

# *Navigating the Health Insurance Marketplace: Health Centers and Consumer Assistance Programs Supplemental Report - 2014 State Update*



## January 2015

### Introduction

This paper is intended as a supplement to NACHC's August 2013 issue brief, [Navigating the Health Insurance Marketplace: Community Health Centers and Consumer Assistance Programs](#), which provided updates about the three types of marketplace consumer application and enrollment assistance programs created in federal law:

- Navigators (who must meet the lengthy and detailed standards set forth in 45 C.F.R. §155.210 and §155.215);

- Non-Navigator assistance personnel (also referred to as In-Person Assisters) who likewise are subject to the extensive requirements applicable to Navigators; and

- Certified Application Counselors (CACs), who are subject to more limited standards set forth in 45 C.F.R. §155.225.

In July 2013, The Centers for Medicare & Medicaid Services (CMS) issued a final rule on navigator and non-navigator personnel, exchange consumer assistance tools and programs, and Certified Application Counselors (CACs). Under the Affordable Care Act's (ACA) Navigator program, navigators are supposed to "educate the public as to the availability and scope of coverage under the ACA, to provide fair and impartial information about ACA programs, and to 'facilitate enrollment in qualified health plans (QHPs).' The ACA gives states express authority to regulate Navigators, and state laws may apply generically to everyone who engages in Navigator behavior or only to entities that specifically get Navigator funding. This analysis updates a 2013 examination of Navigator state laws and considers their implications.

### Background

Navigators and CACs are intended to act as additional resources to traditional insurance agents and brokers for individuals who seek to enroll in QHPs. Some important duties of Navigators and CACs include possessing expertise in program eligibility and enrollment, providing fair and impartial information while recognizing the requirement of other federal and state assistance programs (such as Medicaid and CHIP), and communicating information in a culturally and linguistically sensitive way.<sup>1</sup>

Beginning in 2012, a number of states enacted laws aimed at further regulating consumer assistance programs, particularly Navigators. Under the ACA, states may establish Navigator requirements, but not if their requirements "prevent the application of" (essentially, interfere with or impede) federal standards.

In the previous [NACHC report](#), it was concluded that some state laws appeared to prevent the application of federal

---

<sup>1</sup> The Center for Consumer Information & Insurance Oversight, *New Funding Opportunity Announcement for Navigators in Federally-facilitated and State Partnership Marketplaces*, available at <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/navigator-foa.html>.

standards. For example, some laws appeared to directly limit the information that navigators could provide to clients (such as information about health plans) even though federal requirements identified minimum information to be provided to all people receiving Navigator assistance. Certain states also appeared to require Navigators to meet standards applicable to insurance agents and brokers, even though they do not sell products or get paid by insurers.

As of summer 2014, 18 states have enacted Navigator laws,<sup>2</sup> and legislation is pending in 10 additional states.<sup>3</sup> While some of these laws apply only to those entities that the ACA defines as a “Navigator,” some states, including Kansas,<sup>4</sup> New Mexico,<sup>5</sup> North Carolina,<sup>6</sup> and South Dakota,<sup>7</sup> seem to have expanded the definition of Navigator to include CACs and other assister entities. While this is certainly permitted under federal law, health centers and PCAs in these states may want to take extra care in ensuring the compliance of their assister personnel with any additional requirements.

While some states have chosen to model their Navigator laws on the federal law, others have added different distinctions and restrictions. For example, Iowa,<sup>8</sup> Tennessee,<sup>9</sup> Utah,<sup>10</sup> and Wisconsin,<sup>11</sup> require that Navigators obtain Surety Bonds or Errors and Omissions coverage. CMS has not explicitly prohibited such a requirement but has indicated that such a state standard could “prevent the application” of the ACA by restricting who can be a Navigator. Some states have prohibited Navigators and consumer assistance counselors from assisting individuals who either already have coverage or are interested in policies not offered within the Marketplace. South Dakota has gone so far as to propose a rule that prohibits navigators from providing advice, guidance, or other assistance in selecting health benefit plans.

### **The Final HHS Navigator Rule**

On May 16, 2014, the Centers for Medicare and Medicaid (CMS) released a [final rule](#) entitled “Exchange and Insurance Market Standards for 2015 and Beyond.” The final rule is both lengthy and complex, but provides additional clarity from its earlier proposed version as to which federal regulations preempt those of the states, while also providing guidance on what kind of criteria states can impose on Navigator programs.

The final rule acknowledges that states have flexibility in determining the criteria Navigators and CACs must meet, but prohibits states from enacting regulations that prevent the application of the ACA and explain that such regulations will be preempted by the federal requirements.<sup>12</sup> While the final rule is still relatively vague on what types of state restrictions would prevent the application of the ACA, it suggests that restrictions or modifications that materially change the scope of criteria for the Navigator program would fundamentally alter the program in contradiction of federal law and would therefore be preempted.<sup>13</sup>

The final rule permits states to regulate individuals who apply to be Navigators and CACs for consumer safety reasons. In its proposed form (issued in 2013), the rule would have prevented states from “imposing standards [in a federal exchange] that would prohibit individuals or entities from acting as Navigators that would be eligible to participate as Navigators under standards applicable to the Federally-facilitated Exchange,” but the final rule was less sweeping in its prohibition. Additionally, the final rule authorizes HHS to impose Civil Monetary Penalties (CMPs) against Navigators, non-Navigator

---

<sup>2</sup> AZ, AR, FL, GA, IL, IN, IA, ME, MD, MO, MT, NE, OH, TN, TX, UT, VA, & WI.

<sup>3</sup> KS, LA, MI, NH, NM, NC, OR, PA, SC, & SD.

<sup>4</sup> KS SB 362 (pending)

<sup>5</sup> NM HB 564 (pending)

<sup>6</sup> NC HB 877 (pending)

<sup>7</sup> SD SB 120 (pending)

<sup>8</sup> IA HJ 967

<sup>9</sup> TN HB 88

<sup>10</sup> UT HB 160

<sup>11</sup> WI AB40-ASA1 § 2265K

<sup>12</sup> CMS-9949-F p.23

<sup>13</sup> CMS-9949-F p.49

assistance personnel, and CACs if these entities violate federal requirements applicable to their activities.<sup>14</sup>

Most individuals or entities that receive payment from an insurer cannot be part of the Navigator program, but providers who receive insurance payments are exempt. Significantly, the final rule clarifies that simply because an individual who serves as a Navigator is also a health care provider paid by an insurer, it does not disqualify the provider from being a Navigator or a CAC. While it is crucial to maintaining the integrity of the Navigator program that navigators and assisters not be compensated by insurers, the final rule distinguishes between clinical treatment and what would be payment for plan enrollment activities.

A major area of focus in the final rule is empowering Navigators and assisters to fulfill the duties they are charged with; namely, providing fair, impartial, and accurate information, along with clarifying distinctions between the options.<sup>15</sup> State Navigator programs must not create restrictions on such personnel that would “prevent the application of” Federal requirements,<sup>16</sup> including overly-burdensome licensing or certification standards.

There is also substantial change seen in the final rule regarding who may serve as a community assister. Language in the proposed rule prohibited states from “imposing standards [in a federal exchange] that would prohibit individuals or entities from acting as Navigators” if those individuals would otherwise be qualified to participate as such under federal standards. The final rule instead articulates specific state restrictions that may not be employed, such as requiring that Navigators, non-Navigator assisters, or CACs maintain their principal place of business in a particular exchange’s home state (since some navigators and assisters are national organizations); and requiring that Navigators and non-Navigator assisters (but not CACs) maintain a physical presence in the exchange service area.<sup>17</sup>

The final rule also designates certain types of state Navigator program provisions that CMS will treat as restrictions that prevent the application of federal laws. Under the final rule, states are not permitted to: (1) require Navigators and CACs to refer consumers to entities not also required to provide fair and accurate information (e.g. brokers); (2) prevent assisters from providing information to all individuals in need of their services; (3) prevent Navigators from providing advice about the costs and benefits of various health plans; and (4) require Navigators and CACs be licensed as insurance brokers.<sup>18</sup> At the same time, states can, under the final rule, require licensing and certification in the case of both Navigators and CACs.

### **State Navigator Regulations**

A variety of states have chosen to issue regulations that further clarify and implement their respective state laws regarding Navigator conduct. Each of the nine states<sup>19</sup> implementing regulations includes provisions that focus on the certifications required of Navigators by each respective state. However, some of the regulations impose further restrictions, such as prohibiting Navigators from discussing plans not offered in the Marketplace (Illinois, Louisiana, and Texas), or prohibiting Navigators from communicating with anyone who already has coverage that was purchased from an insurance agent or broker (Iowa).

---

<sup>14</sup> 45 C.F.R. § 155.206. CMPs are punitive fines imposed on an entity that has profited from unfair, unethical, or illegal activity.

<sup>15</sup> 45 CFR §155.225(c)(1).

<sup>16</sup> 45 CFR §155.210(c)(1)(iii)(E).

<sup>17</sup> See Jost, *supra* nt. 1.

<sup>18</sup> 45 CFR §155.210(c)(1)(iii).

<sup>19</sup> GA, IL, IA, LA, MD, MO, OH, TN, & TX.

## Judicial Oversight

In October 2013, a U.S. District Court judge in Tennessee issued a temporary restraining order blocking the state from enforcing a portion of the state's emergency rules for health law Navigators because it was overly broad. And in January 2014, a federal district court in Missouri barred the Missouri Department of Insurance from enforcing a Navigator law that was overly restrictive because it imposed requirements more applicable to agents and brokers and because it prohibited certain types of counseling information required under federal law.

## Possible Exemptions

It may in fact be the case that some states who have implemented particularly onerous Navigator/CAC laws actually exempt health centers from their restrictive requirements, such as Ohio and Utah (please see Appendix B in previous [NACHC brief](#), November 2013) [Recent guidance](#) released on January 29, 2015 from the Health Resources and Services Administration (HRSA) provides further clarification with regards to the outreach and enrollment activities at health centers, which includes guidelines for working with agents and brokers.

### Criteria in State Navigator Regulations that *Could Potentially* Indicate a Conflict with Federal Law

1. Requirements on Navigators to hold an agent or broker license
2. Prohibitions on assisters discussing the contents of the QHP plans themselves
3. Restrictions on assisting individuals who already have some type of insurance coverage
4. Prohibitions on assisters giving advice to consumers about the substantive benefits of each plan

## Considerations for health centers and PCAs

Despite the blanket prohibition on laws that "prevent" the application of the provisions of the ACA, the final federal rule remains vague as to what types of state laws are prohibited. Even more uncertainty surrounds the issue of enforcement, as it is unclear how the federal government intends to ensure that states comply with federal law. PCAs and health centers may wish to carefully examine state laws in relation to the final CMS standards.

And to the extent that uncertainties and confusion persist – especially in the case of requirements normally associated with agents and brokers, or bars against certain types of enrollment counseling required under federal law – health centers and PCAs should reach out to GWU<sup>20</sup> and NACHC with comments or questions.

---

<sup>20</sup> Please address follow up questions and other correspondence to Mark Dorley at the Milken Institute School of Public Health at George Washington University via email at [dorley@gwu.edu](mailto:dorley@gwu.edu).

## Appendix A. Highlights from the Final Rule

### **Federal Requirements for the Navigator Program**

Navigators must:

- Meet any applicable licensing, certification or other standards prescribed by the State or Exchange, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act;
- Maintain expertise in eligibility, enrollment, and program specifications and conduct public education activities to raise awareness about the Exchange;
- Provide information and services in a fair, accurate, and impartial manner;
- Facilitate selection of a QHP;
- Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange;
- Not be required to hold an agent or broker license;
- Comply with the privacy and security standards adopted by the Exchange as required.

45 C.F.R. § 155.210

---

### **Federal Requirements for Certified Applications Counselors**

CACs must:

- Provide information to individuals and employees about the full range of QHP options and insurance affordability programs for which they are eligible;
- Clarify the distinctions among health coverage options, including QHPs;
- Help consumers make informed decisions during the health coverage selection process;
- Assist individuals and employees to apply for coverage in a QHP through the Exchange and for insurance affordability programs;
- Help to facilitate enrollment of eligible individuals in QHPs and insurance affordability programs;
- Meet any applicable licensing, certification, or other standards prescribed by the State or Exchange, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.

45 C.F.R. § 155.225

**Appendix B. Sampling of Provisions by State<sup>21</sup>**

State	Prohibits facilitating enrollment of individuals in the Exchange	Prohibits contact with anyone whose current health coverage was purchased from an agent/broker	Prohibits contact with a person who currently has health insurance	Requires a Surety Bonds/ Errors and Omissions Coverage for Navigators (Financial Responsibility)
GA			<p>No navigators shall solicit any person or business that is currently insured under an existing health benefit plan</p> <p>Ga. Code Ann. § 33-23-203(b)</p>	
IA				<p>The commissioner shall require by rule that a licensed navigator furnish a surety bond or other evidence of financial responsibility that protects all persons against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator.</p> <p>Iowa Code Ann. § 522D.6</p>
MO		<p>Upon contact with a person who acknowledges having existing health insurance coverage obtained through an insurance producer, a navigator shall advise the person to consult with a licensed insurance producer regarding coverage in the private market.</p> <p>Mo. Ann. Stat. § 376.2008</p>		
NE			<p>On contact with an individual who acknowledges having existing health insurance coverage obtained through a licensed insurance producer, a navigator shall make a reasonable effort to inform the individual that he or she may, but is not required to, seek further assistance from that producer or another licensed producer for information, assistance, and any other services and that tax credits may not be available to offset the premium cost of plans that are marketed outside of the exchange.</p>	

<sup>21</sup> This list is in no way meant to be exhaustive.

			Neb. Rev. Stat. § 44-8806	
NM		Proposed: NM HB 564(6)(C). On contact with a person who acknowledges having existing health insurance coverage obtained through an insurance producer, a navigator shall refer the person back to that insurance producer for information, assistance and other services."		Proposed: NM HB 564(4)(E). The superintendent shall require that each navigator obtain a surety bond in an amount acceptable to the superintendent or otherwise demonstrate a level of financial responsibility capable of protecting all persons against the wrongful acts, misrepresentations, errors, omissions or negligence of the navigator. The superintendent may ask for a copy of the bond or other evidence of financial responsibility at any time.
NC			Proposed NC HB 877 "§ 58-33B-60(b) No navigator shall solicit any person or business that is currently under an existing health benefit plan.	
SD	Proposed No navigator may: (1) Provide advice, guidance, or other assistance with regard to health benefit plans as a navigator under the provisions of the federal act		Proposed Section 4. No navigator may solicit any person or business that is currently insured under an existing health benefit plan	
UT				§ 31A-23b-207. (1)(a) Except as provided in Subsections (1)(b)(ii) and (2), a navigator shall obtain a surety bond in an amount designated by the commissioner by administrative rule to cover the legal liability of the navigator as the result of an erroneous act or failure to act in the navigator's capacity as a navigator.
WI				Each entity that is a navigator shall furnish a bond in an amount no less than \$100,000 from an insurer authorized to do business in this state or provide other evidence of financial responsibility capable of protecting all persons against the wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator. Wis. Stat. Ann. § 628.92(5)(a)

**COPYRIGHT**

**January 2015**

**National Association of Community Health Centers, 2015**

**Navigating the Health Insurance Marketplace: Health Centers and Consumer Assistance Programs**

**Supplemental Report – 2014 UPDATE**

*Prepared By:*

**Mark Dorley, Sara Ely, and Carla Hurt**

The George Washington University School of Public Health and Health Services



**National Association of Community Health Centers**

1400 I Street, NW, Suite 910

Washington, DC 20005

*For more information about this publication, please contact:*

Dawn McKinney

Director, State Affairs

[dmckinney@nachc.org](mailto:dmckinney@nachc.org)

202.296.3800

Mark Dorley

Senior Research Associate

Milken Institute School of Public Health at George Washington University

[Dorley@gwu.edu](mailto:Dorley@gwu.edu)

202.994.4247

This publication was supported by Grant/Cooperative Agreement Number U30CS16089 from the Health Resources and Services Administration, Bureau of Primary Health Care (HRSA/BPHC). Its contents are solely the responsibility of the authors and do not necessarily represent the official views of HRSA/BPHC.