insurance or stop-loss insurance, which the entity or individual intends to sell
- Any existing and former employment relationships they have had within the previous five years with any issuer of health insurance or stop-loss insurance, or subsidiaries of such issuers
- Any existing employment relationships between any health insurance issuer or stop-loss insurance issuer, or subsidiary of such issuers, and the individual's spouse or domestic partner
- 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

HHS finalized this section as proposed, with minor changes to clarify that disclosure of non-prohibited conflicts of interest must be made in plain language. HHS further clarified that assisters are required to comply with §155.210(e)(2) to provide information to consumers in a fair, accurate, and impartial manner.

Training Standards

Certification and Recertification Standards (45 CFR §155.215(b)(1))

FFE and SPE Navigators and Assisters and state-based Exchange Assisters whose positions are funded through federal Exchange Establishment grants must meet the following certification and recertification requirements:

- Obtain certification by the Exchange prior to carrying out any consumer assistance functions.
- Register for and complete an HHS-approved training program.
- Following completion of the HHS-approved training, complete and achieve a passing score on all approved certification examinations prior to carrying out any consumer assistance functions.
- Earn continuing education credits and be certified and/or recertified on at least an annual basis.
- Be prepared to serve both the individual and Small Business Health Options Program (SHOP) Exchanges.⁴

⁴ HHS does not interpret this provision to mean that the Navigators and Assisters to which § 155.215 applies must actively seek out small businesses and employers to assist, unless that is the community the Navigator or Assister targets in service delivery. Training on SHOP is required to ensure that individuals can seek assistance with SHOP coverage from a Navigator or Assister. In some circumstances, the assistance may be provided through referral to



HHS finalized this section as proposed.

Training Module Content Standards (45 CFR §155.215(b)(2))

This section provides content standards for the training modules for FFE and SPE Navigators and Assisters and state-based Exchange Assisters. Any individual who provides consumer assistance must be trained on QHP options, insurance affordability programs, eligibility, and benefit rules and regulations.⁵ These training modules must include the following subjects:

- QHPs (including the metal levels), including how they operate, benefits covered, payment processes, rights and processes for appeals and grievances, and contacting individual plans
- The range of insurance affordability programs, including Medicaid, the Children’s Health Insurance Program (CHIP), and other public programs
- The tax implications of enrollment decisions
- Eligibility requirements for premium tax credits and cost-sharing reductions (CSRs) and the impact of premium tax credits on the cost of premiums
- Contact information for appropriate federal, state, and local agencies for consumers seeking additional information about specific coverage options not offered through the Exchange
- Basic concepts about health insurance and the Exchange, including the benefits of having health insurance and enrolling through an Exchange, and an individual’s responsibility to have health insurance
- Eligibility and enrollment rules and procedures, including how to appeal an eligibility determination
- Providing culturally and linguistically appropriate services
- Ensuring physical and other accessibility for people with a full range of disabilities
- Understanding differences among health plans

other Exchange resources, such as the toll-free Exchange call center or another Navigator or Assister in the same Exchange.

⁵ These standards do not apply to Certified Application Counselors. Exchanges may base their own training programs for Navigators, Assisters, and Certified Application Counselors on these standards, or they may adopt the federal standards and training materials. State Exchanges may use their Navigator training for Assisters whose positions are funded through 1311(a) grants if the training meets the standards specified in the final rule.



- Privacy and security standards applicable under § 155.260 for handling and safeguarding consumers' personally identifiable information^{6, 7}
- Working effectively with individuals who have limited English proficiency; people with a full range of disabilities; and vulnerable, rural, and underserved populations
- Customer service standards
- Outreach and education methods and strategies
- Applicable administrative rules, processes, and systems related to Exchanges and QHPs⁸

HHS finalized this section as proposed.

Providing Culturally and Linguistically Appropriate Services (45 CFR §155.215(c))

The section requires any FFE or SPE Exchange Navigators or Assisters funded through an Exchange Establishment grant to meet culturally and linguistically appropriate services (CLAS) standards, including:

- Developing and maintaining general knowledge about the racial, ethnic, and cultural groups in their service area, including the primary languages spoken
- Collecting and maintaining updated information to help understand the composition of the communities in their service area, including the primary languages spoken
- Providing consumers with information and assistance in the consumer's preferred language, at no cost to the consumer, including oral interpretation of non-English languages and the translation of written documents in non-English languages when necessary or requested
- Providing oral and written notice to consumers who have limited English proficiency, in their preferred language, informing them of their right to receive language assistance services and how to obtain them
- Receiving ongoing education and training in culturally and linguistically appropriate service delivery

⁶ For electronic applications, the consumer will log on to a personal account, to which the Navigator or Assisters generally will not have access without the consumer present.

⁷ At this time, HHS does not anticipate that a dedicated portal will be available for the use of Navigators, Assisters, or Certified Application Counselors in the FFEs.

⁸ SBEs must develop their own training and certification programs for Navigators and non-Navigator assistance personnel, and may use section 1311(a) Exchange Establishment grant funds to cover the administrative costs associated with this requirement. If a state Exchange uses section 1311(a) Exchange Establishment grant funds for this purpose, it must comply with the training standards set forth in the final rule.



- Implementing strategies to recruit, support, and promote staff members who are representative of the demographic characteristics, including primary languages spoken, of the communities in their service area

HHS revised the proposed rule for clarification. In response to comments about the provision of translation services, HHS amended §155.215(c)(3) to require translation services when necessary or requested by the consumer to ensure effective communication. HHS also amended §155.215(c)(4) to require that notice of language access services be provided in the consumer’s preferred language.

Standards for Access by Persons with Disabilities (45 CFR §155.215(d))

This section includes provisions for ensuring access to information for persons with disabilities. Navigators and Assisters in FFEs and SPEs and Assisters funded through an Exchange Establishment Grant must:

- Provide auxiliary aids and services for individuals with disabilities at no cost when necessary for effective communication or when requested
- Provide assistance to consumers in a location and in a manner that is physically and otherwise accessible to individuals with disabilities
- Ensure that any consumer education materials, websites, and other tools utilized for consumer assistance purposes are accessible to people with disabilities
- Permit authorized representatives to assist individuals with disabilities to make informed decisions
- Be capable of referring people with disabilities to local, state, and federal long-term services and support programs when appropriate

HHS revised the proposed rule for clarification. In response to comments, HHS amended §155.215(d)(2) to provide auxiliary aids and services when necessary or requested by the consumer to ensure effective communication. HHS also changed §155.215(d)(4) to read “authorized representative” instead of “legally authorized representative.”

Certified Application Counselors

General Rule and Standards of Certification (45 CFR §155.225(a)-(d))

Certified Application Counselors were proposed in the January 22, 2013, NPRM as a type of assistance personnel available to help individuals in each Exchange apply for enrollment in QHPs, Medicaid, CHIP, advance payments of the premium tax credit (APTCs), and CSRs. The final rule incorporates the Certified Application Counselor provisions of the NPRM, indicating that the Exchange “must have a Certified Application Counselor program that complies with the



requirements” of the rule.⁹ In order to provide states with greater flexibility, the final rule provides new options for certification. Each Exchange may designate organizations to certify their staff members and volunteers as Certified Application Counselors, certify individual Application Counselors directly (as provided in the proposed rule), or both. If the Exchange designates an entity, the designated organization must enter into an agreement with the Exchange and maintain a registration process and method for tracking Certified Application Counselor performance.¹⁰

As to their responsibilities, Certified Application Counselors are required to:

- Provide information to individuals and employees about the full range of QHP and insurance affordability options.
- Assist individuals and employees in applying for coverage in QHPs and insurance affordability programs.
- Help facilitate enrollment in QHPs and insurance affordability programs.¹¹ However, in contrasting the role of an Application Counselor with that of a Navigator, the final rule indicates that an Application Counselor’s role is limited to providing enrollment assistance to consumers.¹²

The rule also includes the following certification requirements: completing Exchange-approved training and obtaining a passing score on an examination;¹³ disclosing potential conflicts of

⁹ HHS notes that, since each Exchange is responsible for establishing its own Certified Application Counselor program, the program’s scope can vary based on each Exchange’s needs and market features.

¹⁰ FFEs will primarily focus on designating organizations that already have systems in place for protecting personally identifiable information, such as community health centers/federally qualified health centers; hospitals; health care providers (including Indian Health Services, Indian tribes, and urban Indian organizations that provide health care); behavioral health or mental health providers; Ryan White HIV/AIDS providers; agencies that have experience providing social services to the community, which are either non-federal governmental entities or organized under section 501(c) of the Internal Revenue Code; and other local governmental agencies that have similar processes and protections in place.

¹¹ Helping to facilitate enrollment involves assisting the consumer with submitting the eligibility application, clarifying distinctions among QHPs, and making an informed decision during the plan selection process. Certified Application Counselors will not make eligibility determinations or enroll applicants into QHPs. They will also not select QHPs for applicants. “Help to facilitate enrollment . . . in QHPs and insurance affordability programs,” means that Certified Application Counselors must at a minimum help consumers through the process of applying for and enrolling in QHPs through the Exchange, Medicaid, CHIP, and APTC/CSR.

¹² Unlike Navigators and Assistors, who have a duty to provide referrals to offices of health insurance consumer assistance, health insurance ombudsman, or any other appropriate state agency, and to assist an enrollee with a grievance, complaint, or question, Certified Application Counselors are not expected to have the knowledge to make these types of referrals.

¹³ Training covers QHP options, insurance affordability programs, eligibility, and benefit rules and regulations governing all insurance affordability programs operated in the state 45 CFR §155.225(b)(1).



interest to consumers, the designated organization, or certifying Exchange;¹⁴ complying with applicable privacy and security standards; agreeing to act in the best interest of applicants and enrollees; providing information in a manner that is accessible to persons with disabilities; and entering into an Application Counselor agreement with the designated organization or Exchange indicating that the applicant will comply with all requisite standards under the final rule.^{15, 16} HHS noted that it has *not* finalized the proposed requirement that Certified Application Counselors comply with applicable state law related to Certified Application Counselors because some state laws may limit the organizations and individuals who are eligible to participate.

This section of the rule is finalized with the addition of the option for Exchanges to designate organizations to certify staff and volunteers as Certified Application Counselors, and corresponding revisions to include standards for designated organizations.

Withdrawal of Certification (45 CFR §155.225(e))

This section of the rule requires the Exchange to establish procedures for withdrawing certification of a non-compliant Application Counselor. The final rule adds the requirement that Certified Application Counselor designated organizations are required to establish procedures for withdrawing certification from any noncompliant Certified Application Counselors.

Availability of Information (45 CFR §155.225(f))

This section of the rule requires Exchanges that certify Application Counselors to establish procedures for ensuring that applicants are informed of the functions of Certified Application Counselors and provide authorization for the disclosure of applicant information to a Certified Application Counselor. The final rule also applies this requirement to Certified Application Counselor designated organizations.

Fees (45 CFR §55.225(g))

The final rule prohibits designated organizations and Certified Application Counselors from imposing fees on applicants.

¹⁴ The final rule indicates that Certified Application Counselors and designated organizations must disclose potential conflicts of interest, including any relationships with QHPs or insurance affordability programs, such as Medicaid plans and Medicaid managed care organizations. Certified Application Counselors are responsible for disclosing only their own potential conflicts of interest.

¹⁵ Certified Application Counselors may satisfy the requirement to provide information in a manner that is accessible to individuals with disabilities either directly or through referrals to Navigators, non-Navigator Assistants, and/or the Exchange call center.

¹⁶ HHS has created a model agreement for Certified Application Counselors to enter into with designated organizations that can be found at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/sample-apply-to-be-a-cac-7-12-2013.pdf>.





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