Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9955-P
P.O. Box 8010
Baltimore, MD 21244-1850

May 6, 2013

RE: CMS-9955-P (Notice of Proposed Rulemaking, Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel)

To Whom It May Concern:

The National Association of Community Health Centers, Inc. (NACHC) is pleased to respond to the Notice of Proposed Rulemaking, published by the Centers for Medicare & Medicaid Services on April 5, 2013 (78 Fed. Reg. 20,581) ("the NPRM"). NACHC is the national membership organization for federally qualified health centers (hereinafter interchangeably referred to as "health centers" or "FQHCs") throughout the country, and is a Section 501(c)(3) tax-exempt organization. The Patient Protection and Affordable Care Act's (PPACA) expansion of Medicaid and the establishment of Exchanges are projected to add millions of new patients to health center rolls by 2019.[1] Therefore, health centers will play an even greater role in assisting poor and low-income Americans to qualify for and enroll in coverage, and thus it is essential that health centers be able to apply for and receive Navigator grants, in order to provide adequate consumer assistance.

The NPRM would create standards for conflict-of-interest, training and certification, and meaningful access that are applicable to Navigators and non-Navigator assistance personnel in federally-facilitated Exchanges, including State Partnership Exchanges, and to non-Navigator assistance personnel in State-based Exchanges that are funded through federal Exchange Establishment grants.

The NPRM is of particular interest to health centers because health centers currently serve a large number of individuals who will be eligible for subsidized coverage under qualified health plans (QHP) offered on the Exchanges. In addition, due to the enabling services that they traditionally provide for low-income and uninsured/underinsured patients, health centers currently perform many (if not all) of the duties required of Navigators, with respect to existing forms of health coverage. Thus, health centers are a natural fit as Navigators or non-Navigator assistance personnel.

On the whole, NACHC supports the standards articulated in the NPRM. We propose below several revisions that would ensure that the final regulations do not pose unnecessary obstacles to the ability of uninsured individuals to utilize the expertise of health center staffs in gaining access to coverage under a QHP and (if applicable) to cost-sharing subsidies and premium tax credits.

I. Background on Health Centers and Affordable Insurance Exchanges

There are, at present, more than 1200 health centers with more than 9000 sites serving more than 22 million patients nationwide. Most of these health centers receive federal grants under Section 330 of the Public Health Service Act ("PHS Act"), 42 U.S.C. § 254b, from the Bureau of Primary Health

[1] How the Supreme Court's Medicaid Decision May Affect Health Centers: An Early Estimate, The George Washington University, July 2012.

Care ("BPHC"), within HRSA. Under this authority, health centers fall into four general categories: (1) those centers serving medically underserved areas, (2) those serving homeless populations within a particular community or geographic area, (3) those serving migrant or seasonal farmworker populations within similar community or geographic areas, and (4) those serving residents of public housing.

To qualify as a Section 330 grantee, a health center must be serving a designated medically underserved area or a medically underserved population. In addition, a health center's board of directors must be made up of at least fifty-one percent (51%) users of the health center and the health center must offer services to all persons in its area, regardless of one's ability to pay. BPHC's grants are intended to provide funds to assist health centers in covering the otherwise uncompensated costs of providing comprehensive preventive and primary care and enabling services to uninsured and underinsured indigent patients, as well as to maintain the health center's infrastructure. Patients from eligible communities, who are not indigent and are able to pay or who have insurance, whether public or private, are expected to pay for the services rendered. Approximately 39 percent of health center patients are Medicaid recipients, approximately 36 percent are uninsured, and approximately 15 percent are privately insured. A significant portion of the health centers' uninsured population – which numbers nearly 8 million today – will be eligible to enroll in coverage offered through the Exchanges.

II. Comments

Due to both the large number of uninsured individuals they serve and their statutory mandate under Section 330 to provide enabling services (including services designed to assist health center patients in establishing eligibility for and gaining access to health coverage), health centers are well-positioned to serve as Navigators and non-Navigator assistance personnel.

Health centers' participation as Navigators also advances the provisions in the Affordable Care Act and its implementing regulations, which stipulate that in each Exchange, at least one Navigator organization be a community and consumer-focused nonprofit. *See* Patient Protection and Affordable Care Act (PPACA) § 1311(*i*); 45 C.F.R. § 155.210.

NACHC recommends several revisions to the NPRM in order to reduce the barriers to health centers and primary care associations (statewide associations of health centers and other safety-net primary care providers) serving as Navigators, as follows: (1) removing the certification requirement that a Navigator be prepared to serve both the individual Exchange and the small employer health options program (SHOP) Exchange; and (2) clarifying certain aspects of the conflict-of-interest rules that may uniquely affect health centers.

A. Proposed 45 C.F.R. §§ 155.210 and 155.215(a)

NACHC requests that CMS revise its regulation, or provide clarifying language in the preamble, to remove unnecessary and inappropriate obstacles to health centers' eligibility to serve as Navigators.

Proposed provisions: The Affordable Care Act provides that the Secretary shall establish standards for Navigators to avoid conflicts of interest and that under such standards, a Navigator shall not "be a health insurance issuer" and shall not "receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment of any qualified individuals or employees of a qualified employer in a qualified health plan." Patient Protection and Affordable Care Act § 1311(*i*)(4)(A).

To implement this statutory provision, HHS first proposes in the NPRM to amend 45 C.F.R. § 155.210(d). This regulation, which was finalized effective May 29, 2012, provides that an Exchange must ensure that a Navigator must not (1) be a health insurance issuer; (2) be a subsidiary of an issuer; (3) be an association that includes members of, or lobbies on behalf of, the insurance industry; or (4) receive any consideration directly or indirectly from a health insurance issuer in connection with the enrollment

of any individual in a QHP or non-QHP. The proposed rule would modify this provision in order to extend these prohibitions to issuers of stop loss insurance.

Next, in the NPRM HHS proposes a new regulation, 45 C.F.R. § 155.215, containing conflict-of-interest standards that will apply to all Navigators in a Federally-facilitated Exchange and to federally-funded non-Navigator assistance personnel in a state-based Exchange. To meet the standards, an entity must certify that it fulfills the conditions listed in 45 C.F.R. § 155.210(d). In addition, the entity must satisfy other requirements including disclosing to the Exchange, and to each consumer who receives application assistance, (1) any lines of insurance business that the Navigator intends to sell; (2) any existing or former (within the last five years) employment relationships of a Navigator employee or the employee's spouse with insurers or issuers of stop loss insurance; and (3) any existing or anticipated financial, contractual, or business relationships of the Navigator or its staff with one or more health insurance issuers or issuers of stop loss insurance.

Comment: NACHC recommends that HHS clarify both the prohibitions in 45 C.F.R. § 155.210(d), and the disclosure requirements in 45 C.F.R. § 155.215, in order to ensure that these provisions do not have the effect of barring health centers' participation as Navigators. Specifically, NACHC recommends the following:

First, HHS should make clear -- for example, through a statement in the preamble -- that a health care provider's contract with a health plan (including a QHP) to provide health services as part of the plan network does not bar the health care provider from being certified as a Navigator. The provider would nonetheless, we understand, be required to disclose such a contract pursuant to proposed 45 C.F.R. § 155.215(a)(1)(iv)(C).

Second, HHS should state that a health center's governance of a health-center-controlled health plan does not bar the health center from being certified as a Navigator. Under the Public Health Service Act, HHS may make grants to health centers that receive assistance under Section 330 to enable the health center (or a network of health centers) to plan and develop a managed care network or plan. 42 U.S.C. § 254b(c)(1)(A). The purpose of health center-controlled plans is to allow health centers to more effectively provide high-quality health services to underserved populations. By definition, these plans are nonprofit entities with charitable purposes that qualify them for federal tax-exemption. The health centers do not have financial interest in the plan; instead, they serve as members of an independent nonprofit entity.

Consistent with the proposed rule, individual health centers or primary care associations that participate in health-center-controlled plans are not health insurance issuers themselves, nor does their participation in such plans result in their becoming a subsidiary of an issuer. Furthermore, they would not receive any consideration directly or indirectly from the health-center controlled health plan in connection with the enrollment of any individual in a QHP or non-QHP and would not stand to gain financially from directing patients toward the plan other than receiving reimbursement from the health plan to provide health services as part of the plan network. The health center would nonetheless, we understand, be required to disclose such a contract pursuant to proposed 45 C.F.R. § 155.215(a)(1)(iv)(C).

Third, HHS should provide guidance concerning the restriction in proposed 45 C.F.R. § 155.210(d)(4) – *i.e.,* that as a condition of certification, a Navigator may not "receive any consideration directly or indirectly from any health insurance issuer or issuer of stop loss insurance in connection with the enrollment of any individuals or employees in a QHP or a non-QHP." On occasion, safety net providers receive grants from managed care plans in support of their provision of services to the uninsured or to help finance a program or capital project. NACHC recommends that where a grant is offered by a plan for a restricted purpose of the type described above, it by definition does not constitute "consideration . . . in connection with the enrollment of any individuals" in the plan. NACHC

requests that HHS confirm that receiving such a grant would not cause a health center or other entity seeking Navigator status to run afoul of the certification standards.

B. **Proposed 45 C.F.R. § 155.215(b)**

NACHC requests that CMS reconsider the portion of its proposed regulation concerning training standards for Navigators and non-Navigator assistance personnel in both small group (SHOP) and individual market Exchanges.

Proposed provision: The NPRM requires that as a condition of certification, all individuals carrying out consumer assistance functions must "be prepared to serve both the individual Exchange and SHOP." 78 Fed. Reg. at 20,596.

Comment: NACHC feels that this requirement does not serve the best interests of the Exchanges. The SHOP and individual Exchanges will serve different populations and be subject to different requirements. *See, e.g.,* 45 C.F.R. § 155.705(a) (describing Exchange functions that do not apply to SHOP). Moreover, we understand that states may elect not to merge the small group (SHOP) and individual markets in their Exchanges, and that the two markets will be merged in a federally-facilitated Exchange only if the state's current individual and small-group markets are merged.

The expertise that health centers will bring to the Navigator function relates chiefly to their experience providing enabling services to uninsured and medically underserved patients, including services designed to assist health center patients in establishing eligibility for health care programs. Health center personnel will therefore be particularly well-equipped to assist patients in completing the "single streamlined application" and in determining whether the patient is eligible for enrollment in a qualified health plan, for advance payments of the premium tax credit, for cost-sharing reductions, or for Medicaid or CHIP. *See* 45 C.F.R. § 155.405. This type of assistance is inapplicable to the SHOP Exchange. The Navigator function would be more useful if the federally-facilitated Exchanges provided grants to some Navigators whose expertise is focused primarily on assisting uninsured individuals with gaining access to coverage. Requiring each Navigator to commit to providing enrollment assistance on the small-group market as well as the individual market is inconsistent with that goal.

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Thank you for the opportunity to comment on the NPRM. Please do not hesitate to contact me by telephone at (202) 296-0158 or by e-mail at rschwartz@nachc.org if you require any clarification on the comments presented above.

Sincerely,

Roger Schwartz

Associate Vice President of Executive Branch Liaison