



May 6, 2013

Marilyn Tavenner  
Acting Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Washington, DC 20201

Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

**Re: Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel**

Dear Ms. Tavenner,

I am writing on behalf of The National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. We are pleased to provide comment on the proposed rule titled "Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel," published in Volume 78, No. 66 of the *Federal Register* on April 7, 2013.

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize health insurance coverage. Of significance, the majority of our members also own independent small businesses and will be eligible purchasers of exchange marketplace-based coverage options in the years ahead. Consequently, we have a profound interest in the development of health insurance exchanges and feel that the decisions currently being made by CMS relative to the navigator program and related assistance personnel, as well as protections for exchange-based consumers who may be served by such individuals and programs, are critical.

A representative group of health insurance agents and brokers helped to develop these comments, which have been organized by topic, so please note that they reflect the views of experts who fully understand the needs and interests of private health insurance consumers who purchase coverage at both the individual and group level.

**Role of Navigators and Other Assisters**

NAHU appreciates the clarification this proposed rule provides in that health insurance exchange navigators and non-navigator assistance personnel will not select QHPs for consumers or enroll applicants into QHPs, as existing state consumer protection laws limit those activities to licensed insurance producers. However, our association is unclear as to how the distinction between advising consumers about QHP options and merely helping consumers through the eligibility and enrollment process, which is admittedly a gray area, will be made, monitored and enforced.



NAHU would also like to request clarification about whether or not CMS envisions navigators and non-navigator assisters will provide consumers with information about private health insurance options that exist beyond marketplace-based QHP options. It is NAHU's understanding that the scope of the navigator and non-navigator assisters as outlined in previous rules and guidance and the statute itself indicate that these entities will merely provide individuals with factual information about exchange-based health coverage options. However, if that is the case, we do not understand why an example in the preamble of the rule indicates a navigator could be advising a small business about self-funding arrangements. It is our view that navigators and assisters should present standardized information about exchange-based QHP options only.

NAHU recommends that the final rule clarify the scope of information that may be presented by navigators and non-navigator assisters. Further, we suggest that the scope be clearly limited to exchange-based QHP options and public-assistance health coverage programs like CHIP and Medicaid, and that navigators and related assisters be required to present standardized information on these topics to potential exchange enrollees. If a consumer has questions that extend beyond the scope of the standardized information, navigators and related assisters should be required to direct consumers back to the exchange, QHP issuers or the relevant public coverage program for additional information. If appropriate, questions about private health insurance products could also be directed to certified health insurance agents and brokers. Finally, we believe that navigators and non-navigator assistance personnel should be required to disclose to consumers that there are also non-exchange marketplace options available and where they can go to get additional information about those options. It is NAHU's view that all of these requirements should extend to not only navigators and other related assisters, but also to certified application counselors.

### **Navigator Training and Conduct**

NAHU believes that adequate training and exam-based certification and recertification for all individuals who may be interacting with marketplace consumers in a professional capacity are imperative. We look forward to additional details about what the exchange marketplace training will entail. Beyond training, though, NAHU believes that the consumers who utilize the new exchange marketplaces and the services of navigators and other related assisters deserve the assurance that the people being paid to help them are accountable for providing them accurate information and for keeping their private health and financial information secure.

Merely monitoring the compliance of navigators and assisters with regard to conflict-of-interest standards, data privacy and security, and the quality of information provided is insufficient. Health insurance is a financial-protection product and there can be extreme financial repercussions to consumers if they are led in the wrong direction, even by the most well-intentioned professionals. Furthermore, the exchange application involves a great deal of protected financial information and the consequences for consumers if there is any type of breach could be devastating. Unfortunately, identity theft is an extremely common crime in this country. All exchange consumers who are assisted by professional assisters should be entitled to an equal degree of protection under the law, no matter what the professional capacity of the assister may be. A publicly accessible system for handling consumer complaints and questions relative to navigators and related assisters in all states should be developed. It is also imperative that legal consequences for actions that harm consumers be specified in the final rule and those consequences be clear for both entities who may receive federal funds for assisting marketplace consumers and the individual people who may work or volunteer for such entities.



### **Requirement that Navigators and Related Assisters Serve Individual and Small-Business Consumers**

The proposed rule contends that in order to be truly helpful and useful to the public, navigator and assister services should be available to all consumers, including small businesses. The proposed rule goes on to require all such entities to be prepared to serve all kinds of exchange consumers. NAHU believes that it may be difficult for any one entity to be able to adequately serve all of the stated exchange target population groups. Further, we believe that exchange navigator and assister programs will be most successful if they work with community-based organizations and other groups that are able to provide targeted outreach to specific populations. We suggest that the final rule specify that for an entity to meet the navigator program standards, it must merely be able to demonstrate relationships with at least one specific subset of potential exchange consumers rather than all.

### **State-Based Regulation of Navigators**

NAHU recognizes that a state-based requirement that a navigator or other assister carry errors and omissions insurance designed for health insurance agents and brokers would violate the spirit of the requirement that there be two different types of navigator entities per state and that all navigators may not be required to be agents and brokers. Further, we understand and agree that errors and omissions policies offered to licensed health insurance producers today may not be appropriate liability coverage for the wide range of individuals and entities expected to serve navigator and/or assister roles in exchange-based marketplaces. However, NAHU requests clarification as to whether or not HHS believes the PPACA statute stipulates that a state may not insist that a navigator or other assister operating in the state maintain some other form of appropriate liability insurance or require such an individual or entity to hold some type of bond or establish other means to compensate wronged consumers. Health insurance is a financial-protection product and the majority of exchange-based QHP products sold will involve a federal tax subsidy determination. As such, there could be extreme financial consequences to the consumer if purchasing mistakes are made. Furthermore, assisters and navigators will have access to a wide range of private health and financial information, making the possibility of identity theft or other financial fraud a real one. Exchange consumers deserve a backstop of financial protection if mistakes are made.

Some states have already taken actions to protect consumers in this area, but many have not. Therefore, NAHU believes that, for the final rule, it is critical that exchange liability standards for navigators be developed by HHS. If appropriate standards are not put into place, liability for the actions of navigators is unclear. Not only does that leave exchange-based consumers with an uncertain path to become "whole" should they be harmed by an assister or navigator, but it also creates a great deal of exposure for both state- and federally facilitated exchanges, issuers offering QHPs and any other individuals or entities that come into contact with exchange consumers.

NAHU believes that, in the final rule, further clarification is also needed about entities that have been awarded navigator and non-navigator assister funding from the marketplace and the individual people who may be employed by or volunteer for such entities who may communicate marketplace information to consumers. If a consumer has a concern or complaint, then who is the one to shoulder the liability and have responsibility for addressing and rectifying the issue? Is the entity responsible, or is it each individual navigator or assister? Is responsibility shared? If so, does the exchange itself bear any responsibility? Where does a consumer go for recourse?



## **Conflict-of-Interest Standards**

NAHU appreciates the attempt to establish conflict-of-interest standards for navigators and non-navigator assistance personnel, but we feel the standards included in the proposed rule are incomplete. NAHU has no objection to requiring navigators and other assistance personnel to disclose if they sell other lines of insurance or have a past financial background with a health insurance issuer, but we feel that the limited scope of these disclosure requirements does not address other potential conflicts of interest.

The premise that only a financial relationship with a health insurance issuer can create a conflict is a flawed one. It is NAHU's view that the crafters of PPACA intended health insurance exchanges to benefit all Americans. As beneficiaries, all stakeholders, not just those who offer or sell health insurance products, have both areas of expertise to share and inherent conflicts of interest to avoid. For example, some of the CO-OP entities that have received grant funding also have union ties. What if a related union was awarded a navigator grant? Business groups often have health insurance carriers and/or provider organizations among their membership and may receive sponsorship funds or other sources of revenue from them. Would this prohibit such a group from getting a navigator grant or would such funding or related relationships need to be disclosed? Some assisters or application counselors may actually be employed by providers. What about those relationships? Consumer-advocacy entities that may wish to serve as assisters or navigators may receive funds from state insurance departments to assist with rate review. Is that a financial conflict of interest? The examples are endless.

In general, individuals and entities that meet the experience requirements specified as necessary to become navigators and other assisters as outlined in the proposed rule will also have inherent conflicts of interest. It is obvious that everyone has biases; if you delve into any entity or individual navigator or assister's background, you could probably find something that could be considered a conflict. As such, NAHU proposes that all navigators, navigator entities and related non-navigator assistance personnel, including application counselors, should be required to disclose any relationships they have or had with any groups that would meet the definition of exchange stakeholders as defined by HHS in Section 155.333 of the final exchange rule. Furthermore, we feel that the current receipt of any direct or indirect funds from any stakeholder should be considered a conflict of interest for an entity that wishes to obtain navigator or non-navigator assister grant funds.

In addition to broadening the scope of the conflict-of-interest standards, NAHU believes the final rule should provide clarification of how conflict-of-interest standards will be enforced and the consequences for both individuals and entities that violate them. Requiring an attestation that the individual and/or entity is meeting the standards and a written plan as to how they will continue to meet standards during the grant terms is all well and good, but there should also be a clear process in place to handle potential violations, including, but not limited to, loss of grant funding. Further, the final rule should address how violations will be handled with individual people and the overall entity that is in receipt of grant funds. By making standards and consequences clear from the get-go, consumers will be better protected.

Finally, given that navigators and non-navigator assistance personnel should be limited to discussing exchange-based QHP options and public assistance health coverage programs like CHIP and Medicaid with potential exchange enrollees,



we believe that such personnel should also be required to disclose to consumers that there are also non-exchange-marketplace options available and where they can go to get additional information about those options.

### **Marketplace Fraud**

While we understand that this regulation is purely designed to create standards for legitimate exchange navigators and other non-navigator consumer-assistance personnel, we feel we would be remiss if we did not mention the need for HHS to address potential fraud by entities that may disingenuously represent themselves as navigators or other assisters to unsuspecting consumers for nefarious purposes. Unfortunately, there is ample history in the world of both health insurance and tax programs to fear that such fraud will occur in 2014 and beyond. The profusion of entities offering seniors false prescription coverage when Medicare Part D debuted, the many years of scam artists offering unsuspecting individuals and businesses coverage through sham-MEWA and association plans, and annual troubles with fraudulent tax advisors all indicate that the new health insurance exchanges may unfortunately serve as motivation for criminal activity. We believe it would be prudent for HHS to disclose to the public and legitimate stakeholders how it plans to deal with this issue as soon as possible, including any plans to provide assistance and relief to potentially defrauded consumers.

Furthermore, we request that HHS take the opportunity to address this issue in the final rule for navigators and other related non-navigator assisters by establishing means that consumers can use to identify legitimate navigators. It is critical for purchasers to be able to ensure that the individual who is helping them directly and the entity for whom that individual serves is an accredited navigator or assister in good standing. In addition, we believe that consumers should be provided with clear information about what legitimate navigators can and cannot do, such as clarifying that navigators and assisters never accept funds or receive direct remuneration from the consumer. Such stipulations, both by legitimate navigators and assisters to clients up front, and by HHS via a public information campaign, would help cut down on potential fraud. Finally, while this regulation only addresses navigator and assister requirements, NAHU would like to offer that the members of the health insurance agent and broker community we serve would be happy to abide by requirements to disclose to consumers that they are licensed producers certified to assist exchange-based consumers as well.

NAHU sincerely appreciates the opportunity to provide these comments on the proposed rule, and we look forward to working with you as implementation of PPACA moves forward. If you have any questions, or if we can be of further assistance to you, please feel free to contact me at 202-595-3676 or [jwaltman@nahu.org](mailto:jwaltman@nahu.org).

Sincerely,

A handwritten signature in black ink that reads "Jessica F. Waltman".

Jessica F. Waltman  
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